

HR QUESTION ? of the month



Termination, discharge: What are the requirements for notice to employees over the age of 40?

Question: We have a current employee who has been with the company for 8 years in a Director role. We are considering outsourcing the work he does along with all IT work. I know we can go ahead and lay him off due to these business decisions and we would be putting together a separation agreement. My concern is that I read recently that anyone over the age of 40 is to be given the separation agreement at least 21 days in advance of the separation. True? We are concerned because he does have security controls, etc. and if we give him this advance notice - we are not sure what damage he might do to the company.

Response: If an employee is 40 years of age or older, any separation agreement that seeks to release claims under the Age Discrimination in Employment Act (ADEA) must contain specific language as required by the Older Workers Benefit Protection Act (OWBPA) in order to be a proper, valid and enforceable release (see http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html for specific guidance). You are correct that an employee age 40 and older must be given 21 days to consider a waiver and release agreement, and then an additional seven days once signed (if signed within that time period), to revoke his or her signature and thus the contract itself. There are other requirements that must be satisfied when more than one employee is separating from employment (such as providing information about the ages and positions of employees impacted by a layoff and not impacted by the termination decisions, and a 45-day consideration period), but we assume from the inquiry that only one employee is at issue here (the Director). Note that employers are not required to provide employees under 40 with a specific amount of time to sign a separation agreement and there is no revocation period required in that situation.

As to your concern regarding providing "advance notice" to the subject employee, the 21-day waiting period is solely for purposes of the employee executing the separation agreement. In other words, the employer does not need to give an employee advanced notice as to his or her last day of work. Indeed, the employer can include in the separation agreement that the last day of work is effective immediately requiring him to return all company property, etc. (assuming employment is at-will and no other contract governs the issue) and the employee could still have the 21-day consideration period to decide whether to accept the terms of the separation agreement (albeit the employee would spend this consideration period at home or away from work as he would no longer be employed).

For more information on obligations under the OWBPA in severance agreements, please see http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html and we also recommend that the employer consult with local counsel for guidance in drafting a separation agreement (or to at least review what the employer has endeavored to draft itself) to ensure it meets the employer's objectives while remaining compliant with applicable laws.

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