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Employment

High Court's Ruling in 'Edwards' Leaves Silver Lining for Employers

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The general release agreement is ubiquitous in California; the vast majority of disputes that wend their way through our court system are resolved by settlement, where one or both parties agree to waive "any and all" claims that may exist in its or their favor.

General release agreements also are commonly used before disputes arise. This is especially true in the employment arena, where it is standard for employers to obtain general releases from separating employees in exchange for severance pay or other considerations.

Given how often general release agreements are used, it is somewhat surprising that a case recently decided by the California Supreme Court did not receive more attention. In that case, *Edwards v. Arthur Andersen,* 2008 DJDAR 12286, the Supreme Court reviewed a lower court's decision to invalidate a general release agreement as inherently and fatally flawed under California law because it did not carve out from its scope certain non-waivable statutory claims. If the Supreme Court had affirmed the appellate court's holding, the consequences would have been profound, with potentially hundreds of thousands of existing release agreements being set aside.

Fortunately, California employers and litigators can breathe a sigh of relief: The Supreme Court held that the use of an "any and all" waiver provision in a general release agreement does not by itself invalidate the release agreement, and it is not "legally necessary" to explicitly carve out all non-waivable statutory claims from the scope of a general release provision.

Besides the release validity issue, the Supreme Court in *Edwards* also decided whether courts should recognize the so-called "narrow restraint" exception to California's strict prohibition on non-competition agreements. In *Edwards*, the Supreme Court rejected the "narrow restraint" exception, and affirmed the lower court's decision that the non-competition agreement at issue was invalid.

Arthur Andersen hired Edwards in 1997 to work in its Los Angeles office tax practice. Upon hire, Andersen required Edwards to execute a non-competition agreement, which prohibited him from working for or soliciting certain Andersen clients after his termination. Years later, as part of the fallout from the Enron scandal, Andersen dissolved and sold its practice to various entities. Andersen sold its L.A. tax practice to HSBC, which in turn made offers of employment to Andersen's L.A. personnel.

As a condition of employment with HSBC, however, Andersen required Edwards to execute a "Termination of Non-Compete Agreement" drafted by Andersen. Among other things, the agreement required him to release Andersen from "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from" Andersen. In exchange, Andersen agreed that it would accept Edwards's resignation, consent to his "employment by or affiliation with" HSBC, and release him from the non-compete provisions of the 1997 agreement.

HSBC extended an employment offer to Edwards, contingent upon his executing the termination of non-compete agreement. Andersen informed Edwards that he had to sign the agreement in order to be employed by HSBC. Edwards signed and returned HSBC's written employment offer, but refused to sign the agreement. Andersen subsequently terminated Edwards's employment and withheld severance benefits, and HSBC withdrew its employment offer. Edwards then sued Andersen for, among other things, intentional interference with prospective economic advantage.

The trial court dismissed all of Edwards's claims, finding that both the termination of non-compete agreement and the 1997 non-competition agreement were lawful. On appeal, Edwards argued that the agreement and its broad release were void because, among other reasons, the release provision required Edwards to waive his statutory rights to indemnity under California Labor Code Section 2802, which in turn was a violation of Labor Code Section 2804. Section 2802 provides for an employee's right to indemnity, and says in relevant part: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Essentially, Section 2802 requires an employer to indemnify an employee for all expenses incurred by the employee in the discharge of his duties. *Jacobus v. Krambo Corp.,* 78 Cal.App.4th 1096 (2000).

Section 2804 nullifies all contracts that purport to waive the protections of Section 2802.

Edwards argued on appeal that the termination of non-compete agreement's broad release provision attempted to waive his Section 2802 indemnity rights, and was therefore invalid. The appellate court agreed, finding that the "plain language" of the agreement clearly included indemnity within the scope of the release. As the appellate court noted, the release in the termination of non-compete agreement covers "any and all actions, causes of action, claims, demands, debts, damages, costs, losses, penalties, attorneys' fees, obligations, judgments, expenses, compensation or liabilities of any nature whatsoever," whether "known or unknown," past, present and future. It expressly applies to all "claims that in any way arise from or out of, are based upon or relate to Employee's employment." While the provision did not expressly reference indemnity rights, the court said that such rights were "necessarily encompassed within the clear terms of the broad release."

It also held that requiring employees to

sign a purported waiver of Section 2802 indemnity rights was in itself actionable because doing so violated a fundamental public policy of California. In short, Andersen could not make Edwards's future employment contingent on his waiving his statutorily mandated indemnity rights. Because Andersen attempted just that, the act of requiring Edwards to sign the agreement was an independently wrongful act for purposes of Edwards's interference with prospective economic advantage claim.

Fortunately for California employers, the Supreme Court disagreed. Following the rule of construction that if a contract is capable of two different interpretations, a court should interpret it in a way to render it lawful, the court found that since the agreement did not expressly reference indemnity rights, it should not be read as waiving Edwards's indemnity rights. The court agreed with Andersen that because indemnity rights are non-waivable pursuant to Section 2804, it was "legally unnecessary" to explicitly carve out those rights from the release.

The court also rejected Edwards's argument that employers should be required to insert a catch-all phrase into release agreements to clarify that non-waivable claims and rights are not being released by the agreement. The Supreme Court found that such a phrase "essentially informs the employee of nothing." Thus, the Supreme Court rejected the employee's arguments, and held that "any and all" waiver agreements do not generally encompass non-waivable rights and are not void.

While the *Edwards* case provides at least temporary relief for the use of general release agreements under California law, the status of such agreements in federal court and in various other states is less clear. Courts across the country increasingly have been willing to invalidate release agreements that purport to waive non-waivable federal statutory claims. Courts, for example, have invalidated release agreements that purported to waive (or failed to exclude) claims under the federal Family and Medical Leave Act of 1993.

And there are countless similar traps for the unwary; many federal statutory rights cannot be waived by private agreement. For example, various federal statutes and agency regulations invalidate private agreements that purport to waive an employee's rights to unpaid overtime and minimum wages under the federal Fair Labor Standards Act. Typically, such claims can only be waived with the approval of the responsible regulatory agency or a court of competent jurisdiction.

Moreover, the Equal Employment Opportunity Commission, the National Labor Relations Board and other federal and state agencies have taken the position that employees cannot waive through a private agreement the right to file a complaint or charge with the agencies and/or participate in a claim being investigated by the agencies. Courts have split as to whether such so-called "charge barring" in a release agreement is itself a basis for voiding the release. According to a federal court in Maryland, a release that requires the waiver of the right to file/pursue a charge or claim before the Equal Employment Opportunity Commission in order to receive severance benefits is retaliatory and void. *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006). According to the Maryland court, employees can waive the right to receive damages from an Equal Employment Opportunity Commission investigation, but cannot waive the right to file a complaint with the commission or participate in a commission investigation.

The 6th and 3rd Circuits, on the other hand, have held that a release requiring waiver of right to file/pursue agency claims in order to receive severance benefits is not retaliatory and thus does not void the release. *EEOC v. Sundance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006); *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3d Cir. 2003). While the entire release will not be voided, the provision requiring employees to waive the right to file or pursue Equal Employment Opportunity Commission claims itself may be unenforceable.

While the *Edwards* case offers some refuge for "any and all" releases in terms of state claims, the uncertainty amongst federal courts still means that employers should carefully construct release agreements to ensure that employees understand which claims they are waiving by entering into the release. Releases also should be drafted to clarify that relevant non-waivable claims are not included within the terms of the release.

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