

# Employee Relations

## LAW JOURNAL

### Employee Benefits

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## **Waivers and Severance Arrangements: EEOC Announcement Offers Reminders for Employers**

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*One common practice for employers in this era of layoffs is to offer departing employees additional severance benefits in exchange for a release (or waiver) of liability for claims connected with the employment relationship, such as claims arising under civil rights or other laws protecting against employment discrimination. The Equal Employment Opportunity Commission (EEOC) recently issued guidance explaining the rules and procedures that apply to such waivers.<sup>1</sup> While the EEOC's guidance appears to be directed at explaining the rules to employees who are signing the waivers, it provides a useful reminder of the issues that employers who use these waivers should consider. This column discusses the EEOC guidance and the general rules that apply to waivers that may accompany severance benefits.*

**E**mployers often ask departing employees to sign a release of claims under various civil rights laws such as the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA), in exchange for enhanced severance pay. The employee's signature and retention of the consideration generally indicates acceptance of the terms of the agreement. If an employee who signed a waiver later files a lawsuit alleging that the employer violated these laws and discriminated against him or her, the employer will argue that the court must dismiss the case because the employee waived the right to sue. The employee generally

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will respond that the waiver should not be binding because it is invalid. The validity of the waiver does not affect the substance of that claim, just whether the employee has the right to bring the claim in court. The claim will be dismissed if the waiver is determined to be valid. If a court concludes that the waiver is invalid, it will then consider the employee's discrimination claim. The party asserting the validity of the waiver (generally the employer) will have the burden of proof in litigation.

### ***Requirements for a Valid Waiver***

A valid waiver agreement must:

1. Offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue;
2. Be voluntary and based on informed consent;
3. Not require the employee to waive future rights; and
4. Comply with applicable state and federal laws.

EEOC regulations and court cases further limit the scope of the waiver that can be obtained.

### **Consideration**

An employer generally must offer the employee consideration for the waiver. This consideration must be in addition to any benefit to which the employee is already entitled. For example, the consideration cannot be a vested pension benefit or payment for earned vacation or sick leave. An example of consideration would be a lump-sum payment of some additional severance pay (again, assuming that the employee does not have a previously existing contractual right to such a payment upon severance), or periodic payments of the employee's salary for a specified period of time after termination. Severance plans can be written in advance to require the signing of a waiver as a condition for receipt of the promised severance benefit; the "additional consideration" requirement merely means that the employer cannot require a waiver for a benefit that was already promised upon severance without a waiver condition.

### **Knowing and Voluntary Consent**

A waiver in a severance agreement is only valid when an employee knowingly and voluntarily consents to the waiver. The determination of whether a waiver is knowing and voluntary depends on the statute

under which suit has been brought. The specific rules for waivers under the ADEA are set forth in the Older Workers Benefit Protection Act (OWBPA) and are discussed separately and in more detail below. Under other laws that are customarily waived, such as Title VII, the rules are derived from case law.

To determine whether an employee knowingly and voluntarily waived his or her discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear. Most courts, however, look beyond the contract language and consider factors surrounding the termination and the employment relationship to determine whether the employee knowingly and voluntarily waived his or her rights to sue. The EEOC listed the following as the factors that the courts generally consider whether:

- The waiver was written in a manner that was clear and specific enough for the employee to understand based on his or her education and business experience;
- It was induced by fraud, duress, undue influence, or other improper conduct by the employer;
- The employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;
- The employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;
- The employee had any input in negotiating the terms of the agreement; and
- The employer offered the employee consideration (*e.g.*, severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract, and the employee accepted the offered consideration.

Finding a middle ground between “legalese” and “plain English” may pose a challenge for employers. The courts require that the employees be informed of the specific rights that they are waiving, so some detailed explanation may be necessary. The EEOC guidance provided an example of a case where the individual was given a choice between a voluntary separation with severance pay, and a termination. To obtain the severance pay, the employee had to sign a waiver stating the following: “I . . . hereby release and discharge [my employer] from any and all claims which I have or might have, arising out of or related to my employment or resignation or termination.” The employee later filed suit based on unlawful termination due to race and national origin. The court reasoned that although the language of the agreement was “clear and unambiguous,”

it failed to specifically mention the release of employment discrimination claims. Because the employee only had a high school education and was unfamiliar with the law, the court accepted his argument that he believed he only was releasing claims based on his voluntary termination, because it was “not an unreasonable conclusion.”

A waiver cannot restrict the employee’s right to testify, assist, or participate in an investigation, hearing, or proceedings conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA, or to file charges in a class action with a federal or state enforcement agency.

The law is not clear in all cases as to whether the employee must return an employee’s severance pay or other benefits received in connection with a waiver before filing a charge. Under the ADEA, it is clear that an employee is not required to return severance pay or other consideration received or signing the waiver before bringing an age discrimination claim. EEOC regulations reaffirm that because the employee has a right under OWBPA to contest a waiver’s validity, it is unlawful for the employer to stop making promised severance payments or to withhold any other benefits it agreed to provide while the validity of the waiver is litigated.<sup>2</sup>

Under Title VII, the ADA, or the EPA, however, some courts have ruled that the validity of the waiver cannot be challenged unless the employee returns the consideration, while other courts apply the ADEA’s requirements and allow employees to proceed with their claims without first returning the consideration.

### **Effect of the Waiver on the Employee’s Severance Pay in the Case Where a Lawsuit Is Successful**

According to the EEOC, the employer may offset the amount it paid to the employee in exchange for waiving his or her rights from any monetary award paid to the employee as a result of a successful employment-related claim. However, the employer cannot receive an amount that exceeds the consideration it provided for the waiver in the first place (or the amount of the award if it is less).

### **Special Rules for Waivers of Age Discrimination Claims**

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA), and addressed specifically the procedures for a valid waiver of age discrimination claims. The OWBPA contains specific requirements for a “knowing and voluntary” release of ADEA claims and a number of important additional disclosure requirements when waivers are required from a group or class of employees.

The OWBPA stipulates seven factors that must be satisfied for a waiver of age discrimination claims to be considered “knowing and

voluntary.” The EEOC guidance explains that, at a minimum, waivers of age discrimination claims must meet the following criteria:

- **A waiver must be written in a manner that can be clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. The waiver must not have the effect of misreading, misinforming, or failing to inform participants and must present any advantages or disadvantages without either exaggerating the benefits or minimizing the limitations.
- **A waiver must specifically refer to rights or claims arising under the ADEA.** It must expressly state the Age Discrimination in Employment Act by name
- **A waiver must advise the employee in writing to consult an attorney before accepting the agreement.** A release stating: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims,” did not comply with OWBPA’s requirement that an individual be *advised* to consult with an attorney.
- **A waiver must provide the employee with at least 21 days to consider the offer.** An agreement can be signed prior to the 21-day time period (or the 45-day time period required for certain group terminations, described below) as long as employee’s decision is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the time period, or by providing different terms to employees who sign the release prior to the expiration of such time period.<sup>3</sup>
- **A waiver must give an employee seven days to revoke his or her signature.**
- **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** The employee cannot be asked to waive *new* acts of discrimination. The EEOC’s example of such an act is retaliation against a former employee for filing a charge with the EEOC.
- **A waiver must be supported by consideration in addition to that to which the employee already is entitled.**

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable. Moreover, the EEOC takes the

position that if the waiver language is defective, it can only be corrected by providing a new waiver and running the review period from the beginning of the issuance of that new waiver. The EEOC maintains that a waiver cannot be “cured” by providing a subsequent letter containing OWBPA-required information that was omitted from the original letter. While there may be some court cases that provide support for this position,<sup>4</sup> the EEOC does not explain the scope of its statement and whether the view applies in all cases. The EEOC also states that a material change to the offer will restart the period of consideration, without reconciling that statement to its position in the regulations that the parties can agree that material changes do not restart the running of the period of consideration.<sup>5</sup>

It should be noted that a waiver that includes ADEA rights is valid even if all employees (whether or not over age 40, the age at which ADEA’s protections begin) receive the same consideration for signing the waiver. In *D. Biase v. SmithKline Beechman Corp.*,<sup>6</sup> an employee over age 40 argued that the termination program (and waiver) violated the ADEA because employees under age 40 received the same amount of severance, even though they were not waiving valuable ADEA rights. The court explained that all employees were required to waive all claims, and noted that its decision might be different if only the ADEA claims were being made.

Even when a waiver complies with OWBPA’s requirements, a waiver of age claims, like waivers of Title VII and other discrimination claims, will be invalid and unenforceable if an employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement.

### Special Rules for Group Layoffs

When waivers are offered to employees in connection with a program of workforce reduction that involves a layoff, termination, or “voluntary termination incentive program” offered to a group of employees, an employer must provide enough information about the factors it used in selecting individuals for the program to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

In these cases, the employer must give all employees who are being laid off under the program written notice of the layoff or program particulars and provide a notice period of *at least 45 days* for the employee to consider the waiver before signing it. The EEOC guidance explains that the employer must inform the employees, in writing, about the following:

- **The “decisional unit”**— the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program; for example, the

unit could be the entire workforce, a particular plant, or a particular department.

- **The eligibility factors** for the program; the determination of what constitutes the “decisional unit” can be tricky. An example in the regulations describes eligibility as: “All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.”<sup>7</sup> Some courts, however, interpret the term “eligibility factors” to mean the criteria, such as job performance, experience, or seniority an employer relied on in deciding who to terminate. In *Pagilio v. Guidant Corp.*,<sup>8</sup> the court held that a release violated OWBPA by, among other things, failing to identify the general criteria by which employees were selected for termination; in *Kruchowski v. Weyerhaeuser Co.*,<sup>9</sup> the court invalidated a release of claims because it failed to identify selection criteria as “eligibility factors;” but in a later, revised, opinion, the court omitted eligibility factors as one of the grounds for invalidating the release and held only that the employer violated OWBPA by failing to identify the decisional unit).
- **The time limits** applicable to the program;
- **The job titles and ages of all individuals who are eligible** or who were selected for the program (the EEOC says that the use of age bands broader than one year, such as “age 40–50” does not satisfy this requirement) and the **ages of all individuals in the same job classifications or organizational unit who are not eligible or who were not selected.**

Attached as Appendix A is an example provided by the EEOC setting forth a description of the information that should be provided in writing under OWBPA in the case of a group termination.

### ***Other Issues to Consider***

Even though the federal law imposes requirements applicable to waivers as discussed above, state law also applies with respect to questions regarding the validity of the waiver, so must be consulted before preparing a waiver. In some cases, their requirements are more restrictive or stricter than the federal law. The EEOC cites the Minnesota Age Discrimination Act as an example, where a release must give the employee 15 days after signing the agreement to change his or her mind and revoke his signature. Other states may impose additional requirements to obtain an effective waiver of certain state law claims.

Employers should also keep in mind that tax issues can play a role in severance agreements. As discussed in an earlier column,<sup>10</sup> severance agreements for all employees (not just executives) must comply with Section 409A of the Tax Code by specifying the time and form of payment and limiting the ability to accelerate or further defer such payment. Many (but not all) severance arrangements are exempt from Section 409A because they are “short-term deferrals” or because they meet the exempt severance requirements under Section 409A, but these exclusions require compliance with strict technical rules and need to be considered carefully when providing either individual or group severance arrangements.

Finally, layoffs and workforce reductions can create legal obligations arising under other laws—for example, under the Worker Adjustment and Retraining Notification Act (WARN), the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), as well as under the employer’s plan documents and labor contracts. An employer needs to consult with its attorneys to determine the extent to which a waiver has any effect on these obligations.

### ***Conclusion***

Waivers can be a useful tool for employers, but they will only be effective if written carefully to meet the specific requirements of the EEOC and case law, and if they are presented and administered in a manner that would support their characterization as “knowing and voluntary.”

### ***Appendix A***

#### **Sample of Information to Be Provided with Respect to a Group Layoff**

The class, unit, or group of individuals covered by the program includes all employees in the \_\_\_ [plant, location, area, etc.] whose employment was terminated in the reduction in force during the following period: \_\_\_\_\_. All employees in \_\_\_ [plant, location, area, etc.] are eligible for the program.

The time limits applicable to such program are the employees in the \_\_\_ [plant, location, area, etc.] who are being offered consideration under a waiver agreement and asked to waive claims under the ADEA and were given an opportunity to agree from \_\_\_ to \_\_\_\_\_. They must sign the agreement and return it to the COMPANY within 45 days after receiving the waiver agreement. Once the signed waiver agreement is returned to the COMPANY, the employee has 7 days to revoke the waiver agreement.

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The following is a listing of the ages and job titles of employees who were and were not selected for layoff [or termination] and offered consideration for signing the waiver. Except for those employees selected for layoff [or termination], no other employee is eligible or offered consideration in exchange for signing the waiver:

Job Title	Age	# Selected	# Not Selected
(1)	25	2	4
	28	1	7
	45	6	2
	63	1	
(2)	24	3	5
	29	1	7

### Notes

1. See [http://www.eeoc.gov/policy/docs/quanda\\_severance\\_agreements.html](http://www.eeoc.gov/policy/docs/quanda_severance_agreements.html).
2. See *Oubre v. Entergy Operations, Inc.* 522 U.S. 422 (1998) and 29 C.F.R. § 1625.23.
3. 29 C.F.R. § 1625.22(e)(6).
4. See *Butcher v. Gerber Products Co.*, 8 F. Supp. 2d 307 (S.D.N.Y. 1998).
5. See 29 C.F.R. § 1625.22(e)(4).
6. 48 F.3d 719 (3d Cir. 1995).
7. 29 C.F.F. § 1625.22(f)(4)(vii)(B).
8. 483 F. Supp. 2d 847 (D. Minn. 2007).
9. 423 F.3d 1139, *amended by*, 446 F.3d 1090 (10th Cir. 2006).
10. See Moran, "New 409A Regulations for Nonqualified Deferred Compensation: The end of the Beginning," 33 *Employee Relations Law Journal* 60 (2007).

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