

EEOC Issues New Guidance on Waivers of Age Discrimination Claims

As a result of the economic downturn, many employers have had to make difficult decisions regarding workforce reductions. In doing so, they often provide some form of severance to laid off employees and require a release of all claims in return. Employees who are 40 and older are protected from age-based discrimination under the Age Discrimination and Employment Act (ADEA). In order for an employer to obtain a valid release, or waiver, of an age discrimination claim, the employer must inform the employee of certain facts and rights.

On July 15, 2009, the Equal Employment Opportunity Commission (EEOC) issued guidance to help employers and employees understand the rules governing waivers of employment discrimination claims, including – specifically – waivers of age discrimination claims. The guidance contains a separate section on the Older Workers Benefit Protection Act (OWBPA), a 1990 law that amended the ADEA and requires employers to use specific language when obtaining an employee's waiver of a claim for age discrimination.

The EEOC's new publication answers questions that employees may raise if offered a severance agreement in exchange for a waiver of discrimination claims. It provides guidance to employers regarding the language that needs to be included in the severance agreement. A waiver that is contained in a severance agreement is generally valid if the employee "knowingly and voluntarily" consents to the waiver. Under the OWBPA, there are seven factors that must be satisfied in order for a waiver of age discrimination claims to be "knowing and voluntary." These factors are as follows:

1. **The waiver must be written in a manner that is clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared toward the level of comprehension and education of the average individual signing the waiver. Employers should avoid technical jargon and long, complex sentences.
2. **A waiver must specifically refer to rights or claims arising under the ADEA.** Employers need to make sure that the language of the waiver specifically references the ADEA by name.
3. **A waiver must advise the employee in writing to consult an attorney before accepting the agreement.** The guidance gives as an example 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," and concludes that this statement does not comply with the OWBPA's requirement that an individual be advised to consult with an attorney.
4. **A waiver must provide the employee with at least 21 days to consider the offer.** The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. Employers should note that if material changes to the initial offer are made, the 21-day period will need to be recalculated.

5. **A waiver must give an employee seven days to revoke his or her signature.** This seven-day revocation period cannot be changed or waived by either party for any reason.
6. **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** As a result, the employee cannot waive any acts of discrimination that occur after the date of signing.
7. **A waiver must be supported by consideration in addition to that which the employee is already entitled.** The employee must be given something of value that is more than a final paycheck, such as additional pay.

The new guidance notes that even if a waiver complies with the OWBPA requirements set forth above, it will still be invalid and unenforceable if the employer uses fraud, undue influence or any other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission or misstatement.

The guidance also discusses the additional requirements for group layoffs of employees who are 40 and older. If an employer lays off or terminates a “group” of employees (i.e., more than one) and offers a waiver, the employer must provide enough information about the factors used in making those selections to allow the laid-off employees to determine whether older employees were terminated while younger employees were retained.

This requirement applies in two types of programs:

- **“Exit incentive programs.”** The guidance explains that an “exit incentive program” is a voluntary program where an employer offers two or more employees additional consideration to persuade them to voluntarily resign and sign a waiver.
- **“Other employment termination programs.”** This term generally refers to programs where two or more employees are involuntarily terminated and are offered additional consideration in return for a decision to sign a waiver.

Where an employer terminates a group of employees in connection with either of these types of programs, the employer must give each employee involved 45 days to consider the waiver before signing it, rather than the 21 days required for an individual termination. The employer must also provide the employee information on the: a) “decisional unit” from which the employer chose the employees who were and were not selected for the program; b) eligibility factors for the program; c) time limits applicable to the program; d) job titles and ages of all individuals who were selected for the program; and e) ages of all individuals in the same job classifications or organizational unit who were not selected. Employers who are subject to these additional requirements should consult with an attorney to make sure they are giving notice of each of the above factors.

Finally, it is important to note that provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing or proceeding are unenforceable. As a result, if an employee files a charge with the EEOC after signing a waiver, the employee does not have to return the severance pay he or she received from the employer; nevertheless, the waiver may prevent the employee from recovering damages relating to the waived claims.

Although the EEOC guidance is structured in a question-and-answer format that is geared toward helping employees better understand waivers under the ADEA, employers should review the guidance to make sure they understand the requirements necessary for a binding waiver of age discrimination claims.

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