

The Older Workers' Benefit Protection Act of 1990: Waiving Goodbye

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OWBPA: Background

- The Older Workers' Benefit Protection Act of 1990 ("OWBPA") amended the Age Discrimination in Employment Act ("ADEA").
- OWBPA was enacted in response to the U.S. Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), which significantly reduced the applicable employee protections for employer termination decisions associated with a retirement plan.
- OWBPA was enacted to preserve those protections and provide guidance for employers to offer early retirement incentives without risk of age discrimination claims.
- In spite of the reduced incidence of defined benefit plans, the OWBPA remains a key guide to designing a termination arrangement with one employee or many.

- A waiver and release of ADEA rights in exchange for additional compensation must be knowing and voluntary.
- OWBPA clarified that ADEA applies to all employee benefits.
- The EEOC's equal cost/equal benefit rule was given statutory effect: older workers must receive the same benefits as younger workers unless the employer can show that the cost of the older worker's benefit is greater, such as for:
 - ✓ benefit reductions due to age for life insurance,
 - ✓ limitations on disability benefit duration for older workers.
- Special rules apply for early retirement incentive plans, such as for subsidized early retirement and Social Security bridge payments.
- General favorable recognition is provided for certain designs, such as additional age and service in pension calculations, flat dollar or percentage increases in pensions, continued life and health benefits.

Rules for a “Knowing and Voluntary” Waiver

A waiver for an individual termination must –

- Be written in a manner calculated to be understood by the individual
- Refer specifically to rights and claims under ADEA
- Advise the individual to consult with an attorney prior to executing the waiver
- Apply only to rights or claims that arise before the date of the waiver
- Provide consideration paid by the employer for the waiver that is in addition to anything of value to which the individual is already entitled
- Allow the individual to have at least 21 days to consider the terms of the offered waiver before signing
- Allow the individual to revoke the waiver within 7 days of signing

➤ **Note:** See Appendix A for a checklist provided by the EEOC for employees.

Additional Rules for Group Terminations

For a waiver agreement offered in connection with an exit incentive or other group termination program, the waiver must:

- Be written in a manner calculated to be understood by the average individual in the group,
- Provide at least 45 days for the individual to consider the waiver, and
- Provide information about the class, unit or group covered by the program. See the sample group waiver including a chart describing the group in the attached Appendix B.

- If you have a form waiver agreement, read it again – especially in light of the employees to whom the waiver will be offered
- Keep it simple and understandable: both the terms of the agreement and the description of the additional compensation
- You really need to tell them to consult an attorney – make sure it is in the agreement the employee signs
- Specifically identify ADEA and any other bases for claims against the employer that are being waived
- Do not attempt to waive claims that arise in the future; if additional services will be performed by the employee for a lengthy time after signing a waiver, consider offering a second waiver
- A waiver may not require the individual to waive his or her right to file a charge or cooperate with the EEOC

- Many waiver agreements list ERISA as one of the laws under which a claim is waived, however, most employers do not intend to cover claims for benefits.
 - ✓ Importantly, retirement benefits under ERISA plans may not be “alienated” by a participant
 - ✓ It can be helpful to avoid controversy to specifically note that claims for benefits are not covered by the waiver
- Other ERISA claims, such as under section 510 (retaliation) and fiduciary claims can possibly be waived separately from a claim for benefits.
 - **Note:** The Seventh Circuit recently upheld the exclusion of a lead plaintiff in a stock drop case due to a general release of ERISA claims other than a claim for benefits. *Howell v. Motorola*, 2011 WL 183966 (C. A. 7 (Ill.)).
- Tender-back provisions are prohibited by the EEOC regulation issued following the U.S. Supreme Court decision in *Oubre v. Entergy Operations*, 522 U.S. 422 (1998).

Drafting and Design Considerations for the Group Waiver

- One of the key issues in a group termination program is to identify the department, class or unit (the “decisional unit”) from which individuals are selected and which must be described in the waiver. See *Kruchowski v. Weyerhaeuser*, 446 F.3d 1090 (10th Cir. 2006) (waiver invalidated due to inaccurate description of the decisional unit).
- Examples of decisional units from 29 CFR 1625.22(f):
 - ✓ The Springfield Facility, where 10% of the employees in the Springfield Facility will be terminated
 - ✓ The Computer Division, where 15 of the employees in the Computer Division will be terminated within one month
- When do you create a (group) termination program? Usually a program is created when a standard package is offered to two or more employees.

- Severance Pay Plans are “welfare benefit plans” subject to the Employee Retirement Income Security Act (“ERISA”) needing
 - ✓ Summary plan descriptions
 - ✓ Annual reports on Form 5500
 - ✓ Claims procedure rights
- A pattern or practice of paying certain amounts in the context of certain types of terminations can create a severance pay plan under ERISA
- ERISA can provide some procedural and remedies protections for an employer, so an ERISA severance pay plan can be desirable, particularly when it is desirable to have employees continue working through a period of uncertainty.
- Internal Revenue Code section 409A issues should be addressed with any separation payments.

- IRC Section 409A: Payments under a nonqualified deferred compensation plan are subject to immediate taxation and an additional 20 percent penalty tax unless the provisions of section 409A are satisfied.
- Section 409A requirements include
 - ✓ Restriction of payment to separation from service, disability, death, a specified time, change of control, or unforeseeable emergency,
 - ✓ Prohibition of acceleration of benefit payment, and
 - ✓ Restrictions as to timing of deferral elections – generally in advance of the year in which the compensation is earned.
- The structure of and timing of separation pay should be designed carefully in light of the section 409A rules. A key exception to the rules is the short term deferral exception for amounts paid within 2.5 months of the close of a taxable year.

- Special rules are provided for certain types of separation pay, including:
 - ✓ Certain collectively-bargained plans,
 - ✓ Involuntary separation or window programs subject to certain limitations,
 - ✓ Medical benefits during the COBRA continuation period, and
 - ✓ Reimbursements and certain in-kind benefits.
- **Note:** Separation pay arrangements that include delayed or continued payments of cash or benefits should be reviewed for compliance with section 409A.
- The IRS recently issued Notice 2010-80 which provides certain limited transition relief and guidance for the permitted structure of payments resulting from a release of claims or similar agreement (modifying IRS Notices 2010-6 and 2008-113). The guidance essentially identifies restrictions to the ability of the separation pay recipient to substantially defer such pay based on when a waiver is signed.

- Continued health coverage –
 - ✓ COBRA
 - ✓ State continuation
- 401(k) and other retirement plan contributions
 - ✓ Contributions generally may not be taken from or based on severance pay
 - ✓ Check retirement plan terms for what types of compensation payments are covered by the retirement plan
- Life insurance
 - ✓ Conversion
 - ✓ Portable coverage

- Disability income benefits, such as LTD, can be available even if employment is involuntarily terminated; careful communication is important in situations where disability and performance are both at issue
- COBRA rights extended -
 - ✓ 29 months if qualified beneficiary is disabled (as determined by Social Security) as of a date within 60 days of the employment termination (or other qualifying event)
 - ✓ SS disability determination must be provided to plan administrator within first 18 months after qualifying event
- Life Insurance –
 - ✓ Can be extended through a disability waiver provision in the insurance policy
 - ✓ Review of policy terms can be important

EEOC: Understanding Waivers of Discrimination Claims in Employee Severance Agreements

http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

EEOC Facts About Age Discrimination

<http://www.eeoc.gov/eeoc/publications/age.cfm>

EEOC Regulations

<http://www.eeoc.gov/laws/regulations/index.cfm>

APPENDIX A

Employee Checklist: What to Do When Your Employer Offers You a Severance Agreement:

(from www.eeoc.gov link below as visited March 1, 2011)

- **Make sure that you understand the agreement**
 - Read the agreement to see if it is clear and specific, or if it is confusing because it contains terms you do not understand.
 - If you are 40 or older, inform your employer that the law requires your agreement to be written in a manner that makes it easy to understand. Usually this means that your agreement should not contain technical jargon or long, complex sentences.

- **Check for deadlines and act promptly**
 - The moment you are given a severance agreement, check to see if your employer gave you a deadline for accepting, or declining, the agreement. If you are 40 years old or older, federal law requires the employer to give you at least 21 days to review the agreement and make up your mind.
 - If your employer has not given you a reasonable amount of time, or rushes your decision, this is a red flag. An employer who is fair will understand that you cannot review or make decisions about an important document on a moment's notice.
 - If you are being rushed, ask for more time. Put your request in writing. If you are 40 or older and your employer is asking you for a decision in fewer than 21 days, remind the employer that the law requires you to be provided at least 21 days. (If you and at least one other person are being laid off in a reduction in force (RIF) at the same time, you must be given 45 days to consider the agreement.)

- **Consider having an attorney review the severance agreement**
 - Even if you are parting amicably with your employer, you may want to ask for advice about whether you should sign it, whether the terms are reasonable, and whether you should ask your employer to change any of the terms.
 - If you decide that you want an attorney to review the agreement, promptly make an appointment. Do not wait until the last day before the deadline to review the severance agreement.
 - If you are at least 40 years old, the agreement must advise you to consult with an attorney.

- **Make sure you understand what you are giving up in exchange for severance pay or benefits**
 - The main benefit to signing an agreement is that you will receive a cash payment or benefits in exchange for signing away your right to bring certain legal claims against your employer.
 - Make sure that the agreement offers you something of value to which you are not already entitled.
 - If you think you have been wrongfully terminated because of age, race, sex, religion, or some other discriminatory reason, you may want to think twice about signing. The benefits of signing a severance agreement should be carefully weighed against claims you might have against your employer, the likelihood of winning a court case or settlement, and the probable costs.

- **Review the agreement to ensure that it does not ask you to release nonwaivable rights**
 - Confirm that your employer is not asking you to waive your right to file a charge, testify, assist, or cooperate with the EEOC.
 - Make certain that the agreement is not asking you to waive rights or claims that may arise after the date you sign the waiver.
 - Make sure that your employer is not asking you to release your claims for unemployment compensation benefits, workers compensation benefits, claims under the Fair Labor Standards Act, health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA).

APPENDIX B

[Please note: Appendix B was revised in April 2010]

Sample Waiver and General Release: Group Layoffs of Employees Age 40 and Over

(from www.eeoc.gov link below as visited March 1, 2011)

The following example illustrates one way in which the required OWBPA information could be presented to employees as part of a waiver agreement and is not intended to suggest that employers must follow this format. Rather, each waiver agreement should be individualized based on an employer's particular organizational structure and the average comprehension and education of the employees in the decisional unit subject to termination. For another example of how the required information might be presented, see 29 C.F.R. § 1625.22(f)(vii).

Although this sample addresses only OWBPA issues, most severance agreements also ask employees to waive all claims against the employer, including claims arising under any federal, state, and local laws. See paragraph 6 below.

Dear [Employee]:

This letter will constitute the agreement between you and [your employer] ("the Company") on the terms of your separation from the Company (hereinafter the "Agreement"). **The Agreement will be effective on the date specified in paragraph 7, below.**

1. Your employment will terminate on _____X_____ date.

or

You have agreed to resign on _____X_____ date. Your last day of work will be _____X_____ date.

2. In consideration of your acceptance of this Agreement, the Company will pay you an extra _____ [week's][month's] salary at your current rate of \$_____ per [week][month], less customary payroll deductions, to be paid within five (5) business days after the effective date of this Agreement as defined in paragraph 7 below. This severance pay will be in addition to your earned salary and accrued vacation pay or leave to which you are entitled.

[Paragraphs 3, 4, and 5 may address benefits, unemployment compensation, references, return of property, confidentiality, etc.]

6. Except as to claims that cannot be released under applicable law, you waive and release any and all claims you have or might have against the Company. . . .These claims include, but are not limited to claims for discrimination arising under federal, state, and local statutory or common law, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information and Discrimination Act, and [state law].

7. The following information is required by OWBPA:

You acknowledge that on _____, you were given 45 days to consider and accept the terms of this Agreement and that you were advised to consult with an attorney about the Agreement before signing it. To accept the Agreement, please date and sign this letter and return it to me. Once you do so, you will still have seven (7) additional days from the date you sign to revoke your acceptance (“revocation period”). If you decide to revoke this Agreement after signing and returning it, you must give me a written statement of revocation or send it to me by fax, electronic mail, or registered mail. If you do not revoke during the seven-day revocation period, this Agreement will take effect on the eighth (8th) day after the date you the sign the Agreement.

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

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) Bookkeepers	25	2	4
	28	1	7
	45	6	2
(2) Accountants	63	1	0
	24	3	5
(3) Retail Sales Clerks	29	1	7
	40	2	1
(4) Wholesale Clerks	33	0	3
	51	2	1

Sincerely,

On Behalf [the Company]

By signing this letter, I acknowledge that I have had the opportunity to consult with an attorney of my choice; that I have carefully reviewed and considered this Agreement; that I understand the terms of the Agreement; and that I voluntarily agree to them.

Date:

[Employee]