

**NEW EEOC REGULATIONS PROHIBIT “TENDER
BACK” PROVISIONS AND LIMIT THE USEFULNESS OF
COVENANTS NOT TO SUE IN ADEA WAIVER
AGREEMENTS**

January 2001

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Over the past several years, waivers have become a common tool in preventing future disputes between employers and their employees. Employers often require employees to sign releases or waivers of any employment-related claims as a condition of receiving severance or other benefits in either individual or group employment terminations, such as reductions-in-force. These waivers, if drafted correctly, provide employers with protection against further liability to the releasing employee.

On December 11, 2000, the Equal Employment Opportunity Commission (“EEOC”) issued new Regulations that prohibit certain types of provisions in agreements providing for the waiver of age discrimination claims under the federal Age Discrimination in Employment Act (“ADEA”). These Regulations interpret the Older Workers Benefit Protection Act (“OWBPA”), which imposes certain minimum standards that must be satisfied for a waiver of an ADEA claim to be enforceable. The Regulations, which evidence the EEOC’s hostility toward waiver agreements, particularly covenants not to sue, provide that the EEOC will consider an ADEA waiver agreement to be invalid if it discourages employees from contesting the validity of a waiver, or if it purports to penalize an employee for asserting such a claim.

The OWBPA Requirements and the *Oubre* Decision

Under the OWBPA, an individual may not waive any ADEA right or claim unless the waiver is *knowing and voluntary*. To satisfy this standard, an ADEA waiver must meet certain minimum requirements. The waiver must: (a) be written in a manner calculated to be understood by the employee; (b) specifically reference ADEA rights or claims; (c) advise employees to consult with an attorney before signing the agreement; (d) be supported by consideration, or benefits to which the employee is not otherwise already entitled; (e) not seek to waive claims that arise after the agreement is executed; and (f) provide employees with at least 21 days (45 in a group termination) in which to consider

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the waiver and a seven (7) day period after executing the agreement in which to revoke the agreement.¹

If a release is requested in connection with a group termination or exit incentive program an employer must also provide specific information about the termination program, and lists of the job titles and ages of individuals selected for the program, and the ages of those in the same job classification or organizational unit who are not eligible or selected for the program. A group termination or exit incentive program is typically one in which an employer offers a package of severance or other benefits to two or more employees. It need not be an ERISA plan.

After the OWBPA's enactment, individuals have attempted to test the validity of certain ADEA waivers in court. In such cases, employers have argued that, as a condition to filing suit, employees should be required to "tender back" the consideration provided by the release. In 1998, the United States Supreme Court interpreted the OWBPA to hold that releases that do not comply with the specific requirements of the OWBPA do not bar an employee's ADEA claims, and that the failure to tender back the consideration received in exchange for the waiver does not constitute a ratification of a non-complying release. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). The Court noted that an employer may be entitled to a claim for recoupment or setoff, but left that issue for a later time, nor did the Court address the question of whether a failure to tender back the consideration could constitute the ratification of a release that complied fully with the OWBPA.

The New EEOC Regulations

The EEOC Regulations, which will be codified at 29 C.F.R. §1625.23, provide that the EEOC will consider, and that the courts should consider, a waiver agreement invalid if it discourages employees from contesting the validity of a waiver, or if it purports to penalize an employee for asserting such a claim. Specifically, the Regulations provide as follows:

¹Because the OWBPA's "*knowing and voluntary*" standard is designed to protect individuals who are waiving their right to assert claims under the ADEA, several of the specific OWBPA standards do not apply to releases drafted in connection with the settlement of ADEA claims, where an individual already has asserted such rights in lieu of waiving them. In all cases, however, a waiver must be entered into knowingly and voluntarily.

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1. An employer can not require an employee who enters into a waiver agreement in exchange for some payment or other consideration to tender back that consideration before filing either an age lawsuit or a charge of age discrimination against the employer;

2. Although a general waiver or release of claims is permissible, a provision that requires an employee who enters into a waiver agreement to compensate the employer for its attorneys' fees or other damages in the event the employee files a lawsuit or charge against the employer is impermissible; and

3. An employer is restricted in its attempt to recover the consideration paid to an employee in exchange for a waiver, where the employee proceeds in court despite having signed the waiver agreement. If an employee successfully challenges a waiver agreement, the employer may attempt to recover the consideration paid in exchange for a waiver, but the amount recovered cannot exceed the sum awarded to the employee in the litigation. Notably, the Regulations provide no recourse for an employer to recoup the cost and expense of litigation where an employee has unsuccessfully contested the validity of a waiver.

The most controversial provisions of the new Regulations relate to covenants not to sue, a provision that is often included in a separation of employment and settlement agreement. In a covenant not to sue, an employee agrees not to file a subsequent suit or claim seeking monetary or other relief against the employer, often agreeing to pay the employer's attorneys' fees or other damages in the event of a breach of such a promise. A covenant not to sue provides an additional "incentive" for an individual to adhere to the terms of the release, and given its language, may provide the basis for a breach of contract action to recover damages, such as attorneys' fees and costs, if an employee breaches its terms.

The EEOC, however, now clearly disfavors such covenants. According to the EEOC, even a covenant not to sue that does not contain a provision requiring a breaching employee to compensate the employer for attorneys' fees or other damages conflicts with the OWBPA's requirement that waivers be "written in a manner calculated to be understood" by the employee if it does not put employees on notice of their right to challenge the knowing and voluntary nature of the waiver. Thus, to comply with the new Regulations, an employer who wishes to include a covenant not to sue in a waiver agreement must also inform the employee that the covenant does not prohibit the employee from bringing a claim seeking to challenge the validity of the release. Clearly, this is a troublesome prospect for employers, who are seeking finality with the payments being made to the releasing employee, and are unlikely to be interested in

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advising employees that they can sign the waiver agreement, accept the additional benefits, and still bring a claim challenging the agreement.

The Implications of the EEOC Regulations

It is uncertain whether this aspect of the EEOC's new Regulations will withstand judicial scrutiny, as it goes beyond the scope of the Supreme Court's *Oubre* decision and does not find support in any other court cases. Moreover, it is not known whether the incoming Bush Administration will seek to rescind or otherwise revise this or any other aspect of these new Regulations. **However, in light of the EEOC's aggressive posture, employers are well-advised not to include covenants not to sue in their waiver agreements, unless the Regulations are rescinded or rejected by the courts.** Assuming the agreement has a broad and enforceable release of all claims, a covenant not to sue is of limited utility, particularly if the employer is prohibited from requiring the releasing employee to pay its attorneys' fees or other damages in the event of a breach of the covenant. In light of the prospect that an overbroad covenant not to sue would invalidate the entire waiver agreement, many employers may opt not to include covenants not to sue from their waiver agreements rather than include a covenant that might not pass muster with the EEOC or a court relying upon the EEOC's Regulations, or which explicitly give employees notice of their right to challenge the waiver.

When drafting waivers, employers should also be aware that certain states may place additional requirements to obtain an effective waiver of certain state law claims. For example, to waive claims under the Minnesota Age Discrimination Act, a release must provide for a fifteen day revocation period, in contrast to the seven day revocation period required by the OWBPA, and a waiver can not release unknown claims in California, unless the waiver agreement explicitly so provides. If you have any questions as to whether any particular state law requirements pertain to a particular waiver, or whether your waiver meets the new requirements of the OWBPA, please contact us.

Finally, in the event an employee contests the validity of a waiver in a judicial forum, a valid waiver (one that is entered into knowingly and voluntarily and which complies in all respects with the OWBPA) acts as an "affirmative defense" to an ADEA suit and therefore, the litigation should be disposed of quickly and efficiently. Moreover, employers should note that the EEOC's Regulations and the specific OWBPA requirements apply only to waivers of ADEA claims. Thus, even if a particular waiver does not comply in all respects with the specific requirements of the OWBPA, as long as it is entered into knowingly and voluntarily and is supported by adequate consideration, it should enable an employer to defeat claims other than ADEA claims.

Morgan Lewis' Labor and Employment Law Practice Group has extensive experience in the drafting of waivers and in the litigation of claims relating to such waivers. If you have any questions about the use of waivers in light of these recent Regulations, feel free to contact one of the following attorneys:

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