

## EEOC Issues New Guidance on Discrimination Waivers and Releases

July 21, 2009

On July 15, the Equal Employment Opportunity Commission (EEOC) issued a new guidance document concerning discrimination waivers and releases contained in employee severance agreements. The full text of the guidance, titled “Understanding Waivers of Discrimination Claims in Employee Severance Agreements” (EEOC Guidance), is available online at [www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html).

The EEOC Guidance does not dramatically change the EEOC’s detailed regulations concerning age discrimination waivers and releases, which center around the complex requirements imposed under the Older Workers Benefit Protection Act of 1990 (OWBPA).<sup>1</sup> However, the new EEOC Guidance is important in several respects:

- *The EEOC Guidance deals with all types of discrimination waiver and release requirements. It is not limited to age discrimination waiver requirements applicable under OWBPA, although the OWBPA requirements also receive attention.*
- *The EEOC Guidance is directed to employees, and describes in detail the possibility that an employee—after signing a waiver in exchange for severance pay—can file discrimination charges with the EEOC and initiate litigation attempting to invalidate the release, among other things. Thus, the EEOC Guidance may create a higher practical risk that waivers may be challenged in RIF-related litigation.*
- *The EEOC Guidance contains specific examples, and numerous questions and answers, that should be taken into account by employers when addressing waiver and release issues in severance agreements.*
- *The EEOC Guidance in some respects takes an expansive view of potential waiver/release problems. The EEOC Guidance—if broadly adopted by the courts—could invalidate a great number of waiver and release agreements.*

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1. For the EEOC regulations involving waivers and releases under the Age Discrimination in Employment Act of 1967, see 29 C.F.R. §§ 1625.22–1625.23 (available at [http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr1625\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title29/29cfr1625_main_02.tpl)).

The rest of this LawFlash outlines some of the most important aspects of the recently released EEOC Guidance concerning discrimination waivers contained in employee severance agreements.

## **Reaffirmation of Federal ADEA Waiver Requirements**

The EEOC Guidance, though dealing with all kinds of discrimination waiver requirements (see next section, “Waivers and Other Types of Discrimination”), reaffirms the requirements applicable to age discrimination waivers under the federal Age Discrimination in Employment Act of 1967 (ADEA). The OWBPA, which amended the ADEA, outlines specific prerequisites for an age discrimination waiver to be considered “knowing and voluntary.” The new EEOC Guidance focuses on the following requirements, among others:

- **Understandability.** The EEOC Guidance elaborates on the OWBPA requirement that any age discrimination waiver must be “written in a manner calculated to be understood by [the employee] or by the average individual eligible to participate” (29 U.S.C. § 626(f)(1)(A)). *The EEOC Guidance states that this means waivers must be “drafted in plain language” and that “[u]sually this requires the elimination of technical jargon and long, complex sentences.”*
- **Reference to ADEA.** Any valid waiver of federal age discrimination claims must refer specifically to the ADEA. The EEOC Guidance reaffirms this, and states that the waiver “must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.”
- **No Waiver of Future Claims.** OWBPA invalidates waivers encompassing claims arising after the date of a release agreement’s execution. This means, according to the EEOC Guidance, that an employee could not waive claims stemming from “new acts of discrimination that occur *after* the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer” (emphasis in original).
- **Adequate Consideration.** The EEOC Guidance reaffirms the requirement that valid releases must be supported by adequate consideration—i.e., something of value to which a person is not already entitled.
- **Employee “Advised” in Writing to Consult Attorney.** According to OWBPA, a release of age discrimination claims will be invalid unless employees are “advised in writing to consult with an attorney prior to executing the agreement” (29 U.S.C. § 626(f)(1)(E)).

*The EEOC Guidance takes a very strict, literal view of this requirement, stating that employees must be affirmatively instructed in writing (i.e., “advised”) to consult with an attorney. For example, it is not sufficient, according to the EEOC, for a release to merely state: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing . . .” (citing American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998), for the proposition that to “advise” employees to consult an attorney means affirmatively to “caution,” “warn,” or “recommend”).*

- **Twenty-One-Day (or 45-Day) Consideration Period.** Under OWBPA, employees must be given at least 21 days to consider a waiver and release agreement, and this period must be 45 days if the waiver relates to an “exit incentive or other employment termination program” offered to a group or class of employees. The EEOC Guidance notes that this consideration

period runs from the “date of the employer’s final offer” and “starts over” if the employer makes “material changes to the final offer.” The EEOC Guidance fails to mention the exception established in the EEOC’s waiver and release regulations, which state that “parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.” *See* 29 C.F.R. § 1655.22(e)(4).

- **Seven-Day Revocation Period.** Under OWBPA and relevant regulations, employees must be given a right to revoke any age discrimination waiver within seven days after execution, and the EEOC Guidance states that the “seven-day revocation period cannot be changed or waived by either party for any reason.”
- **OWBPA “Group Layoff” Requirements.** The EEOC Guidance reaffirms the additional OWBPA requirements triggered when a waiver relates to an “exit incentive or other employment termination program” offered to a group or class of employees. In these cases, (i) the consideration period must be 45 days rather than 21 days; and (ii) the employer must make mandatory written disclosures—identifying the “decisional unit,” “any eligibility factors,” “any time limits,” and “the job titles and ages of all individuals” eligible or selected, and not eligible or not selected, for the program. *See* 29 U.S.C. § 626(f)(1)(H); 29 C.F.R. §§ 1655.22(e), 2655.22(f).

Although the EEOC Guidance generally tracks the EEOC’s more detailed regulations concerning these “group” requirements—and provides some examples and explanations—the EEOC Guidance provides no greater clarity, and in some ways adds further potential confusion by attempting to oversimplify OWBPA concepts that are complicated to apply.

Concerning the need to identify “eligibility factors” applicable to a group exit incentive or employment termination program, *the EEOC Guidance perpetuates the possibility that employers must identify not merely the factors governing potential participation or coverage but also “the criteria, such as job performance, experience, or seniority, an employer relied on in deciding who to terminate.”*<sup>2</sup>

- **No Penalties If Employees Attempt to Challenge the Release.** The EEOC Guidance reaffirms the indication, in the OWBPA regulations, that employers may not “renege” on promises contained in a waiver/release, or impose other penalties (e.g., “to stop making promised severance payments or to withhold any other benefits it agreed to provide”) after an employee has filed a lawsuit challenging an age discrimination waiver in court. The EEOC Guidance adopts the view that “tender back” requirements will generally invalidate any age discrimination release, although severance pay or other consideration can offset (or eliminate) any subsequent recovery if the employee successfully pursues an age discrimination claim. The EEOC Guidance also appears to continue the EEOC’s hostility toward “covenant not to sue” provisions, which

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2. The EEOC Guidance notes that the OWBPA regulations contain an example describing eligibility as follows: “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.” 29 C.F.R. § 1625.22(f)(4)(vii)(B). However, the EEOC cited the court decision in *Pagilio v. Guidant Corp.*, 483 F. Supp. 2d 847 (D. Minn. 2007), where the court invalidated a release for, among other things, failing to identify the general criteria by which employees were selected for termination. The EEOC noted, however, that the district court in *Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139, *amended by* 446 F.3d 1090 (10th Cir. 2006), invalidated a release in part because the release failed to identify selection criteria in the “eligibility factors,” but the district court issued a subsequent opinion that omitted the discussion of eligibility factors, although the court invalidated the release on other grounds.

arguably are invalidated by the EEOC's age discrimination waiver regulations. *See* 29 C.F.R. § 1625.23(b).

- **Noninterference with EEOC Enforcement.** The EEOC Guidance reaffirms the OWBPA provisions that invalidate any release purporting to prohibit an employee from filing a charge of discrimination with the EEOC, or that would limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC.

The EEOC Guidance adopts an extreme view concerning an employer's inability to rehabilitate or correct any waiver and release agreements that fail to comply with OWBPA. The EEOC Guidance cites *Butcher v. Gerber Products Co.*, 8 F. Supp. 2d 307 (S.D.N.Y. 1998), for the proposition that "an employer cannot attempt to 'cure' a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement," and that "as a matter of law and public policy, an employer is allowed only *one chance* to conform to the requirements of OWBPA" (emphasis added).

The EEOC Guidance also states that the above factors are the *minimum* required for an age discrimination release to be considered valid. This opens the door to a broader subjective inquiry that can still invalidate an OWBPA-compliant release agreement "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." The EEOC Guidance describes one case involving alleged fraud,<sup>3</sup> and otherwise provides no elaboration concerning the types of "material mistake, omission, or misstatement" that could invalidate release agreements that otherwise appear enforceable on their face.

### **Waivers and Other Types of Discrimination**

The EEOC Guidance differentiates between federal age discrimination waivers (which, as noted above, are subject to OWBPA) and waiver requirements and restrictions applicable to other discrimination claims that, according to the EEOC, "are derived from case law."

As described by the EEOC, the waiver requirements involving discrimination claims under Title VII, the Americans with Disabilities Act of 1990, as amended (ADA), or the Equal Pay Act of 1963 (EPA) do not dramatically differ from the requirements that most employers have traditionally regarded as important to waiver enforceability. Yet, by focusing on different standards governing the waiver of these other claims, the EEOC Guidance may invite more plaintiffs to challenge release agreements based on standards that are less clearly defined than those articulated in OWBPA for age discrimination waivers.

Several requirements applicable to discrimination waivers receive particular attention in the EEOC Guidance:

- **"Knowing and Voluntary" Waiver—Different Standards?** The EEOC Guidance states that, for non-age claims, some courts look at "traditional contract principles" focusing on "whether the language in the waiver is clear," but other courts "look beyond the contract language and consider all relevant factors" or "the totality of the circumstances." Unsurprisingly, many of

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<sup>3</sup> The EEOC Guidance describes, in an example, *Lauderdale v. Johnston Industries, Inc.*, 31 Fed. Appx. 940 (11th Cir. 2002), where the court invalidated a release based on alleged fraud where the employee maintained that he was originally told his employment termination resulted from a "reorganization," and where the employer subsequently asserted that the employee's termination was due to alleged poor performance.

these factors resemble those applicable under OWBPA (e.g., the requirements of adequate consideration, the opportunity for meaningful review, whether consultation with an attorney was “encouraged or discouraged,” and whether a waiver agreement improperly interferes with EEOC charges or investigations).

Yet, the EEOC suggests that the enforceability of non-age claim waivers can depend on more amorphous inquiries, including (i) whether the waiver was “clear and specific enough” for the employee to understand “based on his education and business experience”; (ii) “whether the employee had any input in negotiating the terms of the agreement”; and (iii) whether the release “was induced by fraud, duress, undue influence, or other improper conduct by the employer.”<sup>4</sup> The EEOC Guidance provides little clarity concerning these additional standards, each of which seemingly differs from OWBPA’s age discrimination waiver requirements.

- **Can Plaintiffs Be Required to “Tender Back” Consideration?** OWBPA appears to prevent waivers from requiring the return of severance pay or other consideration before an employee can file an age discrimination lawsuit challenging a release. *See* 29 C.F.R. § 1625.23(b); *cf. Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). However, the EEOC Guidance states that “the law is less clear” concerning the possibility of “tender back” requirements under other discrimination statutes. According to the EEOC, “[s]ome courts conclude that the validity of the waiver cannot be challenged unless the employee returns the consideration, while other courts apply the ADEA’s ‘no tender back’ rule to claims brought under Title VII and other discrimination statutes and allow employees to proceed with their claims without first returning the consideration.”
- **State Law Waiver Requirements.** The EEOC Guidance indicates that “[s]tate law typically governs questions regarding the proper construction of a severance agreement and the validity of waivers,” with examples involving the Minnesota Age Discrimination Act (providing for a 15-day revocation period) and California law (preventing the release of unknown claims unless the waiver contains certain language specifically providing for such a waiver).
- **Nonwaivable Claims.** In an employee checklist (captioned “What to Do When Your Employer Offers You a Severance Agreement”) the EEOC Guidance identifies certain claims that are “nonwaivable” as a matter of law. Such nonwaivable claims, according to the EEOC, include “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 of 1985 (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA).”

## Questions and Answers, and Examples

As noted above, the EEOC Guidance contains an assortment of examples and questions and answers, including two appendices: (a) an “Employee Checklist: What to Do When Your Employer Offers You a Severance Agreement” (Appendix A); and (b) a “Sample Waiver: Exit Incentive or Other Termination

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4. In one of the examples cited by the EEOC—derived from *Torrez v. Public Service Co. of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990)—a waiver was deemed unenforceable where the release language was deemed “clear and unambiguous,” encompassing “any and all claims which I have or might have, arising out of or related to my employment or resignation or termination,” but where the waiver failed “to specifically mention the release of employment discrimination claims,” and the employee was “only high school educated and unfamiliar with the law.”

Programs” (Appendix B). The EEOC Guidance states that it “is not intended to cover all of the issues” arising from layoffs or employment terminations involving discrimination waivers. Likewise, the EEOC Guidance contains illustrations of certain OWBPA requirements—for example, what constitutes the “decisional unit” for purposes of mandatory “group layoff” disclosures—although the EEOC states that the specific requirements may depend on the “particular circumstances of each termination program.”

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