

New EEOC Guidance on Waivers of Discrimination Claims

August 2009

In mid-July, the Equal Employment Opportunity Commission (EEOC) issued a Guidance, ["Understanding Waivers of Discrimination Claims in Employee Severance Agreements."](#) The Guidance is in an easy to understand question-and-answer format and is in part intended to help employees determine whether their employers are providing them with enforceable waivers.

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The Guidance is likely to spur litigation as separated employees review this public document and discover actual or perceived deficiencies with their release agreements. The issues covered are not limited to waivers of age claims by employees age 40 and over.

Below, we summarize key points of the Guidance applicable to all waivers, as well as specific issues applicable to waivers involving group termination of employees age 40 and over.

Key Points

The Guidance reiterates that a waiver of discrimination claim of any kind is only valid if it is knowing and voluntary. Accordingly, release language must be clear and understandable to the particular employee to whom the waiver is provided.¹ In this regard, the Guidance further notes that if the employee signs the waiver based on improper information (e.g., being told it is a position elimination when it is not), there is a viable argument that waiver is invalid based on fraud.² Regardless of whether the Older Worker Benefits Protection Act (OWBPA) applies (i.e., if the employee is age 40 or over), the waiver must be clear, easily understood, and not obtained through subterfuge.

The Guidance reiterates that an employee always retains the right to file a charge with the EEOC without being obligated to return any consideration, but can waive the right to an individual-specific remedy.³ The Commission's position is consistent with the U.S. Supreme Court's decision in *Waffle House v. Travelers*, 114 S.W.3d 601 (Tex. App. 2003), holding that an arbitration agreement signed by a worker does not divest the EEOC of jurisdiction to investigate a claim of discrimination.

The Guidance reiterates that express or implied tender back (i.e., return of consideration or payment of attorney fees incurred by an employer) is prohibited in regard to federal age discrimination claims filed in court by employees age 40 and over, but may be permissible in regard to other claims. The Guidance also notes that if an Age Discrimination in Employment Act (ADEA) suit is filed, the employer cannot refuse to fulfill its obligations under the agreement. The Guidance also reiterates that any recovery on an ADEA claim that survives a purported waiver is subject to offset by the severance paid.⁴

The Guidance reiterates that, as to waivers of claims involving employees age 40 and older in an individual release situation, the agreement must, inter alia:

1. Provide the employee with a read and study period of at least 21 days;
2. Specifically list the ADEA as a claim being waived;
3. Provide a 7-day revocation period that cannot be reduced; and
4. Include language advising the employee of the right to consult with counsel.⁵

Specific Issues Applicable to Group Terminations

Unfortunately, the Guidance does not contain any helpful information relevant to such vexing questions as whether there are differences in application of OWBPA requirements to voluntary and involuntary programs; and whether 45 days must be provided as a read and study period to choose to participate in a voluntary reduction-in-force program if 45 days is provided to consider the release agreement subsequently provided to volunteers. However, the following information is provided.

The Guidance reiterates that for waivers of claims involving employees age 40 and over in a group termination situation, the agreement must, inter alia:

1. Provide the employee with a read and study period of at least 45 days;
2. Specifically list the ADEA as a claim being waived;
3. Provide a nonwaivable 7-day revocation period;
4. Include language advising the employee of the right to consult with counsel; and
5. Provide information regarding eligibility factors, time limits, and the job titles and ages of eligible and ineligible employees.⁶

The Guidance reiterates that separation of as little as two employees is a group termination that triggers the 45-day study period and the employer's obligation to provide comparative data.⁷

The Guidance does not mandate that specific selection criteria must be provided, but specifically notes that some courts have held that eligibility factors include selection criteria. Accordingly, in an involuntary termination situation, we recommend that the agreement list both eligibility factors (e.g., all employees in headquarters) and selection criteria (e.g., the basis for selection of headquarters employees for separation as part of a group reduction program). If selection criteria are not included, the Guidance provides some support for arguing that waiver is valid despite the absence of selection criteria.⁸

For years, employers have struggled with an inconsistency between the statute and the regulations. The statute indicates that the release must contain the job titles and ages of everyone selected for the "program" and the ages of all individuals in the job classification or organizational unit who are not selected. This implies that the second list need not mirror the first list (e.g., in a headquarters (HQ) reduction, list A can include everyone who will be separated from HQ, but if each business unit within HQ was analyzed separately, a member of the Accounting business unit selected for termination is entitled solely to information regarding Accounting business unit employees who are retained). The regulations, however, indicate that the lists should mirror each other. This position is reiterated in the Guidance (e.g., as to the HQ example, list B should not be limited to just employees in the Accounting business unit). We suggest using the coextensive approach to avoid creating a release that the EEOC will consider invalid.⁹

The Guidance reiterates the concept of time limits, but provides little guidance as to its application in an involuntary termination situation. It appears that in an involuntary discharge situation (as compared with a voluntary reduction in force program), this is merely the 45-day consideration period. Nonetheless, based on the example provided in the Guidance, we recommend providing a time frame title to the program such as July 2009 Restructuring Program and clarifying the program title and termination dates of selected employees in rolling reductions in force in which aggregated lists are used.¹⁰

The Guidance reiterates that OWBPA violations cannot be cured by a follow-up letter or reaffirmation. Thus, in the first instance, a release signed by an employee must be fully compliant with the OWBPA.¹¹

Finally, the Guidance cites to caselaw supporting the conclusion that there is no cause of action for violation of the OWBPA.¹²