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OLDER WORKERS ACT A GOOD TEMPLATE FOR VALID WAIVERS

Key requirements are
independent counsel,
adequate time to reflect

By **MORRIS J. BUSCA**

A valuable guide to well-drafted employment releases can be found in an unexpected spot—buried within Title II of the Older Workers Benefit Protection Act of 1990. That act is itself an amendment to the federal Age Discrimination in Employment Act (ADEA).

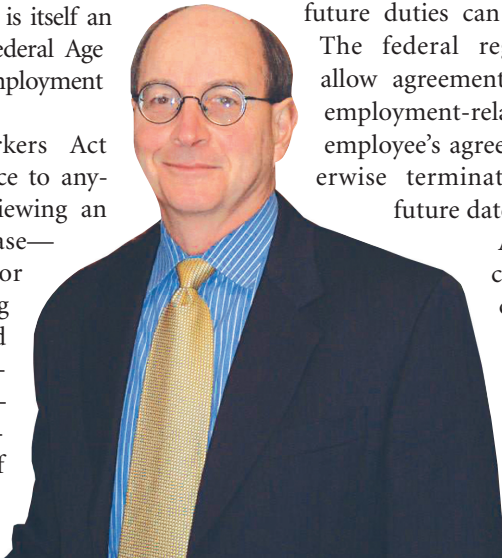
The Older Workers Act offers sound guidance to anyone drafting or reviewing an employment release—not just releases or waivers involving older workers. A valid release requires clarity in communication, fairness in timing and a lack of emotional pressure from the employer.

A release is only going to be enforceable under the ADEA if it is “knowing and voluntary.” At a minimum, it must be written in a manner calculated to be understood by the individual employee. In the case of an early retirement offer extended to a class of workers, it must be understandable by the average individual eligible to participate.

It has to be in writing, and federal regulations require employers to take into account the readers’ educational level and reading comprehension, requiring “limitation or elimination of technical jargon and of long, complex sentences.”

The waiver has to refer specifically to

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anything that is being waived— listing the pertinent rights and claims under the ADEA. Significantly, the release must not waive future rights— rights or claims that may arise after the date the waiver is executed. While future rights can’t be waived, future duties can properly be covered.

The federal regulations specifically allow agreements “to perform future employment-related actions such as the employee’s agreement to retire or otherwise terminate employment at a future date.”

A waiver or release changes the employee’s constellation of legal rights in some way, and in order to be valid, has to be supported by some new benefits above and beyond the financial, health or other benefits to which the

employee is already entitled. Another element of a proper waiver is the written advice to consult with an attorney prior to signing.

Consideration Period

A 1998 First Circuit Court of Appeals case, *American Airlines, Inc. v. Cardoza-Rodriguez*, held the employer’s failure to advise employees to consult with legal counsel in voluntary early retirement program documents rendered the release invalid to waive ADEA claims.

If the waiver is prepared for an individual employee, he or she has a 21-day period to consider the agreement from the date of the employer’s final offer. If the offer is made to a group or class of employees, each person has at least 45 days to consider the agreement.

Changes to the final offer that are not material do not restart the running of the 21- or-45 day period. Additionally, the parties may agree that changes, whether material or not, do not restart the time employees have to consider the agreement. If the changes are material, that restarts the running of the 21- or-45 day period. An employee may sign a release prior to the end of the time period. This commences a mandatory seven-day revocation period. Early signing is only permissible if the employee is not pressured to do so. The employee must agree to a shortening of the consideration period, so long as the employer does not engage in fraud, misrepresentation or a threat to withdraw or alter the offer. It is improper for the employer to threaten to change the terms before the expiration of the 21- or-45 day time period, or to offer different terms to employees who sign early.

Cooling Off Week

After the release is signed, an employee has at least seven days to revoke his or her agreement, under the ADEA.

One feature of a soundly-drafted settlement agreement, in the case of an early retirement offer to a group of employees, is an adequate description of the “decisional unit” covered by the proposal.

To meet federal standards, all members of the group need to know the group of employees covered by the program, its eligibility requirements, and time limits. The offerees are entitled to a list of the job titles and ages of all eligible employees, and the ages of all ineligible people in the same job classification or organizational unit.

This is not an area of the law where “substantial compliance” will carry the day. Strict compliance is required. Take the

example of the 1999 Connecticut District Court case of *Suhy v. Alleid Signal*.

The employer listed the age ranges of the employees who were eligible for an early retirement program. The court ruled that was inadequate, and that job titles and ages of all individuals eligible or selected for the program and the ages of *all* individuals in the same classification not selected should have been listed.

Tender Back Doctrine

Before 1998, to legally challenge a defective waiver, an employee was required to first tender back to the employer the benefits he or she had received. That changed with the U.S. Supreme Court's 1998 case of

Oubre v. Entergy Operations, Inc. In light of *Oubre*, the EEOC amended its regulations, effective Jan. 10, 2001.

Now, an individual wishing to challenge the validity of an ADEA waiver is not required to return the consideration received before filing a lawsuit or discrimination charge.

For an employer, a valid waiver, whether in response to an individual termination or a group termination, will act as an affirmative defense. If an employer can demonstrate its validity, the plaintiff's allegations—regardless of their veracity—will most likely be dismissed. Therefore, a severance package in return for a valid waiver can be a relatively inexpensive form of lia-

bility insurance.

Enlightened employers generally realize this fact since most waivers extend the Older Workers Act requirements and protections to all employment claims. This unified approach also has the advantage of being less susceptible to employee relations exposures because it is based upon a consistent treatment of claims and individuals and is relatively easy to administer.

Plaintiff's counsel should seek to be alert to those waivers that do not pass muster or, faced with one that contains Older Workers Act protections, seek to negotiate improved benefits and consideration for the client. It is unlikely that the employer will take the offer off the table. ■