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## New Guidance on Severance Agreements

The current economic downturn has led to an unfortunate increase in plant closings, furloughs, and workforce reductions across the country and in Central New York.

In response to this economic climate, the Equal Employment Opportunity Commission (EEOC) recently published new comprehensive guidance on the issue of employee waivers of discrimination claims in employee-severance agreements.

Most employees at the time of termination are offered a severance agreement, a legal agreement between an employer and an employee that specifies the terms of ending the employment relationship; however, it is also common for executives to negotiate severance provisions when initially hired.

Generally, the severance agreement provides certain monetary benefits to an employee in exchange for a release of claims against the employer, including waivers of any potential discrimination claims under state, local, and federal laws, including the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, the American with Disabilities Act (ADA), and the Equal Pay Act (EPA).

The guidance provides basic information about severance agreements, explains when a waiver is valid, and specifically addresses waivers of age-discrimination claims under the provisions of the Older Workers Benefit Protection Act. Even though the guidance is directed at assisting employees in understanding waiver of discrimination claims, it also offers employers helpful insight on developing severance and release arrangements that will be enforceable.

### Requirements for valid waivers of discrimination claims

The guidance begins with a general discussion of the basic elements that are required for a valid and enforceable waiver.



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an employee's release of employment-related claims.

Instead, a lump-sum payment of a percentage of the employee's annual salary or periodic payments of the employee's salary for a specific period of time after termination is adequate consideration because the employee is not entitled to be paid post-termination.

Secondly, an employee must "knowingly and voluntarily" consent to the waiver. The EEOC indicates several questions that will be considered in determining whether the employee's waiver was provided "knowingly and voluntarily."

- Was the waiver written in plain language geared to an individual's level of comprehension and education? Was the waiver obtained through fraud, duress, undue influence, or other improper conduct?

- Did the employee have sufficient time to consider the agreement? Was the employee encouraged to consult with an attorney? Did the employee have any input in negotiating the terms of the agreement? Did the employer offer the employee consideration that exceeded what the employee already was entitled to by law or contract?

The EEOC lastly advises that an employee cannot release future claims, which might arise after signing the agreement such as a claim for retaliation under

Employers must first offer the employee something of value ("consideration") that is in addition to payments or benefits the employee is already entitled to by state law or the employer's policies.

For example, existing pension benefits or accrued vacation or sick leave would not be considered sufficient consideration in exchange of

Title VII.

### Waivers and releases for older employees

The guidance addresses specific requirements that must be included in a release for an employee that is 40 years of age or older to validly waive an age-discrimination claim.

Congress amended the ADEA in 1990 by adding the Older Workers Benefit Protection Act (OWBPA), in part, to establish specific requirements for a waiver of ADEA age-discrimination claims to be considered "knowingly and voluntarily."

The EEOC guidance discusses the OWBPA requirements in detail and sets forth specific examples in order to understand how these requirements can be met.

The guidance advises that the failure to meet any one of the following seven OWBPA requirements listed below, results in the waiver being invalid and unenforceable. Issuing a subsequent letter containing information that was not in the original agreement cannot cure a defective waiver.

The waiver must:

1. Be written in a manner that can be clearly understood;
2. Specifically refer to rights or claim against under the ADEA;
3. Advise the employee, in writing, to consult an attorney before accepting the agreement;
4. Provide the employee with at least 21 days (45 days for a program or group or class of employees) to consider the offer;
5. Provide the employee seven days to revoke his or her signature;
6. Provide additional consideration beyond what the employee is already entitled;
7. Not include rights and claims that may arise after the date on which the waiver is executed.

The guidance also advises that older employees are not entitled to more severance than younger workers solely because

they are protected by the OWBPA.

### **Additional requirements for early retirement or group layoffs**

The guidance further details the OWBPA requirements when releases are used as part of a voluntary (e.g., early retirement) or involuntary (e.g., group layoff with severance) termination program.

When there is a group layoff, workers over 40 must be given a consideration period of 45 days, and the employer must provide employees with certain written disclosures such as the "decisional unit" for the group (e.g., the departments and facilities in which employee were considered for layoffs), the "eligibility factors" for selection (e.g., the general criteria for selecting employees within the decisional unit for layoff), the job titles and ages of those who were selected and not selected to participate in the severance program, and time limits applicable to the severance program (e.g., at least 45 days to consider the agreement and seven days to revoke it after signing).

### **The conclusion and checklist**

The EEOC maintains that an employer cannot limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC or prevent the filing of a charge of discrimination with the agency.

In the end, there is a checklist to inform employees on what to do when they are requested to sign a severance agreement.

The checklist states, in part, that employees should not sign agreements that waive claims for unemployment-insurance benefits, workers'-compensation benefits, health-insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), vested retirement benefits governed by the Employee Retirement Income Security Act (ERISA), or claims under the Fair Labor Stands Act.

It is important to reiterate that the guidance pertains only to the limited issues presented by discrimination waivers in severance agreements. There are many related issues regarding both general compliance requirements and also problems arising from specific workers or worksites that the guidance does not address.

The new guidance is not law nor is it intended to change existing regulations; however, the EEOC will refer to the guidance when investigating charges or pursuing lawsuits that involve releases.

Therefore, businesses and their human-resource departments should familiarize themselves with the guidance to determine whether or not to revise their severance agreements to ensure the waivers will withstand likely challenges. □

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