

## **UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS**

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### **I. INTRODUCTION**

Employee reductions and terminations have been an unfortunate result of the current economic downturn. Even in good economic times, however, businesses of every size carefully assess their operational structures and may sometimes decide to reduce their workforce. Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company the longest and are paid the highest salaries. Other employers evaluate individual employees on criteria such as performance or experience, or decide to lay off all employees in a particular position, division, or department.<sup>[1]</sup> An employer's decision to terminate or lay off certain employees, while retaining others, may lead discharged workers to believe that they were discriminated against based on their age, race, sex, national origin, religion, or disability.

To minimize the risk of potential litigation, many employers offer departing employees money or benefits in exchange for a release (or “waiver”) of liability for all claims connected with the employment relationship, including discrimination claims under the civil rights laws enforced by the Equal Employment Opportunity Commission (EEOC) -- the Age Discrimination in Employment Act (ADEA), Title VII, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA).<sup>[2]</sup> While it is common for senior-level executives to negotiate severance provisions when initially hired, other employees typically are offered severance agreements and asked to sign a waiver at the time of termination. When presented with a severance agreement, many employees wonder: Is this legal? Should I sign it?

This document answers questions that you may have if you are offered a severance agreement in exchange for a waiver of your actual or potential discrimination claims. Part II provides basic information about severance agreements; Part III explains when a waiver is valid; and Part IV specifically addresses waivers of age discrimination claims that must comply with provisions of the Older Workers Benefit Protection Act (OWBPA). Finally, this document includes a checklist with tips on what you should do before signing a waiver in a severance agreement and a sample of an agreement offered to a group of employees giving them the opportunity to resign in exchange for severance benefits.

## **II. SEVERANCE AGREEMENTS AND RELEASE OF CLAIMS**

A severance agreement is a contract, or legal agreement, between an employer and an employee that specifies the terms of an employment termination, such as a layoff. Sometimes this agreement is called a “separation” or “termination” agreement or “separation agreement general release and covenant not to sue.”<sup>[3]</sup> Like any contract, a severance agreement must be supported by “**consideration.**” Consideration is something of value to which a person is not already entitled that is given in exchange for an agreement to do, or refrain from doing, something.

The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is already entitled but, rather, must be something of value *in addition* to any of the employee's existing entitlements. An example of consideration would be a lump sum payment of a percentage of the employee's annual salary or periodic payments of the employee's salary for a specified period of time after termination. The employee's signature and retention of the consideration generally indicates acceptance of the terms of the agreement.

### **1. What does a severance agreement look like?**

A severance agreement often is written like a contract or letter and generally includes a list of numbered paragraphs setting forth specific terms regarding the date of termination, severance payments, benefits, references, return of company property, and release of claims against the employer. If your employer decides to terminate you, it may give you a severance agreement similar to the one that follows:

**Example 1:** This letter sets forth our agreement with respect to all matters that pertain to your employment and separation from employment by [your organization] ("the Company").

1. *Termination of Employment.* You will cease to be employed by the Company on X date.
2. *Severance Payments.* The Company agrees to pay you X weeks of severance pay. The severance pay will be in addition to the payment of unused accrued vacation pay to which you are entitled. You may elect to receive this severance pay in the form of a lump sum payment, or spread it over a number of weeks, less applicable deductions for taxes.

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7. *General Release.* You agree that the consideration set forth above, which is in addition to anything of value to which you are or might otherwise be

entitled, shall constitute a complete and final settlement of any and all causes of actions or claims you have had, now have or may have up to the date of this agreement including, without limitation, those arising out of or in connection with your employment and/or termination by the Company pursuant to any federal, state, or local employment laws, statutes, public policies, orders or regulations, including without limitation, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and [certain state] laws.

Agreements that specifically cover the release of age claims will also include additional information intended to comply with OWBPA requirements. *See* Part IV.A, Question and Answer 6.

**Example 2:** This agreement is intended to comply with the Older Workers Benefit Protection Act. You acknowledge and agree that you specifically are waiving rights and claims under the Age Discrimination in Employment Act.

### **III. VALIDITY OF WAIVERS – IN GENERAL**

Most employees who sign waivers in severance agreements never attempt to challenge them. Some discharged employees, however, may feel that they have no choice but to sign the waiver, even though they suspect discrimination, or they may learn something after signing the waiver that leads them to believe they were discriminated against during employment or wrongfully terminated.

If an employee who signed a waiver later files a lawsuit alleging discrimination, the employer will argue that the court should dismiss the case because the employee waived the right to sue, and the employee will respond that the waiver should not bind her because it is legally invalid. Before looking at the employee's discrimination claim, a court first will decide whether the waiver is valid. If a court concludes that the waiver is *invalid*, it will decide the employee's discrimination claim, but it will dismiss the claim if it finds that the waiver is valid.

A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought. The rules for waivers under the Age Discrimination in Employment Act are defined by statute – the Older Workers Benefit Protection Act (OWBPA).<sup>[4]</sup> Under other laws, such as Title VII, the rules are derived from case law. In addition to being knowingly and voluntarily signed, a valid agreement also must: (1) offer some sort of consideration, such as additional compensation, in exchange for the employee’s waiver of the right to sue; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws.<sup>[5]</sup>

## **2. What determines whether a waiver of rights under Title VII, the ADA, or the EPA was “knowing and voluntary”?**

To determine whether an employee knowingly and voluntarily waived his discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear.<sup>[6]</sup> Most courts, however, look beyond the contract language and consider all relevant factors – or the totality of the circumstances -- to determine whether the employee knowingly and voluntarily waived the right to sue.<sup>[7]</sup> These courts consider the following circumstances and conditions under which the waiver was signed:

- whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience;
- whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;
- whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;
- whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;<sup>[8]</sup>

- whether the employee had any input in negotiating the terms of the agreement; and
- whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

**Example 3:** An employee who was laid off from her position at an automobile assembly plant agreed to release her employer from all claims in exchange for a \$100,000 severance payment. After signing the waiver and cashing the check, she filed a lawsuit alleging that she was harassed and discriminated against by her coworkers during her employment. A court found that the employee's waiver was knowing and voluntary by looking at the totality of circumstances surrounding its execution: the employee graduated from college and completed paralegal classes that included a course in contracts; she had no difficulty reading; the agreement was clear and unambiguous; she had ample time to consider whether to sign it; she was represented by counsel; the cash payment provided by the employer was fair consideration; and she did not offer to return the payment she received for signing the waiver.<sup>[9]</sup>

**Example 4:** An employee was informed that his company was downsizing and that he had 30 days to elect voluntary or involuntary separation. The employee chose voluntary separation in exchange for severance pay and additional retirement benefits and signed a waiver, which stated: "I . . . hereby release and discharge [my employer] from any and all claims which I have or might have, arising out of or related to my employment or resignation or termination." The employee later filed suit alleging that he was terminated based on his race and national origin.

In finding that the employee's waiver was *not* knowing and voluntary, a court noted that although the language of the agreement was "clear and unambiguous," it failed to specifically mention the release of employment discrimination claims. Because the employee was only high school educated and unfamiliar with the law, his argument that

he believed he only was releasing claims arising from his voluntary termination and the benefits package he accepted was “not an unreasonable conclusion.”<sup>[10]</sup>

**3. May I still file a charge with the EEOC if I believe that I have been discriminated against based on my age, race, sex, or disability, even if I signed a waiver releasing my employer from all claims?**

Yes. Although your severance agreement may use broad language to describe the claims that you are releasing (*see* Example 1), you can still file a charge with the EEOC if you believe you were discriminated against during employment or wrongfully terminated.<sup>[11]</sup> In addition, no agreement between you and your employer can limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable.<sup>[12]</sup>

**4. If I file a charge with the EEOC after signing a waiver, will I have to return my severance pay?**

No. Because provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing, or proceeding are unenforceable (*see* Question and Answer 3 above), you cannot be required to return your severance pay --or other consideration --before filing a charge.<sup>[13]</sup>

**5. Will I have to return my severance pay if I file a discrimination suit in court after signing a waiver?**

Under the ADEA, an employee is not required to return severance pay -- or other consideration received for signing the waiver -- before bringing an age discrimination claim.<sup>[14]</sup> Under Title VII, the ADA, or the EPA, however, the law is less clear. Some 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.<sup>[15]</sup>

Even if a court does not require you to return the consideration before proceeding with your lawsuit, it may reduce the amount of any money you are awarded if your suit is successful by the amount of consideration you received for signing the waiver. *See* Part IV.A. Question and Answer 9.

#### IV. WAIVERS OF ADEA CLAIMS

##### A. General Requirements for Employees Age 40 and Over

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a “knowing and voluntary” release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees. *See* “Additional Requirements for Group Layoffs of Employees Age 40 and Over” at IV. B.

##### 6. What makes a waiver of age claims knowing and voluntary?

OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered “knowing and voluntary.”<sup>[16]</sup> At a **minimum**:

- **A waiver must be written in a manner that can be clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of *technical jargon* and *long, complex sentences*. In addition, the waiver must not have the effect of *misleading, misinforming, or failing to inform* participants and must present any advantages or disadvantages without either *exaggerating the benefits* or *minimizing the limitations*.

**Example 5:** An employee, who had worked for his company for 28 years, was selected for an involuntary RIF and asked to sign a "General Release and Covenant Not to Sue" (severance agreement) in exchange for money. The severance agreement provided,

among other things, that the employee “released” his employer “from all claims . . . of whatever kind,” including claims under the ADEA and any other federal, state, or local law dealing with discrimination in employment. The severance agreement also referenced “covenants not to sue” and stated that “[t]his covenant not to sue does not apply to actions based solely under the [ADEA].” After reading the severance agreement, the employee asked his supervisor if the exception for ADEA claims contained in the covenant not to sue meant he could sue the employer if his suit was limited to claims under the ADEA. His supervisor contacted the employer’s legal department and then sent the employee an e-mail stating, “Regarding your question on the General Release and Covenant Not to Sue, the wording is as intended. . . . The site attorney was not comfortable providing an interpretation for you and suggested you consult with your own attorney.”

The employee signed the agreement, collected severance benefits, and then sued his employer for age discrimination under the ADEA. A court held that the severance agreement was not enforceable because it was not written in a manner calculated to be understood. [\[17\]](#)

- **A waiver must specifically refer to rights or claims arising under the ADEA.** EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.
- **A waiver must advise the employee in writing to consult an attorney before accepting the agreement.**

**Example 6:** A release stating: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims,” did not comply with OWBPA’s requirement that an individual be *advised* to consult with an attorney. Although the voluntary early retirement agreement advised employees to consult financial and tax advisors, to seek advice from local personnel representatives, and to attend retirement

seminars, it said nothing about seeking independent legal advice prior to making the election to retire and accepting the agreement.<sup>[18]</sup>

- **A waiver must provide the employee with at least 21 days to consider the offer.** The regulations clarify that the 21-day consideration period runs from the date of the employer’s final offer. If material changes to the final offer are made, the 21-day period starts over.<sup>[19]</sup>
- **A waiver must give an employee seven days to revoke his or her signature.** The seven-day revocation period cannot be changed or waived by either party for any reason.
- **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** This provision bars waiving rights regarding 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.

**Example 7:** An employee who received enhanced severance benefits in exchange for waiving her right to challenge her layoff later filed suit. In finding the waiver valid, the court noted that because the waiver clearly stated that she was releasing any claims that she “may now have or have had,” it did not require her to waive future claims that may arise after the waiver was signed.<sup>[20]</sup>

- **A waiver must be supported by consideration in addition to that to which the employee already is entitled.**

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable.<sup>[21]</sup> In addition, 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.<sup>[22]</sup>

## **7. Are there other factors that may make a waiver of age claims invalid?**

Yes. Even when a waiver complies with OWBPA's requirements (*see* Question and Answer 6 above), a waiver of age claims, like waivers of Title VII and other discrimination claims, will be invalid and unenforceable 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.

**Example 8:** An employee who was told that his termination resulted from "reorganization" signed a waiver in exchange for severance pay. After a younger person was hired to do his former job, he filed a lawsuit alleging age discrimination. The company then changed its position and claimed that the real reason for the employee's discharge was his poor performance. The employee argued that his waiver was invalid due to fraud and that if he had known that he was being terminated because of alleged poor performance, he would have suspected age discrimination and would not have signed the waiver. The court held that fraud was a sufficient reason for finding the waiver invalid.<sup>[23]</sup>

**Example 9:** An employee was terminated and given ten weeks of severance pay in exchange for signing an agreement waiving all of her potential discrimination claims. She later filed a lawsuit alleging that she was continuously passed over for promotion based on her age and sex throughout her employment. In response to the employer's attempt to dismiss her suit, she alleged that the waiver was an ultimatum which effectively gave her no choice since she was her grandchildren's guardian and her family's source of income. The court held that the employee's financial problems and prospective loss of her job did not constitute "duress" for the purpose of invalidating a waiver.<sup>[24]</sup>

**8. If I am 40 years old or older, am I entitled to more severance pay or benefits than a younger employee?**

No. Although severance packages often are structured differently for different employees depending on position and tenure, an employer is not required to give you a greater amount of consideration than is given to a person under the age of 40 solely because you are protected by the ADEA.<sup>[25]</sup>

**9. Are there any circumstances where I may have to pay my employer back the money it gave me for the waiver of my age claims?**

Yes. Your employer may offset money it paid you in exchange for waiving your rights if you successfully challenge the waiver, prove age discrimination, and obtain a monetary award. However, your employer's recovery may not exceed the amount it paid for the waiver or the amount of your award if it is less.<sup>[26]</sup>

**Example 10:** Your employer paid you \$15,000 in exchange for a waiver of your age discrimination claim. You sue and convince a court that your waiver was not "knowing and voluntary" under OWBPA and that you are entitled to \$10,000 in back pay and liquidated damages based on age discrimination. A court could reduce your award to zero because \$10,000 is less than the \$15,000 the employer already paid you for the waiver.

**Example 11:** Same as Example 10, except that you are awarded \$30,000 based on age discrimination. A court could not reduce your award by more than \$15,000, the amount you received in exchange for the waiver. This means that you would still get \$30,000 – the \$15,000 your employer paid you for your waiver and an additional \$15,000 awarded by the court.

**10. If I challenge an age discrimination waiver in court, may my employer renege on promises it made in the agreement?**

No. EEOC regulations state that an employer cannot "abrogate," or avoid, its duties under an ADEA waiver even if you challenge it. Because you have a right under OWBPA to have a court determine a waiver's validity, it is unlawful for your employer to stop making promised severance payments or to withhold any other benefits it agreed to provide.<sup>[27]</sup>

**Example 12:** A company eliminated almost all of its direct sales positions and offered terminated employees six months of severance benefits in exchange for signing a waiver. In response to the employees' suit alleging age discrimination, the company indicated

that it was suspending any further severance payments and was discontinuing other benefits provided under the waiver agreement. A court held that the company could not cut off severance payments or demand repayment of benefits because the employees filed suit challenging the validity of the waiver.<sup>[28]</sup>

## **B. Additional Requirements for Group Layoffs of Employees Age 40 and Over**

When employers decide to reduce their workforce by laying off or terminating a group of employees, they usually do so pursuant to two types of programs: “*exit incentive programs*” and “*other employment termination programs*.” When a waiver is offered to employees in connection with one of these types of programs, an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

### **11. What is an “exit incentive” or “other termination” program?**

Typically, an “exit incentive program” is a **voluntary program** where an employer offers two or more employees, such as older employees or those in specific organizational units or job functions, additional consideration to persuade them to voluntarily resign and sign a waiver. An “other employment termination program” generally refers to a program where two or more employees are **involuntarily terminated** and are offered additional consideration in return for their decision to sign a waiver.<sup>[29]</sup>

**Example 13:** A bank must eliminate 20% of its 200 teller positions in a particular geographic location and decides to retain only those employees who most recently received the highest performance ratings. The bank sends a letter to 50 tellers who were rated “needs improvement” offering them six months pay if they voluntarily agree to resign and sign a waiver. This is an “exit incentive program.”

**Example 14:** Same facts as in Example 13, but only 30 tellers voluntarily resign. The bank involuntarily lays off 10 tellers with severance pay in exchange for their waiver of age claims. This is an “other termination program.”

Whether a “program” exists depends on the facts and circumstances of each case; however, the general rule is that a “program” exists if an employer offers additional consideration – or, an incentive to leave – in exchange for signing a waiver to more than one employee.<sup>[30]</sup> By contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a “program” exists. In both exit incentive and other termination programs, the employer determines the terms of the severance agreement, which typically are non-negotiable.<sup>[31]</sup>

**12. If I am in a group of employees who are being laid off and asked to sign a waiver, what information does my employer have to give to me?**

Your waiver must meet the minimum OWBPA "knowing and voluntary" requirements (see Question and Answer 6 above). In addition, your employer must give you - and all other employees who are being laid off with you - written notice of your layoff and at least 45 days to consider the waiver before signing it. Specifically, the employer must inform you in writing of:

- the "**decisional unit**" -- the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program

**Example 15:** If an employer decides it must eliminate 10 percent of its workforce at a particular facility, then the entire facility is the decisional unit, and the employer has to disclose the titles and ages of all employees at the facility who were and who were not selected for the layoff. If, however, the employer must eliminate 15 jobs and only considers employees in its accounting department (and not bookkeeping or sales), then the accounting department is the decisional unit, and the employer has to disclose the title

and ages of all employees in the accounting department whose positions were and were not selected for elimination.

The particular circumstances of each termination program determine whether the decisional unit is the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification.

- **eligibility factors** for the program;<sup>[1321](#)</sup>
- the **time limits** applicable to the program;
- the **job titles and ages of all individuals who are eligible** or who were selected for the program (the use of age bands broader than one year, such as "age 40-50" does not satisfy this requirement) and the **ages of all individuals in the same job classifications or organizational unit who are not eligible** or who were not selected.

*See Appendix B for an example of an agreement issued to employees being laid off or terminated pursuant to a group exit incentive program.*

## **II. CONCLUSION**

If your employer decides to terminate your job, you may be given a severance agreement that requires you to waive your right to sue for wrongful termination based on age, race, sex, disability, and other types of discrimination. Although most signed waivers are enforceable if they meet certain contract principles and statutory requirements, an employer **cannot lawfully** limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC or prevent you from filing a charge of discrimination with the agency. An employer also cannot lawfully require you to return the money or benefits it gave you in exchange for waving your rights if you do file a charge. While this document is not intended to cover all of the issues that arise when your employer informs you that you are being terminated or laid off, the following checklist may help you decide whether or not to sign a waiver.

## **APPENDIX A**

## **Employee Checklist: What to Do When Your Employer Offers You a Severance Agreement:**

- **Make sure that you understand the agreement**
  - Read the agreement to see if it is clear and specific, or if it is confusing because it contains terms you do not understand.
  - If you are 40 or older, inform your employer that the law requires your agreement to be written in a manner that makes it easy to understand. Usually this means that your agreement should not contain technical jargon or long, complex sentences.
- **Check for deadlines and act promptly**
  - The moment you are given a severance agreement, check to see if your employer gave you a deadline for accepting, or declining, the agreement. If you are 40 years old or older, federal law requires the employer to give you at least 21 days to review the agreement and make up your mind.
  - If your employer has not given you a reasonable amount of time, or rushes your decision, this is a red flag. An employer who is fair will understand that you cannot review or make decisions about an important document on a moment's notice.
  - If you are being rushed, ask for more time. Put your request in writing. If you are 40 or older and your employer is asking you for a decision in fewer than 21 days, remind the employer that the law requires you to be provided at least 21 days. (If you and at least one other person are being laid off in a reduction in force (RIF) at the same time, you must be given 45 days to consider the agreement.)
- **Consider having an attorney review the severance agreement**
  - Even if you are parting amicably with your employer, you may want to ask for advice about whether you should sign it, whether the terms are reasonable, and whether you should ask your employer to change any of the terms.
  - If you decide that you want an attorney to review the agreement, promptly make an appointment. Do not wait until the last day before the deadline to review the severance agreement.

- If you are at least 40 years old, the agreement must advise you to consult with an attorney.
- **Make sure you understand what you are giving up in exchange for severance pay or benefits**
  - The main benefit to signing an agreement is that you will receive a cash payment or benefits in exchange for signing away your right to bring certain legal claims against your employer.
  - Make sure that the agreement offers you something of value to which you are not already entitled.
  - If you think you have been wrongfully terminated because of age, race, sex, religion, or some other discriminatory reason, you may want to think twice about signing. The benefits of signing a severance agreement should be carefully weighed against claims you might have against your employer, the likelihood of winning a court case or settlement, and the probable costs.
- **Review the agreement to ensure that it does not ask you to release nonwaivable rights**
  - Confirm that your employer is not asking you to waive your right to file a charge, testify, assist, or cooperate with the EEOC.
  - Make certain that the agreement is not asking you to waive rights or claims that may arise after the date you sign the waiver.
  - Make sure that your employer is not asking you to release your 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 (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA).

## **APPENDIX B**

### **Sample Waiver: Exit Incentive or Other Termination Programs**

The following example illustrates one way in which the required OWBPA information could be presented to employees and is not intended to suggest that employers must follow this format. Rather, each waiver agreement should be individualized based on an employer's particular organizational structure and the average comprehension and education of the employees in the decisional unit subject to termination. For another example of how the required information might be presented, see 29 C.F.R. § 1625.22(f)(vii).

Dear [Employee]:

This letter, upon your signature, will constitute the agreement between you and [your employer] ("the Company") on the terms of your separation from the Company (hereinafter the "Agreement"):

1. Your employment will terminate on X date. or

or

You have agreed to resign on X date. Your last day of work will be X date.

2. You have been paid your earned salary and accrued vacation pay through the effective date of your termination.

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5. Although you are not otherwise entitled to it, in consideration of your acceptance of this Agreement, the Company will pay you an extra \_\_\_ [week's][month's] salary at your current rate of \$ \_\_\_ per [week][month], less customary payroll deductions to be paid upon the effective date of this Agreement as defined in paragraph 11 below. You understand and agree that this payment includes extra payments given to you in exchange for your signature and release.
6. You waive and release any and all claims you have or might have against the Company. . . These claims include, but are not limited to claims for discrimination arising under federal, state, and local statutory or common law, such as Title VII of the Civil Rights

Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and [state law].

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11. The following information is required by OWBPA:

The class, unit, or group of individuals covered by the program includes all employees in the \_\_\_\_\_ [plant, location, area, etc.] whose employment was terminated in the reduction in force during the following period :\_\_\_\_\_. All employees in \_\_\_[plant, location, area, etc.] are eligible for the program.

The time limits applicable to such program are the employees in the \_\_\_ [plant, location, area, etc.] who are being offered consideration under a waiver agreement and asked to waive claims under the ADEA and were given an opportunity to agree from \_\_\_to \_\_\_\_\_. They must sign the agreement and return it to the COMPANY within 45 days after receiving the waiver agreement. Once the signed waiver agreement is returned to the COMPANY, the employee has seven days to revoke the waiver agreement.

The following is a listing of the ages and job titles of employees who were and were not selected for layoff [or termination] and offered consideration for signing the waiver. Except for those employees selected for layoff [or termination], no other employee is eligible or offered consideration in exchange for signing the waiver:

<b>Job Title</b>	<b>Age</b>	<b># Selected</b>	<b># Not Selected</b>
(1)	25	2	4
	28	1	7
	45	6	2
	63	1	
(2)	24	3	5

	29	1	7
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## ENDNOTES

[1] When employers conduct a reduction in force (RIF), they often do so pursuant to “exit incentive programs.” For example, an employer may offer a one-time “buyout” to certain employees (e.g., “all hourly employees”) or an “early retirement” program to all employees who are already eligible for immediate retirement benefits to persuade them to voluntarily resign; or, it may carry out an involuntary RIF, where it lays off all employees in a particular position or division. See discussion in Part IV.B.

[2] The ADEA prohibits employment discrimination against persons 40 years of age or older; Title VII prohibits employment discrimination based on race, color, religion, sex (including pregnancy), and national origin; Title I of the ADA prohibits employment discrimination against an individual on the basis of disability; and the EPA prohibits sex-based wage discrimination between men and women in the same establishment who are performing under similar working conditions. See [http://www.eeoc.gov/abouteeo/overview\\_laws.html](http://www.eeoc.gov/abouteeo/overview_laws.html).

[3] This document uses the term “severance agreement” to describe any termination agreement between an employer and an employee, whether voluntary or involuntary, that requires the employee to waive the right to sue for discrimination.

[4] Waivers of age claims are governed by OWBPA which provides a minimum set of conditions that have to be met in order for the agreement to be considered knowing and voluntary. A waiver of an ADEA claim, therefore, is not valid unless it satisfies OWBPA’s specific requirements and was not induced by the employer’s improper conduct. See Part IV.A, Questions and Answers 6 and 7.

[5] State law typically governs questions regarding the proper construction of a severance agreement and the validity of waivers. For example, under the Minnesota Age

Discrimination Act, a release must give the employee fifteen days after signing the agreement to change his mind and revoke his signature. Under California law, a waiver cannot release unknown claims unless the waiver agreement contains certain language specifically providing for such a waiver. Other states may impose additional requirements to obtain an effective waiver of certain state law claims. To determine whether a severance agreement is enforceable in the state in which you work, contact your state labor law department or consult with an attorney for legal advice.

In addition to waiver issues, workforce reductions or other substantial business changes often trigger additional legal obligations arising, for example, under the Worker Adjustment and Retraining Notification Act (WARN), the National Labor Relations Act (NLRA), the Employee Retirement Income Security Act (ERISA), relevant benefit plans, and labor contracts.

[6] *See e.g., Morrison v. Circuit City Stores*, 317 F.3d 646 (6th Cir. 2003)(“[i]n reviewing whether a waiver of prospective claims was valid, we apply ordinary contract principles”); *Warnebold v. Union Pac. R.R.*, 963 F.2d 222 (8th Cir. 1992)(court applied “ordinary contract principles” in determining whether there was a knowing and voluntary waiver of claims).

[7] *See e.g., Wastak v. Lehigh Health Network*, 342 F.3d 281 (3d Cir. 2003)(courts must inquire into the totality of circumstances “to determine whether the execution of a waiver was ‘knowing and voluntary’”); *Smith v. Amedisys, Inc.*, 298 F.3d 434 (5th Cir. 2002)(“[i]n determining whether a release was knowingly and voluntarily executed, this court has adopted a ‘totality of the circumstances’ approach”). Even courts that apply ordinary contract principles generally consider the circumstances surrounding the execution of the release, the clarity of the release, and whether the employee was represented by or discouraged from consulting an attorney. *See e.g., Whitmire v. WAY FM Group, Inc.*, 2008 WL 5158186 (M.D. Tenn. Dec. 8, 2008)(in holding that a waiver was knowing and voluntary, a court noted that the employee was given at least 21 days to consider the agreement, asked questions that resulted in a revised agreement, sought advice from an attorney but disregarded it and decided to sign the agreement, had

seven days after she signed the agreement to revoke it and chose not to do so, and admitted she understood what she was signing).

[8] *See e.g., Pilon v. University of Minn.*, 710 F.2d 466 (8th Cir. 1983)(where the employee was represented by counsel, the release language was clear, and there was no claim of fraud or duress, the release was upheld). Waivers that are executed by employees who were not advised to seek legal advice are more closely scrutinized than agreements entered into by employees after consultation with an attorney.

[9] *See Hampton v. Ford Motor Company*, 561 F.3d 709 (7th Cir. 2009).

[10] *See Torrez v. Public Service Company of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990); *but see Cirillo v. Arco Chem. Co.*, 862 F.2d 448 (3d Cir. 1988)(employee's waiver was knowing and voluntary where he was advised of equal employment laws, encouraged to consult employee relations representative, and release specifically mentioned Title VII).

[11] *See* EEOC's website for information on "How to File a Charge of Discrimination" at [http://www.eeoc.gov/charge/overview\\_charge\\_filing.html](http://www.eeoc.gov/charge/overview_charge_filing.html).

[12] Agreements that prevent employees from cooperating with the EEOC interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether discrimination has occurred. EEOC guidance also states that obtaining a promise from an employee not to file a charge or assist in Commission investigations constitutes unlawful retaliation in violation of federal employment rights statutes. *See* EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes (April 1997); *see also* 29 C.F.R. § 1625.22(i)(2).

[13] Although your right to file a charge with the EEOC is protected, you can waive the right to recover from your employer either in your own lawsuit, or in any suit brought on your behalf by the Commission. *See* EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes.

[14] See Questions and Answers: Final Regulation on “Tender Back” and Related Issues Concerning ADEA Waivers, available at [www.eeoc.gov/policy/regs/tenderback-ganda.html](http://www.eeoc.gov/policy/regs/tenderback-ganda.html). Recognizing that older workers often need their severance payments to live on and may, in fact, already have spent the payments on living expenses, EEOC regulations clarify that the contract principles of “tender back” (returning the consideration received for the waiver before challenging it in court) and “ratification” (approving or ratifying the waiver by retaining the consideration) do not apply to ADEA waivers. See also Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998) (holding that because the release failed to comply with OWBPA, it could not bar the employee’s ADEA claim even if the employee retained the monies she received in exchange for the release).

Employers also may not avoid the “no tender back rule” by using other means to limit an employee’s right to challenge a waiver agreement or by penalizing an employee for challenging a waiver agreement. For example, an employer may not require an employee to agree to pay damages to the employer or pay the employer’s attorney’s fees simply for filing an age suit. Employers, however, are not precluded from recovering attorneys’ fees or costs specifically authorized under federal law. 29 C.F.R. § 1625.23(b).

[15] See, e.g., Blackwell v. Cole Taylor Bank, 152 F. 3d 666 (7th Cir. 1998) (noting that employees bringing non-age claims might still have to “tender back” their consideration) and Hampton v. Ford Motor Co., 561 F.3d 709 ( 7th Cir. 2009)(noting that because no exception to the “tender back” rule exists in this Title VII case, employee must return – or least offer to return—the consideration she received before challenging the validity of the waiver); *but see* Rangel v. El Paso Natural Gas Co., (holding that because the primary purpose of the ADEA and Title VII is to make it easier for an employee to challenge discrimination, employees bringing claims under Title VII should not have to return their severance pay before filing suit).

[16] See EEOC regulations Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA). 29 C.F.R. Part 1625.

[17] See Thormforde v. International Business Machines Corp., 406 F.3d 500 (8th Cir. 1999); see also Syverson v. IBM, 472 F. 3d 1072 (9th Cir. 2007) (court adopted the reasoning in Thormforde when finding the same waiver used under different circumstances invalid).

[18] See American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (to “advise” employees to consult an attorney means affirmatively to “caution,” “warn,” or “recommend”).

[19] An agreement can be signed prior to the 21- (or 45- ) day time period as long as employee’s decision is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21- or 45-day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. 29 C.F.R. 1625.22 (e) (6).

[20] See Budro v. BAE Sys. Info. And Elec. Sys. Integration, Inc., 2008 WL 1774961 (D.N.H. April 16, 2008).

[21] Although a waiver that fails to meet OWBPA’s requirements is unenforceable, a number of courts have refused to permit a suit based solely on an employer’s alleged violation of OWBPA requirements, holding that a failure to meet those requirements cannot create a separate cause of action under OWBPA and is not a violation of the ADEA. See e.g., EEOC v. Sara Lee Corp., 883 F. Supp. 211 (N.D. Ill. 1995); Williams v. General Motors Corp., 901 F. Supp. 252 (E.D. Mich. 1995); but see Commonwealth of Massachusetts v. Bull HN Information Sys. Inc., 16 F. Supp. 2d 90 (D. Mass. 1998)(holding that an invalid waiver can be an independent cause of action under the ADEA); in a subsequent proceeding, Commonwealth of Massachusetts v. Bull HN Information Sys. Inc., 143 F. Supp. 2d 134 (D. Mass. 2001), the court clarified that although employees can bring a suit challenging a violation of OWBPA requirements, they cannot recover damages absent proof of age discrimination.

[22] See Butcher v. Gerber Products Co., 8 F. Supp. 2d 307 (S.D.N.Y. 1998)(as a matter of law and public policy, an employer is allowed only one chance to conform to the requirements of OWBPA and cannot “cure” a defective release by issuing a letter to employees containing OWBPA-required information that was omitted from their separation agreements and request that they either “reaffirm” their acceptance or “revoke” the release).

[23] See Lauderdale v. Johnston Indus., Inc., 31 Fed. Appx. 940 (11th Cir. 2002).

[24] See Cassiday v. Greenhorne & Omara, Inc., 220 F.Supp. 2d 488 (D. Maryland 2002) (noting that the employee did not allege that her “employer threatened or otherwise misled or duped her into signing; at all times, she remained free to reject the offer and pursue her legal remedies”).

[25] See 29 C.F.R § 1625.22 (d) (4). See also DiBiase v. SmithKline Beecham Corp., 48 F. 3d 719 (3d Cir. 1995)(an employer may offer enhanced benefits to all terminated employees who agree to waive all claims against the company, without providing extra consideration to employees protected by the ADEA).

[26] See Questions and Answers: Final Regulation on “Tender Back” and Related Issues Concerning ADEA Waivers, available at [www.eeoc.gov/policy/regs/tenderback-qanda.html](http://www.eeoc.gov/policy/regs/tenderback-qanda.html); 29 C.F.R. § 1625.23(c).

[27] See Questions and Answers: Final Regulation on “Tender Back” and Related Issues Concerning ADEA Waivers, available at [www.eeoc.gov/policy/regs/tenderback-qanda.html](http://www.eeoc.gov/policy/regs/tenderback-qanda.html); 29 C.F. R. § 1625.23(d).

[28] See Butcher v. Gerber Products Co., 8 F. Supp. 2d 307 (S.D.N.Y. 1998).

[29] 29 C.F.R. § 1625.22(f) (1) (iii) (A) (2005).

[30] *Id.*

[31] *Id.* at § 1625.22(f) (1) (iii) (B).

[32] An example in the regulations describes eligibility as: “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.F. § 1625.22(f)(4)(vii)(B). Some courts, however, interpret the term “eligibility factors” to mean the criteria, such as job performance, experience, or seniority, an employer relied on in deciding who to terminate. *See Pagilio v. Guidant Corp.*, 483F. Supp. 2d 847 (D. Minn. 2007)(the court held that a release violated OWBPA by, among other things, failing to identify the general criteria by which employees were selected for termination); *but see Kruchowski v. Weyerhaeuser Co.*, 423 F.3d 1139, *amended by*, 446 F.3d 1090 (10th Cir. 2006)(the court invalidated a release of claims because it failed to identify selection criteria as “eligibility factors;” however, in a later, revised, opinion, the court omitted eligibility factors as one of the grounds for invalidating the release and held only that the employer violated OWBPA by failing to identify the decisional unit).

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