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RELEASES OF AGE DISCRIMINATION CLAIMS UNDER JUDICIAL ATTACK

Three recent decisions from the federal bench striking down releases of age discrimination claims under the Older Workers Benefit Protection Act (OWBPA) on technical and sometimes questionable grounds should raise red flags for employers who are planning layoffs and voluntary exit programs. In all three cases, employees who were discharged in connection with a reduction in force received severance packages in exchange for signing a release of all claims, including those under the Age Discrimination in Employment Act (ADEA). Thereafter, the plaintiffs in each case brought suit against the employer under the ADEA and successfully argued that the releases were invalid because they did not comply with *all* the requirements of the OWBPA.

The OWBPA requires that all releases of ADEA claims must (a) be written in a manner calculated to be understood by the participating individual or by the average individual eligible to participate; (b) specifically refer to rights or claims arising under the ADEA; (c) not waive rights or claims that may arise after the date the waiver is executed; (d) be in exchange for consideration in addition to anything of value to which the individual already is entitled; (e) advise the individual to consult with an attorney prior to executing the agreement that contains the release; (f) provide the individual with a period of at least 21 days within which to consider the agreement, or 45 days if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees; and (g) include a seven-day period in which the individual may revoke the agreement.

The OWBPA also requires that if a waiver is requested in connection with an employment termination or exit incentive program that is offered to a group of employees (interpreted by the EEOC to mean two or more employees), the release and mandatory disclosures must be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." The waiver must also provide very specific disclosures. Those disclosures include (1) [a]ny class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (2) the job titles and ages of all individuals eligible or selected for the

program, and the ages of all individuals in the same job classification or organization unit who are not eligible or selected for the program.

In *Thomforde v. International Business Machines Corp.*, 406 F.3d 500 (8th Cir. 2005), the Eighth Circuit held that the waiver signed by the employee was not valid because it was not written in a manner calculated to be understood by the employee. The release of claims clearly stated that it covered the ADEA. However, in the "covenant not to sue" section, the agreement stated that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM . . . only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs. . . ." The employer argued that this language only pertained to whether the employee would be liable for attorneys' fees if he brought an ADEA action. The court found the language confusing, however, and further noted that the employer had been unwilling to provide clarification of this language in response to the employee's inquiry.

In *Kruchowski v. Weyerhaeuser Co.* (No. 04-7118), the Tenth Circuit reversed the district court's grant of summary judgment for the employer, because the employer had not fully met the requirement of informing the employees of "any class, unit, or group of individuals covered by such [group termination] program, [and] any eligibility factors for such program." The employer had misinformed the plaintiffs that the class of employees considered for termination was all salaried employees at the mill, when in fact the only employees who were considered for termination were those who reported directly to the mill manager. In addition, the employer failed to inform the plaintiffs of the factors used to determine who would be terminated. In discovery, the employer stated that the factors used in analyzing each employee considered for termination were leadership abilities, technical skills, behavior, and the congruence of the employee's skills with the employer's needs in the future. The court found that the employer had not informed the employees of any of these factors prior to obtaining the releases.

In *Burlison et al. v. McDonald's Corp.* (1:03-cv-2984), the U.S. District Court for the Northern District of Georgia struck down a release based on a questionable interpretation of the requirement that employers disclose "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organization unit who are not eligible or selected for the program." The employer — based on what appears to be a reasonable interpretation of the statute — provided the plaintiffs with the job titles and ages of all individuals selected for layoff, as well as those who were not, within the "decisional unit" (the Atlanta/Nashville/Greenville region). The district court, however, found that the "decisional unit" limitation in the second phrase did not apply to the first phrase, which pertains to the individuals eligible or selected for the program. Thus, the court concluded that the employer should have disclosed the job titles and ages of every employee in the country who was selected for layoff, but only had to disclose the ages of the individuals within the decisional unit who were not selected for the layoff.

These three decisions make clear that employers seeking to obtain waivers of age discrimination claims must comply with the letter of every element of the OWBPA and draft their information disclosures with great care when implementing a voluntary or involuntary reduction in force. The decisions also suggest that employers may wish to err on the side of providing more information as a precautionary measure. Employers should also be aware that the EEOC has taken the position that these disclosures are required even when as few as two employees are covered by the reduction in force — an interpretation that might not be obvious to employers.

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Should you have any questions on these cases or wish to discuss any other matters relating to employee exit or termination programs, whistleblower issues, or other labor and employment issues, please contact **Frank C. Morris, Jr.**, and **Minh N. Vu**, in the firm's **Washington, D.C.** office at 202-861-0900 or by e-mail at **fmorris@ebglaw.com** and **mvu@ebglaw.com**.
