

# Sample Release Language Under OWBPA

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Peter M. Panken and Susan Gross Sholinsky

## A. What Is the Older Workers Benefit Protection Act?

1. In general, releases of discrimination and employment claims must be knowing, voluntary and for a valuable consideration. But the Older Workers Benefit Protection Act (“OWBPA”) has other requirements that must be met to release claims under the federal Age Discrimination in Employment Act (“ADEA”).
2. Added as a collection of discrete amendments to ADEA in 1990, OWBPA (codified at 29 U.S.C. §§621, 623, 626, and 630) imposes, among other mandates, requirements for waivers of ADEA rights and claims, *see* 29 U.S.C. §626(f), to ensure that “older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.” *See* S.Rep.No. 101-263, at 5 (1990) (reprinted in 1990 U.S.C.C.A.N. 1509, 1510); *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) (“[The OWBPA] is designed to protect the rights and benefits of older workers. The OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers”).
3. Under OWBPA, “[a]n employee ‘may not waive’ an ADEA claim unless the employer complies with the statute.” *Oubre*, 522 U.S. at 427. To this end, OWBPA “creates a series of prerequisites for ‘knowing and voluntary’ waivers.” *Id.* The eight mandatory elements for a knowing and voluntary waiver of ADEA claims are set forth in OWBPA, 29 U.S.C. §626(f)(1).

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Peter M. Panken is a member of law firm of Epstein Becker & Green, P.C., in New York City. Susan Gross Sholinsky is an associate in the firm’s New York office.

4. An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum:
  - a. The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.
  - b. The waiver specifically refers to [ADEA] rights or claims.
  - c. The individual does not waive rights or claims that may arise after the date the waiver is executed.
  - d. The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.
  - e. The individual is advised in writing to consult with an attorney prior to executing the agreement.
  - f. The individual is given a period of at least 21 days within which to consider the agreement, or if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.
  - g. The agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.
  - h. If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (f)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—
    - i. Any 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
    - ii. 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 organizational unit who are not eligible or selected for the program.

## **B. Right To File Charge With EEOC May Not Be Waived**

1. OWBPA's mandates apply to releases under which employees agree not to file a *lawsuit* against the employer. In one recent case, the court specifically held that an employee may not waive his or her right to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). See *E.E.O.C. v. Lockheed Martin Corp.*, 444 F.Supp.2d 414 (D.Md. 2006).

## **C. Knowing And Voluntary Waiver: The Saga Of IBM**

1. Often the dispute in OWBPA cases centers on whether the waiver is “knowing and voluntary,” a requirement that itself often turns on whether the waiver is part of an agreement “between the individual and the employer that is written in a manner calculated to be understood by [the] individual, or by the average individual eligible to participate” in a workforce reduction plan. 29 U.S.C. §626(f)(1) (A). To satisfy the “manner calculated” requirement, “[w]aiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate” in a group termination plan. 29 C.F.R. §1625.22(b)(3). Employers are thus instructed to “take into account such factors as the level of comprehension and education of typical participants.” *Id.* These considerations “usually will require the limitation or elimination of technical jargon and of long, complex sentences.” *Id.* See *Syverson v. IBM Corp.*, 461 F.3d 1147 (9th Cir. 2006).
2. The issue of whether a waiver agreement used in connection with a severance benefit package is “knowing and voluntary” was at the heart of two recent decisions from two different Circuit Courts of Appeals involving a broad reduction in force (“RIF”) program implemented by IBM. See *Syverson*, supra, and *Thomforde v. IBM Corp.*, 406 F.3d 500 (8th Cir. 2005). In both cases, the courts struck down the waiver agreement as too “ambiguous” to meet the “knowing and voluntary” standard basically because lawyers had drafted a release and covenant not to sue containing both “belts and suspenders” that the courts found created not greater protection but instead introduced an element of ambiguity.
  - a. The waiver at issue in both cases consisted of a document entitled “General Release and Covenant Not to Sue.” It provided, in relevant part:

*If you feel that you are being coerced to sign this General Release and Covenant Not to Sue (hereinafter “Release”), [or] that your signing would for any reason not be voluntary ... you are encouraged to discuss this with your manager, the MERA Project Office or Human Resources before signing this Release. In exchange for the sums and benefits received pursuant to the terms of the MICROELECTRONICS RESOURCE ACTION (MERA), [employee name], (hereinafter “you”) agrees to release and hereby does release [IBM] ... from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorneys’ fees. . . . You also agree that this Release covers, but is not limited to, claims arising from the [ADEA], as amended, ... and any other federal, state or local law dealing with discrimination in employment, including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status or age. . . . This Release covers both claims that you know about and those that you may not know about which have accrued by the time you execute this Release.*

*You agree that you will never institute a claim of any kind against IBM ... including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM ..., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM ..., including reasonable attorneys’ fees, and all further costs and fees, including attorneys’ fees, incurred in connection with collection. This 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 and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S.*

*Equal Employment Opportunity Commission. . . . You hereby acknowledge that you understand and agree to this General Release and Covenant Not to Sue.*

- b. Endnote 1 of the agreement explains that “[t]he [ADEA] prohibits employment discrimination based on age and is enforced by the [EEOC].”
- c. Prior to signing the release, one of the plaintiffs, Thomforde, asked his supervisor if by signing the agreement he was waiving his right to sue under the ADEA. Thomforde subsequently received an e-mail from the supervisor explaining that, according to a company attorney, the document “is as intended by IBM” and that Thomforde should consult his own attorney, which he later did. Thomforde ultimately decided that he did not waive his ADEA rights under the agreement and signed it. As part of a putative class, he later sued IBM.
- d. Reversing a lower court ruling that the waiver agreement was unambiguous and enforceable, the Eighth Circuit found just the opposite. According to the Eighth Circuit, the inclusion of the “covenant not to sue” in the waiver agreement was confusing, and because the company chose to use legal terminology, it had “a duty to carefully explain” those provisions in the release agreement. The court concluded that the waiver document failed to explain “the limited nature of the exception to the covenant not to sue in light of the release of claims.” Rather, the terms were used in such a way as to suggest they were interchangeable. As a result, a layperson could reasonably, but incorrectly, read the statement “this covenant not to sue does not apply to actions based solely under the [ADEA]” as an exception to the general release, not just as an exception to the covenant not to sue. *Thomforde*, 406 F.3d at 502-04.
- e. The Court also was troubled by IBM’s reluctance to provide clarification, indicating that (1) the company had an obligation to do so and (2) its awareness that the release was in need of clarification underscored the document’s inherent problem:

*It seems axiomatic that if an agreement needs clarification, it is not written in a manner calculated to be understood. To rely on the agreement’s direction to seek legal advice, a separate statutory requirement for a valid waiver, see [29 U.S.C.] §626(f)(1)(E), for clarification of the waiver would nullify the distinct requirement that the agreement be written in a manner calculated to be understood by the participant (as opposed to his attorney).*

*Id.* at 504 n.1. Accordingly, the court concluded that “[g]iven the lack of clarity in the Agreement, and IBM’s declination to tell Thomforde what it meant by the language, we hold that the Agreement is not written in a manner calculated to be understood by the intended participants as required by the OWBPA.” *Id.* at 504 (citation and footnote omitted).

- f. On August 31, 2006, in a case brought by another group of IBM employees, the U.S. Court of Appeals for the Ninth Circuit, deciding precisely the same question, reached the same conclusion as its colleagues in the Eighth Circuit. *See Syverson*, 461 F.3d 1147 (9th Cir. 2006).
  - i. Citing the *Thomforde* court’s analysis, the court in *Syverson* reasoned: “Without a clear understanding of the legal differences between a release and a covenant not to sue, these provisions would seem to be contradictory; how can an employee bring a suit solely under the ADEA if the employee has waived all claims under the ADEA?” *Syverson*, 461 F.3d at 1083 (citing *Thomforde*, 406

E.3d at 503). Thus, the *Syverson* Court also held the release to be invalid under OWBPA’s “manner calculated” requirement.

- g. IBM argued that it had the legal right to include a covenant not to sue in the release and needed to do so to protect its right to obtain costs and fees. The company also contended that it was simply complying with EEOC’s regulation prohibiting releases from “adversely affecting any individual’s right to challenge” the validity of the release. 29 C.F.R. §1625.23(b). While sympathetic to IBM’s intentions, neither court was persuaded. Thus, employers should be wary of including a covenant not to sue—as well as other legal terminology—in OWBPA-related releases, unless they also provide plain-English explanations of the terms used. It may be wise to “test” the clarity of a proposed waiver on nonlawyers before their implementation.
- h. Further, the release should state that the company will respond to questions; the employee should acknowledge in writing that he or she has been so advised; and the company should have procedures in place for fully responding to employee inquiries. Receiving a series of questions on the same issue should alert the company to the likelihood that the release is not as clear and unambiguous as it needs to be to withstand a legal challenge.
- i. The devil is in the details. As the following cases further demonstrate, plaintiffs are successfully focusing on a variety of technicalities to get releases declared invalid under OWBPA.

#### **D. OWBPA’s Informational Requirements**

1. Several recent Courts of Appeals decisions tackled another troublesome aspect of OWBPA—its informational requirements.

#### **E. Decisional Units**

1. OWBPA requires that employers provide information about the ages of discharged and retained workers to employees who are considering releasing potential ADEA claims. 29 U.S.C. §§626(f)(1)(A)–(H). Specifically, employers seeking waivers in connection with group terminations must inform the employee as to
  - a. Any 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
  - b. 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 organizational unit who are not eligible or selected for the program. 29 U.S.C. §626(f)(1)(H).
2. A “decisional unit,” according to the EEOC, is that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term “decisional unit” has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program. 29 C.F.R. §1625.22(f)(3)(i)(B).

3. The task of interpreting “decisional unit” and deciding the scope of information that must be provided was put before the Eleventh Circuit in *Burlison v. McDonald’s Corp.*, 455 F.3d 1242 (11th Cir. 2006).
  - a. In that case, employees terminated by McDonald’s as part of a nationwide “restructuring” were offered severance packages in exchange for releases waiving any claims they may have against the company. McDonald’s had included *region-specific* information sheets with the releases, which (1) listed the job titles and ages of 208 employees in three regions, (2) identified which of those employees had been selected for discharge and offered severance packages, and (3) identified which of those employees were not being discharged.
  - b. About two years after they had signed and filed the releases, some of the former employees filed an age discrimination suit against McDonald’s, alleging that the releases failed to comply with OWBPA’s informational requirements concerning “decisional units” and were therefore void. The district court ruled for the employees, interpreting subsection (ii) to require that McDonald’s provide job titles and ages of *all* employees nationwide who were terminated but the ages of *only* those employees in the same “decisional unit” as the terminated employees.
  - c. The Eleventh Circuit disagreed. Noting that the statute as well as the EEOC’s regulations were themselves ambiguous, the court first determined that “the OWBPA’s informational requirements are limited to the decisional unit that applies to the discharged employees.” *Id.* at 1247. The court then reasoned that its interpretation was consistent with the purpose of the informational requirements:

The OWBPA’s informational requirements are designed to ensure that older employees are provided with information necessary to evaluate any potential ADEA claims they may have before deciding to release them. In order to evaluate their claims, employees need appropriate data to conduct meaningful statistical analyses. In the discrimination context, the data must permit employees and their attorneys to make meaningful comparisons to determine whether an employer engaged in age discrimination. The data must allow the [employees] to consider whether anything suggests that older employees in their unit were unjustifiably terminated in favor of younger ones. Extending the information requirement beyond a decisional unit will in reality only obfuscate the data and make patterns harder to detect.... Information about who was terminated out of a *national* universe is not comparable to data about who was not selected for firing from a *local* unrepresentative subset. It is, in short, comparing apples to oranges. *Id.* (citations omitted).

- ii. Notably, the Court’s narrow construction of the decisional unit in this case was based in part on the fact that “*local* managers played key roles in the [selection] decision[s].... Because the local authorities controlled the decision, the localities accordingly constitute the appropriate scope for the informational requirements.” *Id.* at 1248.
- d. In another recent case, however, interpreting “decisional units,” *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006), the U.S. Court of Appeals for the Tenth Circuit, in its second decision in the same case, again held that releases executed in connection with a RIF were invalid because they inaccurately described the “decisional unit.” The employer’s information sheet had stated that all salaried employees at a particular facility were considered for the termination program, when in fact only salaried employees reporting to a particular manager were considered for possible termination. Because of this error, the waivers were declared invalid, and the employees were allowed to proceed with their ADEA claims.

- e. The *Weyerhaeuser* decision is significant for another reason: in its first ruling, the appellate court also struck down the waiver on the ground that it failed to fully describe the “eligibility factors” to the employment termination program. The court held that because the employer did not list the specific factors used in determining how employees would be selected for layoff (for example, specific technical skills and leadership skills) the release was invalid. *See id.* Significantly, however, in its second ruling in the case, the court completely omitted this holding.

## F. Bottom Line

1. These cases demonstrate how difficult it can be to design a release that will satisfy OWBPA’s myriad complex requirements. To ensure that a release will stand up to judicial scrutiny, employers need to thoroughly understand their obligations under OWBPA, *and* they must also ensure that employees understand *their* rights.

2. Always feature the following in boldface type at the top of the release:

**CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS AGREEMENT AND GENERAL RELEASE YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.**

3. Always call it an agreement and general release.

*I, \_\_\_\_\_, understand and, of my own free will, enter into this AGREEMENT AND GENERAL RELEASE (“AGREEMENT”) with \_\_\_\_\_ (the “COMPANY”) and, in consideration of the severance and termination payment (collectively “termination benefit”) described herein, agree as follows.*

4. Spell out date of termination of employment and agree not to reapply for employment.

*I hereby acknowledge that my employment with the COMPANY terminated on \_\_\_\_\_, 200\_, and agree that I will not hereafter apply for or seek employment or reemployment with the COMPANY.*

5. Spell out the consideration, lump sum, or salary continuation and make clear that the terminnee only receives such benefits if he or she complies with the agreement.

*On \_\_\_\_\_, 200\_, officials of the COMPANY informed me of what I had a right to receive upon the termination of my employment and explained to me that in addition to those rights, the COMPANY will [give me a lump-sum payment of \$\_\_\_\_\_] [continue my salary and benefits for a period of \_\_\_ weeks], less deductions required by law, as a termination benefit, if, and only if, I sign this AGREEMENT and comply with its terms. I understand that the COMPANY will not be required to provide the termination benefit until after this AGREEMENT becomes effective.*

- a. Some people like belts and suspenders and want to specify that the terminnee got everything he or she was entitled to.

*You represent, warrant, and acknowledge that the COMPANY owes you no wages, commissions, bonuses, sick pay, personal leave pay, severance pay, vacation pay, or other compensation or benefits, or payments or form of remuneration of any kind or nature, other than that specifically provided for in this AGREEMENT.*

6. Include a non-admission clause.

*I understand that this AGREEMENT does not constitute an admission by the COMPANY of any: (i) liability; (ii) violation of any federal, state, or local law, regulation, order, or other requirement of law; (iii) breach of contract, actual or implied; (iv) commission of any tort; or (v) other civil wrong.*

7. Spell out as many laws as may be applicable.

*I realize there are many laws and regulations prohibiting employment discrimination retaliation for opposing unlawful acts or otherwise regulating employment or claims related to employment pursuant to which I may have rights or claims. These include, without limitation, Title VII of the Civil Rights Act of 1964, as amended, including the Equal Employment Opportunity Act of 1972; the Age Discrimination in Employment Act of 1967, as amended ("ADEA"); the Americans with Disabilities Act of 1990; the National Labor Relations Act, as amended; the Employee Retirement Income Security Act of 1974, as amended; the Civil Rights Act of 1991; the Family and Medical Leave Act of 1993; the Worker Adjustment and Retraining Notification Act of 1988; 42 U.S.C. §1981; the Sarbanes-Oxley Act of 2002; \_\_\_\_\_ [title of state and local anti-discrimination laws], and federal, state, and local human rights, fair employment, and other laws. I also understand there are other statutes and laws of contract and tort otherwise relating to my employment. I intend to waive and release any rights I may have under these and other laws, and under laws of contract and tort, but I do not intend to nor am I waiving any rights or claims that may arise under the ADEA after the date that I sign this AGREEMENT.*

8. Release everything except ADEA claims arising after the date the agreement is signed (which means that the release should be signed after the termination) and before the consideration is paid. Include an agreement that if terminnee does sue, he or she will pay the company's legal fees.

*In exchange for my receipt of the termination benefit, on behalf of myself, my heirs, and personal representatives, I release and discharge the COMPANY from any and all charges, claims, and actions arising out of my employment or the termination of my employment with the COMPANY, except a charge, claim, or action based upon rights or claims that may arise under the ADEA after the date that I sign this AGREEMENT. If I violate this AGREEMENT by filing or bringing any charges, claims, or actions contrary to this paragraph, except for filing a charge or complaint with the Equal Employment Opportunity Commission, in addition to any other remedies that may be available to the COMPANY, including, but not limited to, remedies for breach of contract, I will pay all costs and expenses of the COMPANY in defending against such charges, claims, or actions brought by me or on my behalf, including reasonable attorneys' fees.*

a. Another alternative is more complex and less understandable but more of a general release.

*In consideration of the payment described above and for other good and valuable consideration, you hereby release and forever discharge, and by this instrument release and forever discharge, the COMPANY from all debts, obligations, promises, covenants, agreements, contracts, endorsements, bonds, controversies, suits, actions, causes of action, judgments, damages, expenses, claims, or demands, in law or in equity, which you ever had, now have, or which may arise in the future, regarding any matter arising on or before the date of your execution of this AGREEMENT, including but not limited to all claims (whether known or unknown) regarding your employment at or termination of employment from the COMPANY, any contract (express or implied), any claim for equitable relief or recovery of punitive, compensatory, or other damages or monies, attorneys' fees, any tort, and all claims for alleged discrimination based upon age, race, color, sex, sexual orientation, marital status, religion, national origin, handicap, disability, or retaliation, including any claim, asserted or unasserted, that could arise under Title VII of the Civil Rights Act of 1964; the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967; the Older Workers Benefit Protection Act of 1990; the Americans with Disabilities Act of 1990; the Civil Rights Act of 1866, 42 U.S.C. §1981;*



*the Employee Retirement Income Security Act of 1974; the Civil Rights Act of 1991; the Family and Medical Leave Act of 1993; the Worker Adjustment and Retraining Notification Act of 1988; the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. §1514A, also known as the Sarbanes-Oxley Act; [insert state and local laws]; and any other federal, state, or local laws, rules or regulations, whether equal employment opportunity laws, rules or regulations, or otherwise, or any right under any COMPANY pension, welfare, or stock plans.*

9. Consider a trade secrets clause and possibly a non-compete clause.
10. Be sure the release covers everyone.

*As used in this AGREEMENT, the COMPANY includes its parents, subsidiaries, affiliates, and divisions and it and their respective: (i) predecessors, successors, and assigns and (ii) past and present directors, officers, representatives, shareholders, agents, employees, and their respective heirs and personal representatives of any of them.*

- a. Be sure the release of company officials covers everyone. But be careful that corporate personnel are not releasing the terminnee.

11. Consider a confidentiality clause.

*I will not at any time talk about, write about, or otherwise publicize the terms or existence of this AGREEMENT or any fact concerning its negotiation, execution, or implementation. I will not testify or give evidence in any forum concerning my employment or termination of employment with the COMPANY unless required by law or requested to do so in writing by an authorized official of the COMPANY.*

- a. Terminnees usually want to be sure they can share the terms of the agreement with their family, attorneys, and tax advisers, so often the following clause is used.

*You agree not to disclose the terms, contents, or execution of this AGREEMENT, the claims that have been or could have been raised against the COMPANY, or the facts and circumstances underlying this AGREEMENT, except in the following circumstances:*

- i. *You may disclose the terms of this AGREEMENT to your immediate family, so long as such family member agrees to be bound by the confidential nature of this AGREEMENT;*
- ii. *You may disclose the terms of this AGREEMENT to (i) your tax advisers so long as such tax advisers agree in writing to be bound by the confidential nature of this AGREEMENT, (ii) taxing authorities if requested by such authorities and so long as they are advised in writing of the confidential nature of this AGREEMENT, or (iii) your legal counsel; and*
- iii. *Pursuant to the order of a court or governmental agency of competent jurisdiction or for purposes of securing enforcement of the terms and conditions of this AGREEMENT should that ever be necessary.*
- iv. *Upon service on you, or anyone acting on your behalf, of any subpoena, order, directive, or other legal process requiring you to disclose any information about the COMPANY, you or your attorney shall immediately notify the COMPANY [or a specified individual or attorney] of such service and of the content of any testimony or information to be provided pursuant to such subpoena, order, directive, or other legal process and within two business days send to the designated representative of the COMPANY via overnight delivery a copy of said documents served upon you.*

12. Add a non-disparagement clause.

*I will not at any time disparage or denigrate the COMPANY, orally or in writing*

- a. Terminees often ask for mutual no disparagement clauses. This creates problems if it binds fellow employees and other corporate insiders who may be difficult to police. One possibility is to agree on a reference letter. That is generally appropriate for RIFs because it is easy to say truthfully that the individual is out of work only because a particular operation shut down or slimmed down. But it is important to be consistent with employer policies that often limit references to title held and dates of employment. Additionally, it becomes more problematic if there is an element of bad performance in the termination.

13. Get a representation that no charges or suits have been filed or will be filed.

*You represent and agree that you have not filed any lawsuits or arbitrations against the COMPANY, or filed or caused to be filed any charges or complaints against the COMPANY, with any municipal, state, or federal agency charged with the enforcement of any law. Pursuant to and as a part of your release and discharge of the COMPANY, as set forth herein, with the sole exception of your right to bring a proceeding pursuant to the Older Workers Benefit Protection Act to challenge the validity of your release of claims pursuant to the Age Discrimination in Employment Act (“ADEA”), you agree, not inconsistent with EEOC Enforcement Guidance On Non-Waivable Employee Rights Under EEOC-Enforced Statutes dated April 11, 1997, and to the fullest extent permitted by law, not to sue or file a charge, complaint, grievance, or demand for arbitration against the COMPANY in any forum or assist or otherwise participate willingly or voluntarily in any claim, arbitration, suit, action, investigation, or other proceeding of any kind that relates to any matter that involves the COMPANY, and that occurred up to and including the date of your execution of this AGREEMENT, unless required to do so by court order, subpoena, or other directive by a court, administrative agency, arbitration panel, or legislative body, or unless required to enforce this AGREEMENT. To the extent any such action may be brought by a third party, you expressly waive any claim to any form of monetary or other damages, or any other form of recovery or relief in connection with any such action. Nothing in the foregoing paragraph shall prevent you (or your attorneys) from (i) commencing an action or proceeding to enforce this AGREEMENT or (ii) exercising your right under the Older Workers Benefit Protection Act of 1990 to challenge the validity of your waiver of ADEA claims set forth in paragraph \_\_\_\_ of this AGREEMENT.*

14. For higher corporate executives or highly compensated individuals, include an IRS §409(a) clause.

*The COMPANY may deduct or withhold from any compensation or benefits any applicable federal, state, or local tax or employment withholdings or deductions resulting from any payments or benefits provided under this AGREEMENT. In addition, it is the COMPANY’S intention that all payments or benefits provided under this AGREEMENT comply with section 409A of the Internal Revenue Code of 1986, as amended (the “Code”), including without limitation the six-month delay for payments of deferred compensation to “key employees” upon separation from service pursuant to section 409A(a)(2)(B)(i) of the Code (if applicable), and this AGREEMENT shall be interpreted, administered, and operated accordingly. If under this AGREEMENT an amount is to be paid in installments, each installment shall be treated as a separate payment for purposes of Treasury Regulation section 1.409A-2(b)(2)(ii). Notwithstanding anything to the contrary herein, the COMPANY does not guarantee the tax treatment of any payments or benefits under this AGREEMENT, including without limitation under the Code, or federal, state, local, or foreign tax law and regulations.*

15. Include an agreement to cooperate with the company in subsequent litigation.

*You agree that you will assist and cooperate with the COMPANY in connection with the defense or prosecution of any claim that may be made against or by the COMPANY, or in connection with any ongoing or future investigation or dispute or claim of any kind involving the COMPANY, including any proceeding before any arbitral, administrative, judicial,*

*legislative, or other body or agency, including testifying in any proceeding to the extent such claims, investigations, or proceedings relate to services performed or required to be performed by you, pertinent knowledge possessed by you, or any act or omission by you. You further agree to perform all acts and execute and deliver any documents that may be reasonably necessary to carry out the provisions of this paragraph.*

16. Include a termination of prior agreements clause. Be mindful that there may be agreements that should survive, like non-competition, trade secrets, non-solicitation, and inventions.

*This AGREEMENT constitutes the entire agreement between the COMPANY and you, and supersedes and cancels all prior and contemporaneous written and oral agreements, if any, between the COMPANY and you. You affirm that, in entering into this AGREEMENT, you are not relying upon any oral or written promise or statement made by anyone at any time on behalf of the COMPANY.*

17. Bind the terminatee's successors and assigns.

*This AGREEMENT is binding upon you and your successors, assigns, heirs, executors, administrators, and legal representatives.*

18. Consider a jurisdiction and venue provision.

*This AGREEMENT shall be deemed to have been made within the County of \_\_\_\_\_, State of \_\_\_\_\_, and shall be interpreted, construed, and enforced in accordance with the laws of the State of \_\_\_\_\_ and before the Courts of the State of \_\_\_\_\_ in the County of \_\_\_\_\_. I hereby consent to the jurisdiction of such courts for the enforcement of this AGREEMENT and waive trial by jury.*

19. Illegality And Severability

*If one or more provisions or terms of this AGREEMENT shall be ruled void or unenforceable, the COMPANY may elect to enforce the remainder of this AGREEMENT, or cancel it and get back from me, my successors, or assigns or otherwise any consideration paid.*

20. OWBPA's EEOC Saving Clause And ADEA Waiver Requirements

*I understand that this AGREEMENT may not affect the rights and responsibilities of the Equal Employment Opportunity Commission to enforce the ADEA or be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the EEOC under the ADEA.*

- a. Here is another format that, though somewhat repetitive, is comprehensive.

*Without detracting in any respect from any other provision of this AGREEMENT:*

1. *You, in consideration of the termination benefit provided to you as described in paragraph \_ of this AGREEMENT, agree and acknowledge that this AGREEMENT constitutes a knowing and voluntary waiver of all rights or claims you have or may have against the COMPANY as set forth herein, including, but not limited to, all rights or claims arising under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), including, but not limited to, all claims of age discrimination in employment and all claims of retaliation in violation of the ADEA; and you have no physical or mental impairment of any kind that has interfered with your ability to read and understand the meaning of this AGREEMENT or its terms; and that you are not acting under the influence of any medication or mind-altering chemical of any type in entering into this AGREEMENT.*

- 2. *You understand that, by entering into this AGREEMENT, you do not waive rights or claims that may arise after the date of your execution of this AGREEMENT, including without limitation any rights or claims that you may have to secure enforcement of the terms and conditions of this AGREEMENT.*
- 3. *You agree and acknowledge that the consideration provided to you under this AGREEMENT is in addition to anything of value to which you are already entitled.*
- 4. *You are hereby advised to consult with an attorney prior to executing this AGREEMENT.*

*You acknowledge that you were informed that you had at least 45 days in which to review and consider this AGREEMENT, to review the information as required by the ADEA, a copy of such information being attached to and made part of this AGREEMENT, and to consult with an attorney regarding the terms and effect of this AGREEMENT.*

21. OWBPA Timing Clauses

- a. If some aspects of the ADEA's timing requirements are included in section 20 above, there is no need to duplicate these.

*I was given a copy of this AGREEMENT on \_\_\_\_\_, 200\_. I have had an opportunity to consult an attorney before signing it and was given a period of at least 45 days, or until \_\_\_\_\_, 200\_, to consider this AGREEMENT. I acknowledge that in signing this AGREEMENT, I have relied only on the promises written in this AGREEMENT and not on any other promise made by the COMPANY.*

*I have seven days to revoke this AGREEMENT after I sign it. This AGREEMENT will not become effective or enforceable until seven days after the COMPANY has received my signed copy of this AGREEMENT.*

22. No Oral Modifications

*This AGREEMENT may not be modified or changed orally.*

23. Add some more belts and suspenders, including terminnee's and company's signature lines.

*Please write the following in the space provided if it is true:*

*I have read this AGREEMENT AND GENERAL RELEASE and I understand all of its terms. I enter into and sign this AGREEMENT AND GENERAL RELEASE knowingly and voluntarily, with full knowledge of what it means.*

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\_\_\_\_\_  
EMPLOYEE'S SIGNATURE

STATE OF \_\_\_\_\_ )

: ss.

COUNTY OF \_\_\_\_\_ )

On the \_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_ before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he or she executed the same in his or her capacity, and that by his or her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public

By: \_\_\_\_\_

COMPANY'S REPRESENTATIVE

24. OWBPA Disclosure Requirements For Group Termination Or Severance Programs

The following information is provided in accordance with the ADEA because the severance payments offered to you have been established in connection with an exit incentive program or other employment termination program offered to a group or class of employees of the COMPANY:

The class, unit, or group of individuals covered by the program includes all employees in the \_\_\_\_\_ Department [plant, location, area, etc.] whose employment was terminated in the reduction in force during the following period: \_\_\_\_\_ [but does not include any employee whose employment was terminated for cause].

The eligibility factors are those selected for termination in the reduction in force that took place on [dates]. The selection criteria included [seniority], [job performance], [ability to perform the tasks required of those not laid off], [suitability for jobs remaining after the reduction in force], and [position elimination].

The time limits applicable to such program are that employees in the \_\_\_\_\_ Department [plant, location, area, etc.] who are being offered consideration under a waiver agreement and asked to waive claims under the ADEA 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 eligible or selected for the program:

<u>Job Title</u>	<u>Age</u> [List same job title for each age in which there is an incumbent.]
Bank Teller	54
Bank Teller	36
Bank Teller	27
Loan Officer	45
Loan Officer	62

The following is a list of the ages of individuals in the same job classification or organizational unit who are not eligible or selected for the program:

<i>Job Classification Or Organizational Unit</i>	<i>Age</i>
<i>Bank Teller Broad Street</i>	25
<i>Bank Teller Broad Street</i>	37
<i>Bank Teller Broad Street</i>	47
<i>Loan Officer Broad Street</i>	37
<i>Loan Officer Broad Street</i>	45

25. The general rule is that a release is valid if it is “knowing, voluntary and for a valuable consideration.” OWBPA has specific rules as to knowing and voluntary that are reflected in certain of the above language, which is only required for terminatees who are 40 years of age or older. This includes: (a) reference to ADEA and OWBPA in section 13 above; (b) section 20 above; (c) section 21 above; and (d) section 24 above. Even if part of a RIF, employees under the age of 40 need not be provided with a specific period of time to review a release agreement (although a reasonable period of time, such as 14 days, is generally recommended), and they need not be provided with a period of time within which to revoke the agreement.
- a. Additionally, the provisions included in sections 21 and 24 above need not be included in a release agreement when the termination is an individual termination (that is, not part of a group termination). The ADEA does, however, require that all individual terminatees who are age 40 or over be provided with 21 days to review the release agreement and seven days to revoke the same (therefore, section 20 above will need to be reworded to reflect (a) this different review period and (b) that an OWBPA exhibit will not be attached to the release agreement).

To purchase the online version of this outline, including editable versions of the provisions in it, go to [www.ali-aba.org](http://www.ali-aba.org) and click on “online.”