



Practical and Legal Guidance for Drafting Enforceable Release Agreements

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Panel

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OWBPA Overview

- Group Termination Releases – Only Required If Employee Is Age 40 And Over – DUE TO OWBPA, FOR VALID WAIVER OF ADEA CLAIM, RELEASE MUST:
 - i. INCLUDE “GROUP TERMINATION” LANGUAGE AND EXHIBITS;
 - ii. EXPRESSLY LIST ADEA;
 - iii. CONTAIN 45 DAY CONSIDERATION PERIOD;
 - iv. CONTAIN 7 DAY REVOCATION PERIOD; AND
 - v. ADVISE EMPLOYEE OF RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING AGREEMENT

OWBPA Overview (cont'd)

- For Individual Separation Of Employees Age 40 And Over,
- “GROUP TERMINATION” LANGUAGE AND EXHIBITS ARE NOT NECESSARY, *HOWEVER, DUE TO OWBPA*, FOR VALID WAIVER OF ADEA CLAIM, RELEASE MUST:
 - i. EXPRESSLY LIST ADEA;
 - ii. CONTAIN 21 DAY CONSIDERATION PERIOD;
 - iii. CONTAIN 7 DAY REVOCATION PERIOD; AND
 - iv. ADVISE EMPLOYEE OF RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING AGREEMENT

Releases - In General

- For All Separations Of Employees Under Age 40,
- ADEA AND OWBPA ARE INAPPLICABLE SO
 - i. “GROUP TERMINATION” LANGUAGE AND EXHIBITS ARE NOT NECESSARY EVEN IF THE EMPLOYEE UNDER AGE 40 IS BEING SEPARATED AS PART OF A GROUP TERMINATION PROGRAM;
 - ii. NO REASON TO LIST ADEA;
 - iii. NO REASON TO INCLUDE REVOCATION PERIOD;
 - iv. NO SPECIFIC CONSIDERATION PERIOD IS MANDATED; AND
 - v. NO SPECIFIC REQUIREMENT TO ADVISE EMPLOYEE OF RIGHT TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING AGREEMENT

HOWEVER...

Releases - In General (cont'd)

- THE FOLLOWING TWO REQUIREMENTS APPLY TO ALL RELEASES
- First, any waiver must be **knowing and voluntary**; and
- Second, the waiver must be **written in a manner so that it is understandable to the reader.** (SPECIFIC OWBPA REQUIREMENT BUT ALL ENCOMPASSING).
- *THINK ABOUT THE EDUCATIONAL AND PROFESSIONAL BACKGROUND OF THE EMPLOYEE.*
- *ALWAYS SUGGEST THE EMPLOYEE CONSULT WITH COUNSEL*

Major Relevant Considerations In Drafting Agreements

- **In General**
 - Parties To Agreement
 - Defined Terms
 - Date of Execution
 - Active v. Inactive Employment

Major Relevant Considerations

● As To Consideration

- Reference And Ensure Consistency With Severance Plan, As Applicable
- Ensure Listed Monies And Benefits Are Truly Consideration

Major Relevant Considerations

- **As To Consideration (cont'd)**
 - Payment Details
 - Generally Cannot Promise Date That Payments Will Begin Due To Consideration And Revocation Period
 - Whether To Require A No-Revocation Letter – Requirement Is Contractual Not Statutory – Ensure Payment Details Match Decision

Major Relevant Considerations

- **As To Consideration (cont'd)**
 - Details Of Any COBRA Benefit
 - Effective Date Of COBRA
 - Be Specific Regarding Other Consideration/Maximize Management Discretion
 - Note Consideration Being Provided Solely Due to Execution of Agreement

Major Relevant Considerations

General Release of Claims-Sample Provision

Employee knowingly and voluntarily releases and forever discharges **[Insert Company Name]**, its parent corporation, affiliates, subsidiaries, divisions, predecessors, insurers, successors and assigns, and their current and former employees, attorneys, officers, directors and agents thereof, both individually and in their business capacities, and their employee benefit plans and programs and their administrators and fiduciaries (collectively referred to throughout the remainder of this Agreement as “Releasees”), of and from any and all claims, known and unknown, asserted or unasserted, which the Employee has or may have against Releasees as of the date of execution of this Agreement and General Release, including, but not limited to, any alleged violation of: ...

Major Relevant Considerations

● As To Release Provision

- Scope Of Released Claims
- Scope Of Released Parties
- Release Only Covers Claims As Of Date Of Execution (Or Possibly Date Of No-Revocation Letter)
- Avoid Legalistic Distinction Between Scope Of Release And Scope Of Covenant Not To Sue

Major Relevant Considerations

- **As To Release Provision (cont'd)**
 - Except For ADEA, Generally No Per Se Need To List A Statute In Order To Obtain A Waiver
 - Check Relevant Jurisdiction
 - If There Is Concern In Regard To A Specific Claim, Ensure It Can Be Waived – better safe than sorry
 - Will The Exclusion Of A Specific Statute Could Raise A Factual Issue As To Waiver?
 - MUTUAL RELEASES?

Major Relevant Considerations

Acknowledgments and Affirmations- Sample Provision

Employee affirms that Employee has not filed, caused to be filed, or presently is a party to any claim against **[Insert Company Name]**, except _____ **[Identify any pending complaints/charges/claims.]**

Major Relevant Considerations

Acknowledgments and Affirmations- Sample Provision (cont'd)

Employee also affirms that Employee has [reported all hours worked as of the date Employee signs this release and has] **[It is important that this “all hours worked” bracketed language only be used with a release for a non-exempt employee who was entitled to and paid overtime while employed.]** been paid and/or has received all compensation, wages, bonuses, commissions, and/or benefits to which Employee may be entitled. Employee affirms that Employee has been granted any leave to which Employee was entitled under the Family and Medical Leave Act or related state or local leave or disability accommodation laws.

Major Relevant Considerations

Acknowledgments and Affirmations- Sample Provision (cont'd)

Employee further affirms that Employee has no known workplace injuries or occupational diseases.

Major Relevant Considerations

Acknowledgments and Affirmations- Sample Provision (cont'd)

Employee also affirms that Employee has not divulged any proprietary or confidential information of **[Insert Company Name]** and will continue to maintain the confidentiality of such information consistent with **[Insert Company Name]**'s policies and Employee's agreement(s) with **[Insert Company Name]** and/or common law.

Major Relevant Considerations

Acknowledgments and Affirmations- Sample Provision (cont'd)

Employee further affirms that Employee has not been retaliated against for reporting any allegations of wrongdoing by **[Insert Company Name]** or its officers, including any allegations of corporate fraud. Both Parties acknowledge that this Agreement does not limit either party's right, where applicable, to file or participate in an investigative proceeding of any federal, state or local governmental agency. To the extent permitted by law, Employee agrees that if such an administrative claim is made, Employee shall not be entitled to recover any individual monetary relief or other individual remedies.

Major Relevant Considerations

- **As To Acknowledgments and Affirmations Provision**
 - FLSA And Arguably FMLA Claims Are Not Waivable In A General Release - Affirmations As To These Issues Are Necessary - potential distinction as to retaliation claims
 - Concerns With Inclusion Of Charge Withdrawal Condition Precedent Language
 - Modify Confidential Information Language As Appropriate
 - “Right To File Charge Language” – Better Safe Than Sorry

Major Relevant Considerations

- **As To Group Termination Provision**
 - Broad Definition Of Group – 2 Or More
 - Name Program
 - Eligibility Criteria
 - Selection Criteria – consider impact of language on potential future litigations
 - Distinction Between Being Selected For Separation And Eligibility For Severance
 - Aggregation Of Selected Employees
 - Does Listing Of Unselected Employees Include All Comparators
 - Balance Considerations Of Providing More Vs. Providing Less Information

Major Relevant Considerations

- **As To Confidentiality**
 - Consider Situation In Regard To “Gag”
Language
 - Confidential Information Language

Major Relevant Considerations

● Miscellaneous

- Tender Back Language Is Prohibited By OWBPA
- Non-Disparagement
- Non-Admission
- Non-Solicitation
- Non-Assistance
- Applicable Law
- Choice of Forum
- Amendment
- Entire Agreement
- Could Require Arbitration Of Disputes Over Terms Of Agreement

Major Relevant Considerations

Closing Language-Sample Provision for Group Termination

EMPLOYEE IS ADVISED THAT EMPLOYEE HAS UP TO FORTY-FIVE (45) CALENDAR DAYS TO CONSIDER THIS AGREEMENT AND GENERAL RELEASE. EMPLOYEE ALSO IS ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO EMPLOYEE'S SIGNING OF THIS AGREEMENT AND GENERAL RELEASE.

Major Relevant Considerations

Closing Language-Sample Provision- Group Termination (cont'd)

EMPLOYEE MAY REVOKE THIS AGREEMENT AND GENERAL RELEASE FOR A PERIOD OF SEVEN (7) CALENDAR DAYS FOLLOWING THE DAY EMPLOYEE SIGNS THIS AGREEMENT AND GENERAL RELEASE. ANY REVOCATION WITHIN THIS PERIOD MUST BE SUBMITTED, IN WRITING, TO _____ **[IDENTIFY COMPANY REPRESENTATIVE]** AND STATE, "I HEREBY REVOKE MY ACCEPTANCE OF OUR AGREEMENT AND GENERAL RELEASE." THE REVOCATION MUST BE PERSONALLY DELIVERED TO _____ **[IDENTIFY COMPANY REPRESENTATIVE]** OR HIS/HER DESIGNEE, OR MAILED TO _____ **[IDENTIFY COMPANY REPRESENTATIVE]** AND POSTMARKED WITHIN SEVEN (7) CALENDAR DAYS AFTER EMPLOYEE SIGNS THIS AGREEMENT AND GENERAL RELEASE.

Major Relevant Considerations

Closing Language-Sample Provision- Group Termination (cont'd)

EMPLOYEE AGREES THAT ANY MODIFICATIONS, MATERIAL OR OTHERWISE, MADE TO THIS AGREEMENT AND GENERAL RELEASE, DO NOT RESTART OR AFFECT IN ANY MANNER THE ORIGINAL UP TO FORTY-FIVE (45) CALENDAR DAY CONSIDERATION PERIOD.

Major Relevant Considerations

Closing Language-Sample Provision- Group Termination (cont'd)

EMPLOYEE FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS EMPLOYEE HAS OR MIGHT HAVE AGAINST RELEASEES.

Major Relevant Considerations

● As To Group Termination Language

- Appropriate Consideration And Revocation Periods
 - purpose of “up to”
 - consider specific consideration period even for employees under age 40
- Appropriate Language Regarding Employee Consulting With Counsel
- Consider Limiting Revocation To Solely ADEA Claims
- In “Rolling” RIF Situations, Consider Providing Updated Lists To Those Still Considering Whether To Sign

Relevant Recent Decisions

Knowing and Voluntary

- Two Recent IBM Decisions
- Release v. Covenant Not To Sue
 - Syverson v. International Business Machines (9th Circuit 2006)
 - Thomforde v. International Business Machines (8th Circuit 2005)

Scope of Enforceable Releases

- Potential That Release Is Facially Retaliatory

In at least two instances, courts in 2006 issued decisions that underscore the need for employers to ensure that all release agreements contain carefully scripted waiver language and that payment under the agreements not be premised on any unlawful considerations.

A decision by the National Labor Relations Board (“NLRB”, “Board” or “Labor Board”) illustrates a position taken by other administrative agencies with regard to the waiver of the right to file charges of alleged violations of anti-discrimination laws, such as the National Labor Relations Act (“NLRA”). Governmental agencies, such as the Equal Employment Opportunity Commission (“EEOC”) and now the NLRB, take the position that such rights are unwaivable, thereby limiting the use of broad waiver language in release agreements.

In this case, the NLRB found an arbitration clause unenforceable because it attempted to release claims arising under the NLRA. The Labor Board pronounced that all employees covered by the Act have the unwaivable right to file a charge with the Board, a holding consistent with the position taken by other administrative agencies, such as the EEOC. U-Haul Co. v. California, 347 NLRB No. 34 (2006).

In fact, the OWBPA regulations specifically provide that “[n]o waiver agreement may include any provision prohibiting any individual from [f]iling a charge or complaint, including a challenge to the validity of the waiver agreement, with [the] EEOC. . . . No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual’s right to [f]ile a charge or complaint, including a challenge to the validity of the waiver agreement, with [the] EEOC.” See 29 CFR §§ 1625.22(i)(2)(i), 1625.22(i)(3)(i).

A ruling from a federal district court in Maryland underscores this point. The U. S. District Court for the District of Maryland has held that an agreement, which stated that the employee had released all claims, was retaliatory on its face and constituted unlawful interference with protected activity. The court indicated that such language unlawfully implies to employees that they do not have the right to file an EEOC charge after executing a release. EEOC v. Lockheed Martin Corp., No. 05-cv-0287 (RWT) (D.Md. Aug. 9, 2006).

However, in EEOC v. SunDance Rehabilitation Corporation (6th Circuit 2006), the court held that an agreement which indicates all rights were waived was not facially retaliatory...**but,**

It is vital to note that the Court indicated that while the release was not facially retaliatory, individuals still retained the right to file a charge with the EEOC regardless of the scope of the release.

Group Terminations

Determining Who to Include In Job Title List

Compliance with the requirement to list job titles and ages of employees selected for a termination program is one of the challenges posed by the OWBPA. Indeed, it is unclear whether an employer must list only terminated employees in a particular decisional unit, or all employees who have terminated employment under similar programs.

Determining Who to Include In Job Title List (cont'd)

In 2005, in Burlison v. McDonald's Corp, 401 F. Supp. 2d 1365 (N.D. Ga 2005), the U. S. District Court for the Northern District of Georgia took the more expansive approach. In analyzing the appropriate scope of the list of affected employees, the court held that such list must include not only those in the separating employees' "decisional unit" but all employees being separated, including those from different regions. As stated by the court, "[t]his Court's reading of the statutory language is consistent with the legislative intent of the OWBPA by ensuring an employee faced with a decision whether to sign a release will be provided with information necessary to evaluate any potential age discrimination claim."

Determining Who to Include In Job Title List (cont'd)

On appeal of the decision, the U. S. Court of Appeals for the Eleventh Circuit (which governs Alabama, Georgia, and Florida) came to the opposite conclusion. It held that the listing of selected employees could be limited to the affected employee's decisional unit – the portion of the employee's organizational structure from which the employer chose the persons who would be offered consideration for the signing of the waiver. That court upheld the waiver which only listed those employees separated from the relevant decisional unit – a specific region of the employer – despite the fact that employees also were separated in other regions. The court pointed out that the informational requirements of OWBPA are designed to ensure that older employees are given the information needed to evaluate any potential ADEA claims before deciding to release them.

Determining Who to Include In Job Title List (cont'd)

To make an informed decision, 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 11th Circuit stated that “[t]he data must allow the employee 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.”

Determining Who to Include In Job Title List (cont'd)

Accordingly, the court determined that the appropriate decisional unit includes those who were considered for jobs in the same process as the terminated employees. See *Burlison v. McDonald's Corp.*, No. 05-13991, 2006 U.S. App. LEXIS 17260 (11th Cir. Jul. 11, 2006). **In this area of OWBPA compliance, there is uncertainty as to whether an employer is required to provide information regarding separating and remaining employees outside of the decisional unit to obtain an enforceable ADEA waiver.**

Defining Eligibility and Selection Criteria

Another tricky aspect to OWBPA compliance for group terminations is the requirement that the release provide information about “eligibility factors.” In 2005, consistent with the position taken by the EEOC, the U.S. Court of Appeals for the Tenth Circuit held that a group termination release was invalid if the release did not expressly set forth the criteria used by the employer in selecting employees for separation. This decision was consistent with the holding of the U. S. District Court in Massachusetts v. Bull HN Info Sys., Inc., 143 F.Supp. 2d 134 (D. Mass. 2001), the only previous federal court decision analyzing an employer’s compliance with this OWBPA requirement.

Defining Eligibility and Selection Criteria (cont'd)

The Tenth Circuit stated that the information provided should be similar to a response to a litigation interrogatory as to the basis of separation. However, without further analysis, in May 2006 the court withdrew its holding on this issue while finding the release invalid on other grounds. See *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006). Thus, there remains uncertainty in this area as to whether an employer is required to provide eligibility and selection criteria to obtain an enforceable waiver of the ADEA.

Time Limits

Further complicating an employer's compliance strategy is a decision issued earlier this year by the U.S. District Court for the Northern District of Ohio. In this decision, the court, without detailed analysis, invalidated the waiver of an ADEA claim because the employer did not list the time limits applicable to such a program. Thus, to be safe, release agreements and related severance plans should note the time period during which the group termination program was in effect.

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