

# What is the OWBPA Again and Why Should We Care? Here Is A Quick Refresher

## Labor & Employment Law Update

on July 6, 2015

The Older Workers Benefits Protection Act (OWBPA) amended the Age Discrimination in Employment Act (ADEA) back in 1990 to specifically permit bona fide seniority systems and voluntary early retirement incentive plans. Along with these allowances, the OWBPA mandated strict requirements for ADEA waivers and disclosures for group termination. The provisions are very technical and have tripped up many unsuspecting employers.

To be effective a waiver must be “knowing and voluntary.” That sounds straightforward, but the statute specifically spells out what “knowing and voluntary” means in this context. If the situation involves an isolated termination – a single employee terminated for cause or let go as a result of a restructuring that impacts his position alone – an ADEA waiver is not “knowing and voluntary unless at a minimum,” the waiver:

- is in writing and written in a manner the individual can understand;
- specifically refers to ADEA rights or claims;
- does not waive rights or claims arising after the waiver is executed;
- provides consideration over and above anything to which the individual is entitled already;
- advises the individual in writing *to consult with an attorney* prior to executing the agreement (advising the individual *has the right to* consult with an attorney may not be sufficient);
- allows the individual at least 21 days (45 in the case of group terminations addressed below) to consider the agreement before signing; and
- allows the individual at least 7 days to revoke following execution of the agreement.

The statute tacks on additional requirements for waivers “requested in connection with an exit incentive or other employment termination program offered to a group or class of employees.” Legislators complicated matters by failing to define the key terms in this phrase. Relevant regulations and considerable case law interpret them broadly to encompass any situation in which two or more employees are terminated at or near the same time under

similar circumstances or are offered incentives which stem from a standardized plan.

Whenever a release is offered in conjunction with a reduction in force involving more than one employee or other group terminations, the employer must follow each of the requirements set forth above and must also disclose:

- the “decisional unit” or class, unit, or group of individuals covered by such program – in other words, the pool of employees from which the employer chose those who would be involuntarily terminated or offered an incentive to leave;
- the eligibility factors used to determine who was selected for termination or offered an exit incentive;
- any applicable time limits; and
- job titles and ages of all eligible or selected individuals and all individuals in the same job unit who are not eligible or selected.

If you are implementing a RIF or thinking about offering severance to a departing employee in hope of avoiding potential litigation, you should consult qualified legal counsel first. It is important to make sure the ADEA waiver contained in your release is enforceable.

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