

**OLDER WORKERS BENEFIT**  
**PROTECTION ACT-MATERIALS**

Cover Summary for the Older Workers Benefit Protection Act (OWBPA) article:

OWBPA amended the Age Discrimination in Employment Act (ADEA).

The ADEA covers any employee 40 years of age or older. The OWBPA amended the ADEA to allow for non-discriminatory voluntary early retirement plans.

Employers need to be very careful when advertising, discussing, drafting and implementing voluntary early retirement plans.

Employees are allowed to bring suit under the ADEA claiming that the voluntary early retirement plan was discriminatory or coercive. Further, employees can bring suit alleging that their agreement to voluntarily retire was not valid.

Take-aways from relevant case-law and federal regulations concerning voluntary retirement plans:

- The burden of proving that a voluntary early retirement program is valid will rest with the employer.
- In order to be valid, the agreement (at a minimum) must meet the following requirements:
  - a- The agreement must be in clear and readily understandable terms for the average employee
  - b- The agreement must make clear the participation is optional
  - c- The agreement must advise and encourage the employee to seek out legal advice before signing
  - d- The employee must have sufficient time to consider the proposed agreement

Take-aways from relevant case-law and federal regulations concerning releases and covenants to sue under the ADEA:

- Releases of liability must be made "knowingly and voluntarily". The employer bears the burden of proving that any waiver/release is valid
- The release must be written in language that can be understood by the employee
- The release must specifically reference releasing all ADEA claims
- The release cannot waive his/her rights for any acts that "arise" after the effective date of the agreement
- The release must advise the employee to consult with an attorney before signing
- The employee must be given at least 21 days to consider the release
- The release must contain a provision allowing the employee seven days to revoke the release after signing it

**The OWBPA and Issues Raised by the Regulations Both Past and Proposed; Impact of the Oubre Decision**

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In recent years, the Older Workers Benefit Protection Act or OWBPA, has been the subject of a negotiated rule-making and now proposed new rules by the EEOC. The new rules come as a result of the U.S. Supreme Court's decision last year in the case of *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998).

The purpose of this paper will be to discuss these developments and attempt to explain how they impact releases, information given during reductions in force or RIFs, and what if any impact these events may have on discovery in age discrimination litigation.

**I. The OWBPA -- Recent Developments**

**A. The Oubre Decision**

In *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), Dolores Oubre worked as a scheduler at the Entergy Operations Inc. Louisiana plant. After getting a poor performance rating

in 1994, Oubre was approached by her employer and told that she could either improve her performance or accept a severance package which included the execution of a waiver of rights. Oubre, who was 40 and thus protected by the ADEA, chose the latter option and signed a waiver upon her acceptance of such benefits. In exchange for the waiver, Entergy made periodic payments over the next few months totaling \$6,258. The waiver that Oubre signed was not in compliance with the OWBPA in at least three areas:

1. Entergy did not give Oubre the required time (at least 21 days) to consider the agreement;
2. Entergy did not give Oubre seven (7) days after she signed the release to revoke it; and
3. The release made no specific reference to claims which were waived under the ADEA.

After receiving the last of her severance payments, Oubre filed a charge of age discrimination with the EEOC. When she received a right-to-sue letter from the agency, Oubre filed a lawsuit under the ADEA. The company defended on the basis of the release, maintaining that even though it did not strictly comply with the OWBPA requirements, because Oubre had not returned nor offered to return the consideration the company had paid in exchange for the release, she had ratified the agreement. The federal district court granted Entergy's motion for summary judgment on the basis of ratification. The Fifth Circuit affirmed. The United States Supreme Court reversed the Fifth Circuit, rejecting the tender back/ratification theory as a defense to an attack on a waiver agreement that fails to comply with the requirements of the OWBPA.

In *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), the Supreme Court resolved the conflict among the circuits as to whether individuals who sign releases that fail to conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA") will be deemed to have ratified the releases by failing to tender back the proceeds they received in exchange for them before filing suit. In *Oubre*, the Court ruled 6-3, in an opinion written by Justice Kennedy, that the OWBPA, "governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply [with the OWBPA]." Justice Breyer filed a concurring opinion which Justice O'Connor joined, and there were two dissents, one from Justice Scalia and one from Justice Thomas, the latter of which was joined by the Chief Justice.

Reviewing the plain language of the OWBPA, that an employee "may not waive" an ADEA claim unless the employer complies with the statute - the majority concluded:

It suffices to hold that the release cannot bar the ADEA claim because it does not conform to the statute. Nor did the employee's mere retention of monies amount to a ratification equivalent to a valid release of her ADEA claims, since the retention did not comply with the OWBPA any more than the original release did. The statute governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply. *Id.* at \*8.

Five Justices held that releases that fail to conform to the OWBPA requirements are voidable. The Breyer opinion, which discusses the issue, concludes that an employer would be permitted to recover its own reciprocal payment where doing so seems fair, namely where the recovery would not bar the worker from bringing suit. Once the worker brings an age discrimination suit, he or she has clearly rejected the promise not to sue. As long as there is no "tender-back" precondition, the worker's promise will not bar suit in conflict with the statute. Once the worker has sued, however, nothing in the statute prevents the employer from asking for restitution of its reciprocal payment or relief from any ongoing reciprocal obligation.

The two dissenting opinions both argued that the OWBPA had not abrogated the validity of the common law doctrine of tender-back. Justice Scalia wrote that an invalid release could be ratified, while the Thomas/Rehnquist dissent argued in favor of both the tender-back and ratification doctrines.

The Breyer concurrence seemed to permit employers to answer any complaint filed by a release-signer by filing a counterclaim for restitution of the consideration they thought they had paid in exchange for the release. Alternatively, Breyer suggested that the amount paid by the employer as consideration for the release should be deducted from any recovery secured by the plaintiff. However, given the comment in the majority opinion that one reason not to accept the tender-back rule was that, "[i]n many instances, a discharged employee likely will have spent the monies received and will lack the means to tender their return," the EEOC has now proposed a regulation (excerpted in the appendix to this paper) which seems to strongly suggest that employers not bring counterclaims of this sort and urges that if they want to get credit for money paid, that they should plead restitution as an affirmative defense.

Although the Supreme Court in *Oubre*, addressed the important question of whether the common-law "tender back" requirement is applicable to employees who sue their former employers where the release is defective, and although the EEOC has now published a final rule under the OWBPA and recently issued a proposed guidance in light of *Oubre*, it is arguable that the net result of these developments is to raise as many new questions as those that have been resolved.

## **B. What the OWBPA and ADEA Permit Employers to do**

The OWBPA amended the ADEA to allow nondiscriminatory bona fide seniority systems, employee benefit plans, and voluntary early retirement incentive plans. The OWBPA applies to new plans or plan changes implemented after October 16, 1990, and to all private benefit plans after April 14, 1991, or June 1, 1992 in the case of certain collectively-bargained plans. However, the OWBPA does not apply to any payment of benefits that began before October 16, 1990, and that were continued after that date.

Early retirement and other incentive plans were affected by the OWBPA. Under the OWBPA, the ADEA does not prohibit the voluntary early retirement of an employee pursuant to an early retirement or special incentive program. In fact, Congress specifically amended section 4(f)(2) of the ADEA to permit voluntary early retirement incentive plans "consistent with the relevant purpose or purposes [of the act.]" 29 U.S.C. § 623(f)(2).

But, the amendment continues that no voluntary early retirement incentive plan can excuse the failure to hire or require the involuntary retirement of any employee because of his/her age. Further,

the amendments impose the burden of proving that a voluntary early retirement program is valid on the employer.

To induce employees to voluntarily leave, employers will often offer severance pay or other enhanced benefits. Under the ADEA, plaintiffs generally made one of two allegations: 1) that the benefit plan offered as inducement for early retirement was a "subterfuge" to eliminate older workers from the work force; or 2) that the plan required or permitted the "involuntary" retirement of protected employees.

Under the OWBPA, such challenges continue, cast in terms of whether an incentive plan was intended to evade or was inconsistent with the purposes of the ADEA, or whether it required involuntary early retirement.

Prior to the OWBPA, § 4(f)(2) of the ADEA was concerned with whether an employer practice was a "subterfuge" to evade the purposes of the Act. The OWBPA discarded the term "subterfuge", and required that voluntary retirement incentive plans be "consistent with the relevant purpose, or purposes of" the ADEA. The statute makes benefit plans -- other than voluntary retirement incentive plans -- which cannot be justified in terms of an equal benefit/equal cost principle illegal. However, due to the fact that some courts had utilized the same or similar equal benefit/equal cost principle as the standard of evaluation prior to the advent of the OWBPA, some "subterfuge" case law continues to be relevant to the post-OWBPA/ADEA.

Participation in an exit incentive program must be truly voluntary. Because the OWBPA expressly states that voluntary retirement plans are permissible under the ADEA, pre-OWBPA case law which held as such in addressing the voluntariness issue is still relevant. No bright-line distinction exists to determine whether a plan is in fact voluntary. Therefore, the courts consider a number of factors. Two identified in *Henn v. The National Geographic Society*, 819 F.2d 824 (7th Cir. 1987) are: 1) time to consider the agreement; and 2) whether the choice, under the circumstances, was essentially forced upon the employee.

In *Henn*, the plan was considered to be voluntary at least in part because the employees were given two months to decide to accept it or not. The *Henn* court was apparently otherwise unimpressed by what amounted to a coercion argument, opining that voluntarism in fact existed as long as the employees had adequate time to consider an offer, and appropriate information, even if they "felt pressure and perceived the choice to be excruciating." *Henn*, 819 F.2d at 829. Indeed, the *Henn* court concluded that separation from employment under such circumstances would be deemed to be involuntary only if it constituted a constructive discharge.

Conversely, just 15 days was found adequate in *Bodnar v. Synpol, Inc.*, 843 F.2d 190 (5th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988) while a period of time ranging from three days to one day involving multiple plaintiffs was held to be inadequate in *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81 (2nd Cir. 1987) ("employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice ... the amount of time reasonably required ... will vary depending upon the circumstances of each case.")

For a program to be truly voluntary, a document describing the program must make it clear that it is *optional* for the employees. In addition, management statements should not be inconsistent with this document. The employee must sign the document voluntarily and without coercion. A statement simply stating that his/her decision to retire under the early retirement inducement program was voluntary and not coerced would not meet the spirit or the intent of either pre or post-OWBPA case

law. Providing the employee with a sufficient period of time in which to make the retirement decision helped evidence that the decision was not coerced before the OWBPA and now it is required by the OWBPA. Finally, the document should encourage the employee to speak to his/her attorney.

As far as cost justifications for differentiation in employee benefits are concerned, if they are based on age, generally, the OWBPA prohibits it except when age-based reductions in employee benefit plans are justified by significant cost considerations. Therefore, the OWBPA permits employers to provide older workers fewer benefits but only when the actual amount of payment made or cost incurred on behalf of an older worker is no less than that for a younger worker. What does this mean? It means that an employer can provide reduced life or health insurance benefits to older workers if it pays at least the same amount for those benefits as it pays for benefits for younger workers.

What about severance pay plan offsets? Under the OWBPA, employers can offset severance payments to older workers by the value of any retiree health benefits provided to an individual eligible for an immediate pension. Severance payments can also be offset by the value of any additional pension benefits or "sweeteners" provided to employees who are eligible for an immediate and unreduced pension.

The OWBPA provides the rules for determining the value of pension benefits and retiree health benefits to be deducted. The OWBPA also provides that early retirement subsidies or payments that reduce or eliminate the actuarial reduction for early retirement, or certain social security supplements paid from a defined benefit plan to older workers may offset severance payments.

What about long term disability payment setoffs? The OWBPA also allows employers to reduce the amount of an older worker's long-term disability benefits by the value of pension benefits an older worker voluntarily elects to receive (other than benefits attributable to employee contributions) or that the older worker receives because of the attainment of the later of age 62 or normal retirement age.

Please note that these benefit-offset sections are complex, and the OWBPA contains detailed methods for the calculations necessary to determine if an early retirement incentive program is in compliance. Further, because employees could challenge not just the facial requirements but the actual effects of a program with differential benefits, a statistical analysis of how a program benefits employees of different ages may be appropriate.

### **C. Releases and Covenants Not To Sue Under the 1998 OWBPA Regulations**

Employers frequently offer terminated employees additional severance benefits in exchange for a general release of all claims relating to or arising out of the employment relationship or its termination. The employer pays the additional benefits to insure against post-termination litigation; many employees may be dissuaded from contemplating legal action after signing a release and agreement not to sue in exchange for money or extended benefits, or both.

However, employees who choose to pursue a claim of age discrimination can allege a number of grounds on which they can challenge and avoid the effect of the release they signed. The following sections analyze the specific minimum requirements for the valid release of age discrimination claims that have been adopted in the OWBPA.

Codifying various court decisions, the OWBPA requires releases of age discrimination claims to be "knowing and voluntary". It also sets forth the minimum requirements for releases and waivers in standard terminations, RIF terminations, and settlements of pending age discrimination claims. See 29 U.S.C. § 626(f)(1). The OWBPA also establishes that the party asserting the validity of the waiver, the employer, has the burden of proving that the waiver satisfies these requirements.

The final EEOC regulation on the waiver provisions of the OWBPA became effective on July 6, 1998. See 29 C.F.R. § 1629.22. The regulation was developed in 1996 through a negotiated rule-making. A committee was established, of which this author was a part, consisting of employee, management and EEOC representatives. The OWBPA requirements for a "knowing and voluntary" waiver, accompanied by the new regulatory clarification, are set forth below.

*a. Be written in understandable English. The release must be written in language that can be understood by the employee.*

According to the regulation, this means that the release must be drafted in "plain language" which is geared to the level of comprehension and education of the individual or the average person eligible to participate in a group termination program; is written in a language understood by the individual (i.e., may need to be translated from English); limits or eliminates the technical jargon; and limits or eliminates long complex sentences.

*b. Refers to ADEA protection. The release should specifically tell employees they are relinquishing rights or claims arising under the ADEA.*

Oddly, this provision, perhaps easiest to fulfill, has not always been strictly construed. See *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996) (unsigned release of ADEA claim enforced despite lack of reference to the statute.) The regulation and the Supreme Court decision in *Oubre*, emphatically suggest that this will no longer be the case.

The regulation specifically states that "the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver"; reference to only the OWBPA will not suffice.

*c. Make no waiver of future claims. The employee cannot waive rights or claims that "arise" after the date the release is signed. (This provision was inserted so that waivers signed under the OWBPA are less comprehensive and less effective than pre-OWBPA waivers).*

In repeating the statutory language, the regulation emphasizes that claims arising after the signing date but before the effective date (i.e., during the seven day revocation period) cannot be waived by the release.

Some uncertainty has arisen over the breadth of the OWBPA requirement that the individual not be required to "waive rights or claims that may arise after the date the waiver is executed." Did this mean that a release signed prior to the employee's last moment on the payroll opens the employer



up to some period of risk? Some employers permit employees to stay on their premises and on the payroll for some period of time after notifying them that they are to be released. They may also give such employees time to search for other jobs inside or outside the company. If they executed a release some time before their last day of actual employment, does it cover events between the date of execution and the last day of actual employment? *Norton v. Houston Indus.*, 65 EPD ¶43,252 (S.D. Tex. 1994), held that a release executed before an employee's last day of employment, which purported to cover all events until employment actually ended, did not involve a "waiver of future rights." That was also the issue in *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 533-34 (7th Cir. 1996). The employee there had signed one release after being informed of his termination, but before the expiration of a retention period. The employer asked the employee to execute another release when the employee actually left the payroll, but the employee refused. The court refused to hold that the first release covered events during the retention period.

The proposed regulations do not directly address this issue, but they seem to validate the practice of permitting employees to execute releases before their last moment of employment. 29 C.F.R. §1625(c)(2).

If an employer is going to permit employees some "retention period," and is not going to use a two-release strategy, holding some benefits back until after the last day that are made contingent on executing a second release, there is still some uncertainty as to whether the employee could file suit over such things as an unsuccessful application for a job opening that occurred during the retention period. From a litigation avoidance perspective, under a single release scenario, a release executed prior to an employee's last day on the rolls should specify in the plainest terminology the employee's status during the post-execution pre-termination period.

*d. Add additional compensation. The employee must receive compensation in addition to anything to which he/she already is entitled.*

This was a reaction to the Third Circuit's decision in *Dibiase v. Smithkline Beecham Corp.*, 48 F.3d 719 (3rd Cir. 1995) *cert. denied*, 116 S. Ct. 306 (1995), where the Third Circuit reversed the decision of the district court which had held that the employer had violated the ADEA by offering, in connection with a severance package, to employees both those within and without the protected class, the same severance benefits in exchange for such releases. Two of the members of the negotiated rule-making committee, this author and Cathy Ventrell-Monsees from AARP, had written an amicus in the *Dibiase* appellate court case. The district court had held that it was discriminatory not to offer extra consideration to those protected by the ADEA, because "persons age 40 and older are required to release more ... than ... persons under age 40 ... to receive the same ... benefits." In reversing the district court, the Third Circuit simply observed that existence of the ADEA did not, by that fact alone, make a 50-year old's 'accrued claims' worth more than any other individual's accrued claims.

A contentious issue between plaintiffs' and employers' counsel in the committee that drafted the proposed regulations was whether "additional consideration" was involved if an employer amended an existing severance pay plan which had not previously incorporated a requirement to sign a release to get benefits, and imposed such a requirement shortly before a RIF. The two sides didn't

budge, and the proposed regulations fail to address it:

If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of Section 7(F)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

29 C.F.R. §1625(d)(3).

As a concession to management, the regulation confirms the *Dibiase* decision in that it allows that persons over 40 need not receive greater consideration than persons under 40 solely because they are in the protected class. However, this concession is a trap. While it may seem a simple requirement, it can result in noncompliance under certain circumstances. See *U.S. EEOC v. Johnson & Higgins*, 5 F.Supp. 2d 181 (S.D.N.Y. 1998) (facially-compliant OWBPA waivers executed in exchange for consideration of \$1,000 each subsequent to finding that mandatory retirement policy violated ADEA deficient with respect to adequacy of consideration; EEOC calculations indicated that lawsuit damages would entitle retirees to somewhere between three-ten million dollars each, and court concluded that because the retirement policy at issue had been found illegal, it would be impossible to construe the "benefits" to which the employee was "already entitled" at the time of signature.)

*e. Suggest consultation with an attorney. The employee must be advised in writing to consult with an attorney before executing the release.*

In the situation where the employee is already working with a lawyer, it is reasonable to presume that the OWBPA will be satisfied if the agreement indicates that the employee has consulted with an attorney, and the attorney certifies that such consultation has taken place. Where no attorney is involved, the employee has to go out and find one. This can pose some risk to the employer depending on the advice the employee receives.

This straightforward requirement can be implicated if an employer tries to "get cute" with the language of the release and soft-peddle the "advice" to seek legal counsel. American Airlines recently ran afoul of this requirement in *American Airlines v. Cardoza-Rodriguez*, 75 FEP Cases 1217 (1st Cir. 1998). Employees were required to sign an "election form" indicating their intent to participate in the "Voluntary Early Retirement Program" ("VERP"). The election form, which employees had 45 days to consider signing, advised them that, on their last day on the payroll, they would be required to sign a release, but it contained no reference to consultation with an attorney, despite advising employees to consult with financial and tax advisors, to attend retirement seminars and to seek advice from personnel representatives. The actual release contained the following language: "I have had reasonable and sufficient opportunity to consult with an independent legal

representative of my own choosing before signing this Complete Release of All Claims." Holding that the statute meant what it plainly said, the court ruled that American had failed to comply with the OWBPA:

[S]ection 626(f)(1)(E) provides that a waiver is not knowing and voluntary unless the "individual is advised in writing to consult with an attorney prior to executing the agreement." To advise is to "caution," "warn" or recommend. See Webster's Third New World International Dictionary 32 (1986). This statutory requirement could not be more clear nor its purpose more central to the statutory scheme at issue.... The failure to advise the employees to consult with counsel goes to the heart of the statute's purpose.

*Id.*

The company was only spared ADEA litigation because the court held that employees' claims accrued as of the date they signed the VERP Election Forms, and none of them had filed charges within 300 days of signing the form.

*f. Provide 21 days to decide. The employee must be given a period of at least 21 days in which to decide whether to sign the release.*

The OWBPA requires that the employee be "given a period of at least 21 days" within which to consider the release. 29 U.S.C. § 626(f)(1)(F)(i). It was decided during the rule-making that Congress intended only that employee have *the option* of waiting 21 days while considering whether or not to release their claims, and that Congress did not absolutely intend that the employee wait 21 days before the agreement could be accepted. Employers should include in the release a statement informing the employee that he/she has 21 days in which to determine whether to accept the terms of the release. If practical, employers should also remind employees who attempt to execute agreements quickly that they have the full three weeks. Many employees are likely to want to obtain the additional severance benefits offered in exchange for the release before the full 21 days have elapsed. If the employee has knowingly waived his/her right to the three-week consideration period, this condition should be satisfied.

The danger is where the 21-day period is extended due to severance pay negotiations. Where possible, any extension should be clearly stated and in writing. The regulation states that the 21/45 day consideration period starts from the date of the employer's "final offer"; material changes to the offer will restart the consideration period; however, the parties may agree that changes do not restart the running of the consideration period. The regulation also states that an employee may sign a release prior to the end of the 21 or 45 day time period, thus commencing the mandatory 7 day revocation period as long as the employee's decision to accept such shortening of time is knowing and voluntary. The regulation further provides that if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

*g. Provide seven days to revoke. The employee must be advised in writing that he/she has the opportunity to revoke the release within seven days after signing it. 29 U.S.C. § 626(f)(1)(G).*

Somewhat ironically or maybe as a result of the negotiations that took place during the rule-making, execution of a waiver in relation to a pending charge or lawsuit under Section 626(f)(2) of the statute (relating to claims under the ADEA) is subject only to the first seven requirements of the OWBPA to make such a waiver "knowing and voluntary". However, there are additional requirements where an ADEA charge or lawsuit is not pending. The first is the twenty-one (21) day consideration period. The second is the seven (7) day revocation period. Under the regulation, the seven (7) day revocation period cannot be shortened whether the employee wants to or not. There was perhaps the most heated debate of the rule-making process over this provision. The employer-representatives wanted the 7-day period to be absolute. The employee-representatives argued that the 7-day revocation period should be subject to being shortened also. Management won out on this one.

In light of the fact that the employee has seven days from the date he/she signs the release to revoke it, the incentive pay and any other incentive should not be provided until after the seven-day revocation period has elapsed. Because the OWBPA is silent on this issue, the employer should clearly establish how revocation is to occur. Although employers cannot require an employee to revoke the agreement in writing during the seven-day period, they should require at least a telephone call to the designated representative(s) communicating the revocation, or a detailed message that the employee has called to communicate the revocation of the release agreement. These issues were tackled at the rule-making but the parties could not come to a consensus. Everyone involved finally agreed to leave it to the courts to determine the parameters of this provision.

Although a release and waiver that satisfies these new requirements may bar an employee's right to recovery on an ADEA claim, the OWBPA provides that no waiver agreement can affect the EEOC's rights and responsibilities to enforce the ADEA. The EEOC insisted on this escape clause. Also, the OWBPA states that "no waiver may be used to justify interfering with the right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." This was another issue deemed paramount by the EEOC.

Thus, under the OWBPA, employers cannot prevent employees from instigating EEOC investigations and potential EEOC enforcement actions. However, if the waiver executed by an employee is valid, the employee should not be entitled to financially gain from participation in any EEOC proceeding.

Although the regulation does provide some guidance with respect to the contemplation period required by the law, the question remains with respect to the seven (7) day revocation period -- should it be implemented -- as to precisely what the employee is revoking: The entire agreement? Only the waiver of the age discrimination claim? Can the agreement be considered bifurcated so as to contemplate the release of one claim but not the other? Should there be more than one release respecting the different claims?

The preamble to the regulation emphasizes that Section 7(f) of the ADEA sets out the minimum standards for the validity of a waiver agreement, and that an agreement that "fails to meet all of the requirements of that section will not be valid." (Emphasis in the original.)

The regulation also addresses the terms "exit incentive program" and "employment termination program," which were left undefined by the law. An exit incentive program is defined as a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled ... in exchange for their decision to resign voluntarily and sign a waiver.

"[O]ther employment termination program" is defined as:

*[A] group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.*

The EEOC follows these explanatory precepts by noting that the question of the existence of a "program" will be decided "based on the facts and circumstances of each case," indicating that a "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. This was another matter left for the courts to flesh out.

Several employers have tried to argue - quite unsuccessfully - that an involuntary layoff in which special severance pay is offered in exchange for a waiver is not an "employment termination program." See *Raczak v. Ameritech Corp.*, 103 F.2d 1257, 1259 (7th Cir. 1997); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 682 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Clark v. United Techs. Corp.*, 1997 U.S. Dist. LEXIS 14148 (D. Conn. Sept. 3, 1997); *Elliott v. United Techs. Corp.*, 1995 U.S. Dist. LEXIS 19325 (D. Conn. May 19, 1995); *Burch v. Fluor Corp.*, 867 F. Supp. 873, 876-77 (E.D. Mo. 1994).

A more serious issue is posed by the question of, "How many terminations make a program?" It has proved to be critical for employers who want ADEA waivers to be enforceable to be extremely cautious before concluding that a small number of terminations are not really a "program." The number of employees involved need not be large for a court to conclude a "program" existed. *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994 (W.D. Mich. 1995), involved the termination of five managers, which the court believed constituted a "program." The regulations state that the question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination program such as a reduction in force to two or more employees.

The legislative history of the OWBPA suggests that the key distinction is whether the pay and benefits offered are standardized, with little or no opportunity for individual negotiation. This would generally be the case when the severance pay plan was ERISA-qualified, with a sliding scale of benefits dependent on job level and/or years of service. However, the proposed regulations state that the benefit plan at issue need not be an ERISA - qualified plan. 29 C.F.R. §1625(f)(1)(iii)(D).

The House Report accompanying the OWBPA cited another factor as pointing to the existence of a "program:" that the employer's communications to employees about their layoff indicated that the decision on their termination had been made on a group basis, as opposed to an individualized job performance basis. Thus, a RIF scenario where employees are rated and ranked within a division or work group contrasts for this purpose with a determination by senior management

that several managers are not performing adequately and that their department can be reorganized with their duties assumed by others. In the latter situation, if individualized releases and "packages" are offered to each affected employee, it would seem that a "program" sufficient to trigger the longer notice and statistical requirements did not exist.

The biggest concession the plaintiff group got from the management side during the negotiated rule-making was in the area of what kind of information must be provided. When release agreements are offered in the course of a RIF, employers now must include the following additional information in the releases given to employees age 40 or over:

*a. The class, unit, or group of individuals covered by the program: e.g., employees of "Division X" or "Store Y" or "Department Z";*

*b. The factors making an employee eligible to participate in the program: e.g., employees involuntarily terminated based on their position or geographical location; employees with X years of service;*

*c. Any time limits applicable to the program: e.g., that the plan is available until \_\_\_\_\_, 1998.*

*d. The job titles and ages of all individuals eligible or selected for the program: e.g., all clerical assistants, ages 25, 33, 44, and 52; or engineers, ages 29, 33, and 49; and*

*e. The ages of all individuals in the job classification, or "organizational unit" who are not selected for the program: e.g., department managers transferred and not discharged ages 26 and 38. See 29 U.S.C. § 626(f)(1)(H).*

Important regulatory provisions specifically applicable to the above include: 1) as indicated, a "group" or "class" is two or more employees; the scope of these terms is defined by a company's organizational structure and decision-making process; 2) the information about those eligible and ineligible must be provided in a format "explicitly" comparing them by the same job classification or organizational unit; the EEOC provides the model notification format which has all the information on the page rather than separate listings for eligible and ineligible employees; 3) job title or job category breakdowns will not be sufficient if there are grade levels or other subdivisions within those job titles or categories; 4) specific ages must be used (i.e., 40, 41, 42, etc.); age bands are prohibited (e.g., 40-45, 45-50, etc.); and 5) where an involuntary group termination takes place in "successive increments" over a period of time, special rules require cumulative information to be given.

In addition, employees terminated under this section must be given a period of at least 45 days, increased from the standard 21 days, in which to decide whether to sign the release. 29 U.S.C. § 626(f)(1)(F)(ii).

The disclosure of such information is to enable employees -- and lawyers investigating the merits of a potential age discrimination class action against a company -- to ascertain whether, for example, an RIF suggests a legally cognizable disparate impact upon those in the protected category. Although this information may be relevant in relation to a RIF, due to the fact that retirement programs are by nature voluntary under the OWBPA, disclosures in relation to such programs do not appear relevant to any logical end. In addition, if the data gathered suggests possible age discrimination, an employer will have difficulty proving that it did not willfully discriminate based on age if it does not conduct an investigation which concludes that discrimination is not in fact the case.

Prior to the regulation, there had been limited decision-making on the concepts of "job classification" and "organizational unit." *See, e.g., Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368 (11th Cir. 1995) (employer obligated to provide data for more than just the plant being closed; to limit individuals in the same "job classification or organization or unit" to a single plant would be to read the statute's words "contrary to the naturally broad meaning.")

The EEOC clarified these terms in the regulation by adopting a new concept known as the "decisional unit." This term was developed to reflect to the process by which an employer chose certain employees for a program and screened other employees out. Because the term hinges upon the ramifications of the term "process," the application of the decisional unit precept will be very fact-specific. This, too, is a trap. The following language from the regulation suggests the potential problems which the decisional unit concept presents employers:

*Likewise, if the employer analyses its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at different facilities, and determines to focus its work force reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facilities selected for reductions.*

Under this case-by-case method, for example, if an employer is seeking only to reduce its workforce at a particular facility, that facility would be considered the decisional unit, or would it? If the focus was simply on a subgroup of that facility, the subgroup might not constitute the decisional unit. The fact that a termination decision is reviewed by upper management could serve to change the size of the decisional unit even where the review does not alter the initial scope. Should an involuntary termination program take place in increments over a period of time in a decisional unit, the employer should provide the required information for all persons in the decisional unit from the beginning of the program. The rule does not clarify and there was no consensus on the issue of whether successive RIF's are separate events, or part of a single event. There may be a duty to update information given to previously terminated employees even if the disclosure at the time met the requirements.

It may be that in certain RIF situations employers will choose not to provide such detailed information in the release out of fear that employees will use the information to initiate individual or class age discrimination actions. In these cases, employers can obtain a release of all other potential employment-related claims, but not a release of employees' potential federal age discrimination claims.

Furthermore, the courts may at some point determine that the employer's failure to provide adequate information in a RIF situation is itself a separate and independent ADEA violation.

Finally, as one last concession by management in the rule-making, the regulation states that the party asserting the validity of the release/waiver has the burden of showing that it was knowing and voluntary. Generally the party who has the burden of proof on an issue has the harder time of it in litigation.

#### D. Ratification and Tender Back

Prior to the OWBPA, releases of claims under the ADEA entered into without EEOC supervision were often deemed valid, precluding subsequent claims of discrimination. *See Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir.), cert. denied, 493 U.S. 924, 110 S.Ct. 292 (1989); *Cirillo v. Arco Chem. Co.*, 862 F.2d 448 (3rd Cir. 1988); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), cert. denied, 482 U.S. 928 (1987); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir. 1986) (en banc), cert. denied 479 U.S. 850(1986); *Widener v. Arco Oil & Gas Co.*, 717 F. Supp. 1211,1215-17 (N.D. Tex. 1989).

The courts diverged, however, on the appropriate analysis respecting the enforceability of a release submitted by the employer as barring the prosecution of a claim under the ADEA. For example, the Sixth and Eighth Circuits purported to apply ordinary contract principles when determining whether a plaintiff knowingly and voluntarily waived his or her ADEA claims, while most other circuits utilized a "totality of circumstances" approach to the validity of a release of discrimination. *See Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) (ordinary contract principles apply); *contra, Torrez v. Public Serv.Co. of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990) (totality of circumstances test).

After October 16, 1990, the effective date of the OWBPA, employers found themselves confronted by ADEA lawsuits from former employees who maintained that their age discrimination claims were not foreclosed due to the fact that the waivers they had signed were not in conformance with the requirements of the OWBPA. Faced with such claims, employers raised defenses based on common law tender back and ratification doctrines, which required an employee seeking to avoid a contractual waiver/release to tender the consideration he or she had received for the release as a condition precedent to the ability to bring such a lawsuit, the failure to do so constituting ratification of the release or waiver. Before the decision in *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), the federal courts were highly divided over the issue of whether tender back/ratification doctrine was somehow able to survive congressional mandate ("statutory nullification") in this regard. *See, e.g., Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993) (the language of the OWBPA forbids ratification of deficient waiver; tender back requirement would deter meritorious challenges to ADEA releases); *contra, Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993) (choice to retain and not tender back benefits paid in consideration of promise not to sue manifests intention to be bound by waiver and new promise to abide by terms).



### E. Proposed Regulation

As noted before, the EEOC has proposed adopting a regulation to deal with issues raised by *Oubre*. With respect to the tender back situation, the EEOC cites to *Oubre*, and states that the case has disposed of the issue in its holding that an employee seeking to challenge the validity of an ADEA waiver or release is "not required to tender back consideration to the employer before bringing legal action."

Subsection (i)(3) of the proposed regulation, § 1625.23(c), states that:

No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) file a charge or complaint, including a challenge to the validity of the waiver agreement, with the EEOC, or

(ii) participate in any investigation or proceeding conducted by EEOC.

According to the EEOC, this section was promulgated at least in part to prevent the enforcement of a tender back requirement as a prerequisite to the filing of an EEOC charge. However, on its face, the section would does not appear to preclude other employer defense/recovery alternatives, such as:

a. a counterclaim for the consideration expended by the employer exchanged for the waiver in the lawsuit ultimately brought by the employee; and/or

b. a suit for the consideration exchanged for the defective waiver in a contract action subsequent to the expiration of an employee's rights with respect to an EEOC charge.

As long as there is no "tenderback" precondition [the employee's] (invalid) promise will not have barred his or her suit in conflict with the statute. Once the employee has sued, however, nothing in the statute prevents the employer from asking for restitution of his reciprocal payment or relief from any ongoing or reciprocal obligation. *Oubre*, 118 S.Ct. at 844.

Post-*Oubre* case law has generally supported these principles. See, e.g., *Butcher v. Gerber Products Co.*, 8 F. Supp. 2d 307 (S.D.N.Y. 1998) (holding that the employer's failure to provide the requisite information to RIF'd employees could not be cured, and that "self-help" in the termination of benefits once participation in protected activity (an ADEA lawsuit) was known constituted retaliation, the court nevertheless also noted, citing *Oubre*, that the defendant had affirmative defenses for recoupment and setoff); *Rangel v. El Paso Natural Gas Co.*, 1998 U.S. Dist. LEXIS 2119; 76 F.E.P. Cases 445 (1998) (extending *Oubre* to Title VII in rejecting ratification defense, court

nevertheless decided it would "offset the amount [plaintiff] received for severance pay from [his employer] against any monies he recovers in this cases."

From the plaintiffs' standpoint, plaintiffs lawyer may have disagreement with this subsection. Plaintiffs lawyers generally believe that recovery by the employer should be available only when there is an award to the employee; that is, when the employee successfully challenges a waiver but does not prevail on the merits, no recovery of any amount paid for the waiver should be allowed.

To allow the employer to recovery amounts paid for an unenforceable waiver should the employer ultimately prevail on the merits would undermine the entire thrust of the proposed rulemaking. The Commission's aim would seem to be to prevent efforts by employers to use the amounts paid for invalid waivers as an *in terrorism* device to chill ADEA suits. An employee will not challenge even a clearly invalid waiver at the price of returning a severance check and the peril of paying the defendants costs if he or she loses.

In its textual comments accompanying the proposed rulemaking, the Commission shows that it is keenly aware of such chilling effect. As the Commission notes in the textual material, the tender back requirement was inconsistent with the OWBPA legislative history and Oubre, which make clear that Congress contemplated that litigation should be available to decide the validity of waiver agreements. A limitation of recovery of waiver consideration to those instances where the employee obtains a damages award, and only to the extent of the award is consistent with the Commissions' purpose.

This limitation is not fundamentally unfair to the employer and would aid compliance with the OWPBA. Since the employer is responsible for providing the disclosures and following the procedures under OWBPA needed to make any waiver enforceable under that section, it can only blame itself for a waiver's unenforceability. As the Commission puts it in its textual material, "[i]f a waiver is not upheld because it is not knowing and voluntary under the ADEA, the employer has no right to the benefit of its bargain." And by limiting recoupment to the amounts awarded as damages, the employer will have an additional incentive to "do it right" as far as OWPBA compliance goes by providing the employee with all the procedural protections and substantive information that the Act contemplates.

It may be that the proposed text in fact limits recovery by the employer only to those situations where there is a damage award to be reduced. This is suggested by the accompanying text which states that the restitution, recoupment or setoff should "never exceed the lesser of the consideration given or the damages won." Whether or not this is the case, it is submitted that the proposed regulation should be clarified to prohibit recovery unless there is a damages award.

There is another apparent flaw in the proposed regulation and that is how it deals with or doesn't deal with payments made in severance from a third party like a pension plan. Is the employer entitled to a setoff from those kinds of payments? The proposed regulation appears to permit this.

It is not uncommon for a waiver to be "purchased" by an enhanced pension award. While the Supreme Court has in recent years upheld the employer's right to amend a plan so as to purchase waivers with pension plan assets, there is no suggestion anywhere in these cases or in ERISA that these funds belong to the employer. To the contrary, ERISA is clear that the assets of a plan belongs solely to the plan. The proposed rulemaking should provide that the employer has no right to seek reduction in a damages award for monies to provided by a pension plan or other third party.

#### F. State Law on Age Discrimination Releases and Covenants Not To Sue

Many state courts follow decisional law under the ADEA when construing their state age discrimination statutes. It would therefore seem appropriate for states to adopt the analysis of release validity prevailing in the applicable federal circuit, and absorb the minimum requirements set forth in the OWBPA as well. *See McBriarty v. Am. Tel & Tel. Co.*, 52 F.E.P. Cas. (BNA) 58, 60 n.3 (D.N.J. 1990). However, the law on releases and particularly the law on covenants not to sue is a product of state contract law. States may individually assess the validity of releases to employment actions under tests applied to regular contract claims.

In New York, for example, in an appellate decision the court ruled that settlements and release forms in employment cases are entitled to routine handling, rejecting the view that discrimination cases are entitled to a higher level of scrutiny than ordinary contract cases. *Skluth v. United Merchants & Manufactures, Inc.*, 559 N.Y.S. 2d 280 (App. Div. 1990). The court found that because the employee was an educated experienced businessperson who had ample time to seek legal counsel and was not prevented or discouraged from doing so by the employer, the presence of an attorney was not required to show that the release was signed willingly:

There is, certainly, no requirement in the law that consultation with a lawyer must occur in order to render a contractual obligation enforceable, even one relinquishing a discrimination claim, so long as the agreement has been knowingly and voluntarily entered into. Although a party's representation by an attorney is some evidence of the knowledge and volition with which a particular contract was made, the absence of counsel is far less critical than the opportunities to consult counsel.

*Id.* at 282.

Even more removed from the "totality of circumstances" analysis of employee release forms is an employee's agreement not to sue the employer on the release claims. Under general contract law, there is a distinction between a release and a covenant not to sue:

"[A] covenant not to sue is an agreement by one having a present right of action against another not to sue to enforce such right. A covenant not to sue is not a release since it is not a present abandonment of a right or claim, but merely an agreement not to enforce an existing cause of action. Such distinction, although technical, is nevertheless clear. Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit; however, [the party] may be compelled to respond in damages for breach of the covenant."

*Colton v. New York Hosp.*, 385 N.Y.S. 2d 65, 66 (1976).

While a covenant not to sue can be deemed to operate as a release and bar an underlying action,

a separate action lies for recovery under the covenant even if the covenant is found not to bar the claim. The employee's agreement to a covenant not to sue provides the employer with either a counterclaim or a separate cause of action for breach of the covenant not to sue. If the employer's claim is upheld, damages for breach of the covenant not to sue include all damages flowing from the breach, theoretically including any damages the employee obtains through the claim or lawsuit brought in violation of the covenant.

Under some circumstances, an employer's litigation expenses can be recovered as well. *See, e.g., Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523 (2d Cir. 1985). However, it may be risky if an employer attempts to include a covenant not to sue in an agreement with a terminated employee that also contains the employee's release and waiver of a federal age discrimination claim.

If the covenant not to sue is construed as asking the employee to somehow waive a future right, its presence in the agreement could, because of the prohibition against such waiver of future rights in the OWBPA, render the release portion of the agreement invalid.

Also, it could be argued that if an agreement contains both a release and a covenant not to sue (and any other agreements such as confidentiality, protection of trade secrets, and the like) the consideration paid to the employee is diminished by the covenant not to sue. This makes possible an argument that inadequate consideration has been provided in exchange for the release.

## II. Impact on Discovery Involving RIFs

### A. Discovery of Events Prior to the RIF

Discovery requests by plaintiffs that seek data covering long periods - sometimes up to five or ten years prior to suit - are propounded with frequency. Courts have limited them on the ground of relevance in both ADEA and Title VII cases, but there is significant authority for permitting discovery over a long period of time. With the OWBPA regulations and with the EEOC's new proposed rules, broader discovery would seem justified.

Some courts have permitted two, three, and even five years of discovery prior to a RIF. *See, e.g., Finch v. Hercules, Inc.*, 149 F.R.D. 60, 65 (D. Del. 1993) (discovery permitted over a two-year period); *Zahorik v. Cornell Univ.*, 98 F.R.D. 27 (N.D.N.Y. 1983) (holding the proper date for discovery cutoff to be two years prior to the earliest date the plaintiff filed an EEOC charge); *Williams v. United Parcel Serv.*, 34 FEP Cases 1655 (N.D. Ohio 1982) (holding that three years prior to the last discriminatory act alleged would be sufficient); *Woods v. Coca-Cola Co.*, 35 FEP Cases 151 (M.D. Ga. 1982) (four years prior to termination); *EEOC v. Service Sys. Corp.*, 32 FEP Cases 1009 (W.D.N.Y. 1983) (three years before filing complaint); *Cormier v. PPG Indus., Inc.*, 452 F. Supp. 594, 596 (W.D. La 1978) (five-year discovery period allowed); *James v. Newspaper Agency Corp.*, 591 F.2d 579 (10th Cir. 1979) (four-year limitation had not unreasonably restricted plaintiff in her pre-trial discovery).

There have even been numerous cases in which longer discovery periods have been granted by a court. *See, e.g., Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49 (D.N.J. 1985) (denial of tenure and terms and conditions of employment, allowing plaintiff discovery covering a seven-year period); *Flanagan v. Travelers Ins. Co.*, 111 F.R.D. 42 (W.D.N.Y. 1986) (two-year back pay liability provision of Civil Rights Act could not be used by employer to limit employee's discovery to events

occurring two years before employee filed her EEOC complaint); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983) (trial judge overstepped bounds of discretion in limiting discovery to the two year period preceding the initiation of the action); *Nash v. City of Oakwood*, 90 F.R.D. 633 (five years permitted), *reh'g denied*, 94 F.R.D. 83 (S.D. Ohio 1982); *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3d Cir. 1983) (abuse of discretion to limit plaintiff to obtaining information going back no farther than 180 days from filing charge), *vacated and remanded on other grounds*, 468 U.S. 1201 (1984); *EEOC v. ISC Fin. Corp.*, 16 FEP Cases 174 (W.D. Mo. 1977) (five years before the filing of discrimination charge with EEOC); *Foster v. Boise-Cascade, Inc.*, 20 Fed. R. Serv. 2d 466 (S.D. Tex. 1975) (discovery allowed back to 1965, effective date of the Act).

### B. Discovery After the RIF

Again, because of the regulations and proposed regulations, it would seem that plaintiffs now have the right to seek data and information about the employer's post-RIF hiring and placement activity in an effort to determine whether the employer hired, placed or rehired "younger employees...at the expense of older employees." *Abel v. Merrill Lynch & Co.*, 1993 U.S. Dist. LEXIS 1213 (S.D.N.Y. Feb. 3, 1993). Employers that permit employees to seek positions in other units within the organization after notifying them that they are at risk in an impending RIF will find such discovery demands particularly difficult to resist. *Clarke v. Mellon Bank, N.A.*, 1993 U.S. Dist. LEXIS 6680, at \*7 (E.D. Pa. May 11, 1993) ("At the very least, the information sought would have bearing on whether the named employees were qualified for the positions which they were offered"). Likewise an employer that argues that damages should be limited because, even if the plaintiff should not have been RIFFed when he was, he would have lost his job later, in another RIF or plant shutdown. The plaintiff can cite Abel and Clarke in support of this discovery. *See also James v. Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979) (allowing discovery two years following a failure to be promoted); *Hicks v. Arthur*, 159 F.R.D. 468, 471 (E.D. Pa. 1995) (two years after discharge held a "reasonable time frame in which to conduct discovery").

### III. Conclusion

The EEOC's activity in its negotiated rule-making and its most recent proposed rules shows that the agency intends to strongly enforce the provisions and requirements of the OWBPA. Care should therefore be exercised when dealing with the issues discussed above.

**EEOC Proposed Rule Following *Oubre***

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1625

#### Waivers of Rights and Claims: Tender Back of Consideration

**AGENCY:** Equal Employment Opportunity Commission (EEOC)

**ACTION:** Notice of Proposed Rulemaking

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is publishing this notice of proposed rulemaking (NPRM) to address issues related to the United States Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

**DATES:** To be assured of consideration by EEOC, comments must be in writing and must be received on or before June 22, 1999.

**ADDRESS:** Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507.

**FOR FURTHER INFORMATION CONTACT:** Carol R. Miaskoff, Assistant Legal Counsel, or Paul E. Boymel, Senior Attorney-Advisor, 202-663-4689 (voice), 202-663-7026 (TDD).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

###### I. Introduction

In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court held that an individual was not required to return ("tender back") consideration for a waiver in order to allege a violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA). The Court explained that, because the release did not comply with the ADEA, plaintiff's retention of the consideration did not constitute a

ratification that made the release valid. Moreover, the employer could not invoke the employee's failure to tender back consideration as a way of excusing its own failure to comply with the statute.

EEOC is issuing proposed legislative regulations to address issues raised by the Oubre decision. In summary, EEOC's position is that: (1) an individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration as a precondition for challenging that waiver agreement; (2) a covenant not to sue or any other condition precedent, penalty, or other limitation adversely affecting any individual's right to challenge a waiver agreement is invalid under the ADEA; (3) although in some cases an employer may be entitled to setoff, recoupment, or restitution against an individual who has successfully challenged the validity of a waiver agreement, such setoff, recoupment, or restitution cannot be greater than the consideration paid to the individual or the damages awarded to the individual, whichever is less; and (4) no employer may unilaterally abrogate its duties under a waiver agreement, even if one or more of the signatories to the agreement successfully challenges the validity of that agreement under the ADEA.

## 2. The Older Workers Benefit Protection Act of 1990

Title II of OWBPA amended the ADEA to set out rules governing the validity of a waiver agreement. Section 7(f)(1) of the ADEA provides that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." Section 7(f)(1) provides a list of minimum requirements that must be met in order for a waiver to be knowing and voluntary. The statutory language and legislative history of OWBPA make it clear that the listing in § 7(f)(1) is nonexhaustive, and that even waiver agreements meeting the stated minimum requirements would not satisfy the ADEA if, under the totality of the circumstances, the waiver were not knowing and voluntary. As recognized in Oubre, the ADEA waiver rules extend to the tender back situation.

## 3. Tender Back Requirement Before Oubre

Prior to the Supreme Court's decision in Oubre, the circuits were split on the issue of whether an individual who signed an agreement waiving rights and claims under the ADEA was required to tender back any consideration paid by the employer in order to challenge the validity of the waiver in court. Several courts took the position that an individual who accepted consideration in exchange for a waiver agreement was not required to tender back that consideration to the employer before challenging in court either the validity of the waiver agreement or any employment discrimination. See, e.g., *Long v. Sears Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), cert denied, 118 S.Ct. 1033 (1998); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993). Other courts took the position that the tender back of consideration was necessary



before an individual could challenge the waiver and the discrimination in court. These courts concluded that by retaining the consideration, the individual "ratified" the waiver agreement and therefore could not challenge the agreement in court. See, e.g., *Blistein v. St. John's College*, 74 F.3d 1459, 1465-66 (4th Cir. 1996); *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993).

#### 4. The Oubre decision

In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court resolved the split among the circuits on the question of tender back. The facts in *Oubre* involved an employee who, upon her termination, signed an agreement waiving all claims against her employer in exchange for payments totalling \$6,258. The waiver agreement failed to comply with at least three of the requirements of § 7(f)(1) of the ADEA. It did not: (1) give her the statutorily mandated 21 days to consider the waiver agreement, but instead provided only 14 days; (2) give her seven days to revoke the agreement; or (3) make specific reference to ADEA claims. *Oubre*, 522 U.S. at 424. After the employee received all of the consideration for the waiver, she filed an ADEA suit against the employer without tendering back the consideration. The lower courts ruled that she could not proceed with her lawsuit because she had not offered to return the consideration to the employer, agreeing with the employer's arguments under state contract and common law. See *Oubre v. Entergy Operations, Inc.*, 112 F.3d 787 (5th Cir. 1996), rev'd 522 U.S. 422 (1998).

The Supreme Court reversed the Fifth Circuit's decision, stating that under § 7(f)(1) of the ADEA:

[T]he employee's mere retention of monies [did not] amount to a ratification equivalent to a valid release of her ADEA claims, since the retention did not comply with the OWBPA any more than the original release did. The statute governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply.

*Oubre*, 522 U.S. at 428. Thus, the Court allowed the employee's case to proceed even though she had not tendered back the consideration for the waiver agreement.

In its decision, the Court addressed three main concerns. First, the Court stated that the ADEA foreclosed the employer's argument that state contract law and common law principles apply to ADEA waiver issues. The Court emphasized that "the OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law." 522 U.S. at 427. The Court also noted that the contract law principles cited by the employer "may not be as unified as the employer asserts." *Id.* at 426.

Second, the Court reasoned that the practical effect of the employer's position, requiring tender back of consideration as a condition of bringing suit, could frustrate the purposes of the ADEA and lead to an evasion of the statute:

In many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification.

Oubre, 522 U.S. at 427.

Finally, the Court observed that lower "courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee, and these questions may be complex where a release is effective as to some claims but not as to ADEA claims." 522 U.S. at 428. The Court saw no need to resolve such questions in this case, however, and simply reversed the Fifth Circuit's judgment and remanded for further proceedings consistent with its opinion. *Id.*

#### 5.EEOC Negotiated Rulemaking on Waivers under OWBPA

In 1995 and 1996, EEOC conducted a negotiated rulemaking on ADEA waivers under OWBPA. Although the Rulemaking Committee considered the issue of tender back and ratification during its deliberations, the Committee decided that it would not reach consensus and the issue was not addressed in the regulatory language recommended by the Committee to the Commission. EEOC promulgated a final regulation at 29 C.F.R. § 1625.22 on June 5, 1998, 63 FR 30624. The preamble to the final regulation confirmed that the issues raised in Oubre would not be addressed in that section, but that the tender back issue would be covered in other guidance.

#### B.Purpose and Discussion of this Proposed Rule

1.Purpose: Pursuant to its regulatory authority under § 9 of the ADEA, EEOC has developed this proposed legislative regulation to address issues related to the Oubre decision. This proposal would add a new legislative regulation at 29 C.F.R. § 1625.23.

2.Discussion: This regulation sets forth EEOC's position on several important issues concerning tender back.

a.An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices

agency. Retention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver. A clause requiring tender back is invalid under the ADEA.

(i) The Oubre Decision: The Court in Oubre made it clear that “[a]n employee ‘may not waive’ an ADEA claim unless the waiver or release satisfies the OWBPA’s requirements. . . . Courts cannot with ease presume ratification of that which Congress forbids.” 522 U.S. at 427. The Court emphasized that “the employee’s mere retention of monies [does not] amount to a ratification equivalent to a valid release. . . .” *Id.* at 848.

The facts of the Oubre case concerned a waiver agreement that clearly did not satisfy at least three of the requirements of § 7(f)(1), and thus was invalid on its face. However, the holding and rationale of Oubre, which are based on the ADEA as well as important public policy concerns, are not limited to cases in which the terms of the waiver agreement are facially invalid. The ADEA’s overarching standard is that waivers must be knowing and voluntary, and the specific provisions in § 7(f)(1) are only minimum requirements. While a waiver agreement that fails to meet these minimum criteria cannot be knowing and voluntary, even agreements that do meet these criteria still may not be knowing and voluntary under the ADEA.

For example, a waiver agreement that meets all of the enumerated requirements in § 7(f)(1) still would not be knowing and voluntary if the employer obtained an employee’s signature by force or compulsion. As another example, an agreement might state on its face that an individual had 45 days to accept the offer. If the individual in fact were given only 5 days to make this decision, the waiver would not be knowing and voluntary under the ADEA. See 29 C.F.R. § 1625.22(e). Finally, with regard to the informational requirements under § 7(f)(1)(H), it is impossible to assess an employer’s compliance by a mere examination of the waiver agreement. These requirements depend on the unique facts of a particular workforce reduction or voluntary termination program. See 29 C.F.R. § 1625.22(i); see, e.g., *Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368 (11th Cir. 1995)(analyzing the validity of the information provided under § 7(f)(1)(H), the court found that, where the employer may have considered several plants for closure before it decided to close the plant at issue, it might need to provide information about employees at multiple facilities).

In summary, compliance with § 7(f)(1) of the ADEA cannot be determined based solely on the face of a waiver document. Because a waiver agreement may be invalid due to circumstances beyond the document itself, the Supreme Court’s rationale in Oubre precludes tender back as a condition for any lawsuit or charge.

(ii) ADEA Statutory Language and Legislative History: In the ADEA, as amended by the OWBPA, Congress clearly contemplated that courts would decide the validity of waiver agreements. A requirement of tender back would, as the Oubre Court pointed out, effectively prevent access to the courts for many employees and therefore would undermine this statutory scheme.

Section 7(f) of the ADEA contemplates that the courts have the authority to determine the validity of a waiver agreement. Section 7(f)(3) states that:

In any dispute that may arise over whether any of the requirements [of §§ 7(f)(1) or (2)] have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(Emphasis supplied). Thus, the statute does not envision a waiver agreement as a complete bar to litigation, but rather suggests that a waiver is an affirmative defense. A tender back requirement would be inconsistent with this statutory design.

A tender back requirement is inconsistent with the OWBPA legislative history, which also shows that Congress contemplated that litigation would be available for deciding the validity of waiver agreements. Here, Congress expressly stated that the burden of proof described in § 7(f)(3) establishes “an affirmative defense.” See S. 1511, Final Substitute Statement of Managers, 136 Cong. Rec. 13596-97 (1990). In reference to an earlier version of the OWBPA legislation, the Senate Committee on Labor and Human Resources explained:

The Committee expects that courts reviewing the “knowing and voluntary” issue will scrutinize carefully the complete circumstances in which the waiver was executed. . . . The bill establishes specified minimum requirements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was “knowing and voluntary.”

S. Rep. No. 101-263, at 32 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537 (hereinafter “Senate Report”).

The law also is clear that a waiver agreement cannot interfere with an individual's right to file a charge of discrimination or assist EEOC in any administrative or legal proceedings. Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may 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 Commission.

See also 29 C.F.R. § 1625.22(i); EEOC Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes, #915.002, April 10, 1997, 3 EEOC Compl. Man. (BNA) No. 2345. In light of the Oubre Court's concern about the chilling effect of a tender back requirement, imposition of such a requirement as a condition for filing an EEOC charge clearly would "interfer[e] with the protected right of an employee to file a charge . . ." and therefore would contravene the statute. 29 C.F.R. § 1625.22 (i).

b. A covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement, is invalid under the ADEA, whether the covenant or other arrangement is part of the agreement or is contained in a separate document. A provision allowing an employer to recover costs, attorneys' fees, and/or damages for the breach of any covenant or other arrangement is not permitted.

(i) Covenants not to sue and other similar arrangements purport, on their face, to bar an individual's right to challenge a waiver agreement in court. Like a tender back requirement, such a covenant or other arrangement directly offends the congressional intent to afford an individual the right to challenge the validity of a waiver agreement. The ADEA clearly envisions that courts would have authority to determine the validity of the waiver and, therefore, necessarily contemplates that individuals would have the opportunity to bring such a challenge. See § 7(f)(1) of the ADEA (setting out the specific standards for a court to determine the validity of a waiver agreement); § 7(f)(3) of the ADEA (referring to a "court of competent jurisdiction" as the entity expected to decide the validity of a challenged waiver); accord Senate Report at 32. See also *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1271 (6th Cir. 1997) ("[i]t was the intent of Congress that waivers would not preclude parties from bringing suit under the OWBPA"), cert denied, 118 S.Ct. 1033 (1998).

(ii) Covenants not to sue and other such arrangements also carry with them the threat of a counterclaim for breach of the covenant and liability for costs, attorneys' fees, and damages. The threat of such a counterclaim or a similar threat<sup>2</sup>, with the prospect of being forced to pay defendant's legal expenses, easily could chill persons with valid claims from challenging waiver agreements.

This chilling effect runs counter to the purposes of the ADEA, a remedial civil rights statute that encourages employees to challenge illegal conduct by employers. See generally, *Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*, 16 F.Supp. 2d 90, 106 (D. Mass. 1998) (“[u]nder Bull’s proffered interpretation, employers could functionally insulate themselves from ADEA suits and ignore the waiver provisions of the OWBPA simply by including a drastic penalty provision in the waiver as Bull has done. This interpretation offends the intent of Congress. . . .”); *Carroll v. Primerica Financial Services Insurance Marketing*, 811 F.Supp. 1558 (N.D.Ga. 1992); *Isaacs v. Caterpillar, Inc.*, 702 F.Supp. 711, 713 (C.D.Ill. 1988); *EEOC v. United States Steel Corp.*, 671 F.Supp. 351, 358-59 (W.D.Pa. 1987) (the court enjoined a waiver provision wherein an employee promised not to file a charge or claim under the ADEA since the waiver “has the potential of deterring individuals from participating in ADEA claims. . . . [I]f an individual is deterred from bringing such an action in the first instance, the validity of the waiver of rights will not be able to be determined.”)

A position permitting covenants not to sue or similar arrangements would render the OWBPA amendments and the Oubre decision a nullity. Such provisions, coupled with the threat of counterclaims, would as a practical matter undo the ADEA’s carefully crafted criteria for a knowing and voluntary waiver by encouraging employers to ignore those provisions. This in turn would undermine the ADEA’s objective to “ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.” Senate Report at 5. EEOC does not find cases allowing covenants not to sue persuasive, because they are fundamentally at odds with the holding and rationale of the Supreme Court in *Oubre*. See, e.g., *Astor v. International Business Machines Corp.*, 7 F.3d 533, 540 (6th Cir. 1993) (covenant not to sue permissible in release of ERISA rights); *Artvale Inc. v Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966).

(iii) An employer does not need to bring a counterclaim to obtain what it purchased with the waiver. With a valid waiver, an employer receives an affirmative defense against ADEA claims. See *Isaacs v. Caterpillar*, 765 F.Supp. 1359, 1371 (C.D.Ill. 1991); Senate Report at 53. Assuming that a waiver agreement is upheld in court, and consequently serves as an affirmative defense to a discrimination suit, the employer has received the benefit of its bargain. If the waiver is not upheld because it is not knowing and voluntary under the ADEA, the employer has no right to the benefit of its bargain.

c. In some circumstances an employer may be entitled to restitution, recoupment, or setoff against an employee’s recovery of damages in court (or in the administrative process).

In *Oubre*, the Court commented that, “[i]n further proceedings in this or other cases, courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee . . . .” 522 U.S. at 428.3 In EEOC’s view, restitution, recoupment, or setoff should be in the discretion of the court but never exceed the lesser of the consideration given or the damages won. In the context of the *Oubre* decision, with its overriding prohibition of tender back requirements, permitting any restitution beyond the lesser of the amount the plaintiff wins in court, or the amount of consideration given, would operate constructively as a tender back penalty for bringing suit. Such a tender back penalty would interfere with the plaintiff’s exercise of ADEA rights, impose significant hardship, and be contrary to public policy. Additionally, *Oubre* dictates that general contract principles are not applicable to ADEA cases if their application would deter protected individuals from vindicating their statutory rights or encourage employers to evade their statutory responsibilities. See generally *Daley v. United Technologies Corp.*, Civil No. 3:97 CV 00439 (AVC) (D.Conn. March 23, 1998); *Pace v. United Technologies Corp.*, Civil No. 3:97 CV 00481 (AVC) (D.Conn. March 23, 1998) (post-*Oubre* cases stating that the employer would be entitled to a setoff consisting of all or part of the severance benefits paid if the plaintiffs should prevail on their ADEA claims); *Rangel v. El Paso Natural Gas Co.*, 996 F. Supp. 1093, 1099 (D.N.M. 1998) (post-*Oubre* Title VII waiver case concluding that setoff against damages would be the proper way to handle reimbursement); 50 C.J.S. Judgment § 674 (stating that set-off “is not demandable as of course, but rests in the discretion of the court”).

This limit also ensures that employees would not be penalized for a challenge to a waiver agreement when the amount of damages awarded is low (for example, when the employee has mitigated damages by finding new employment). Moreover, as stated in section b., above, covenants not to sue or other similar arrangements are not permitted. Therefore, an employer is not entitled to restitution, recoupment, or setoff for any costs, attorneys’ fees or other amounts claimed as damages attributable to an alleged breach of such a covenant or other arrangement.

Finally, in a case involving more than one plaintiff, the reduction must be awarded on a plaintiff-by-plaintiff basis. Thus, no individual’s award can be reduced based on the consideration received by any other person.

The following is a nonexhaustive list of the factors that may be relevant in calculating the proper amount of reduction to avoid unjust enrichment. These factors reflect, in the ADEA context, equitable principles that a reduction should be allowed only if it would promote justice, and should not be allowed if it results in injustice. See generally 50 C.J.S. Judgment § 674. These factors also

reflect the Oubre Court's recognition that determining the proper amount of reduction may be complex when the waiver encompasses claims other than those arising under the ADEA. Oubre, 522 U.S. at 428. The factors include:

- (i) Whether the employer apportioned the amount paid for the waiver agreement among the rights waived, if the waiver purports to waive rights other than ADEA rights. If the employer did not apportion the consideration among the rights waived, the apportionment should be done on an equitable basis;
- (ii) Whether the employer's noncompliance with the ADEA waiver requirements was inadvertent or was in bad faith or fraudulent;
- (iii) The nature and severity of the underlying employment discrimination in the case, including whether the employer willfully violated the ADEA. If a willful violation occurred, any deduction from the award should be made after the damages are doubled pursuant to §7(b) of the ADEA;
- (iv) The employee's financial condition;
- (v) The employer's financial condition;
- (vi) The effect of the reduction upon the purposes and enforcement of the ADEA and the deterrence of future violations by the employer.

d. No employer may unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA.

In his concurrence in Oubre, Justice Breyer expressed concern that a successful challenge to a waiver agreement by one or more individuals not be construed to relieve an employer of its obligations to other individuals who did not challenge that agreement. Oubre, 522 U.S. at 431 (Breyer, J., concurring). Such an abrogation would penalize innocent employees for the employer's noncompliance with the ADEA, and would therefore be void as against public policy. See generally 17A Am. Jur. 2d Contracts § 327 (1991) (stating that an illegal contract will be enforced if refusal to enforce it "would produce a harmful effect on the party for whose protection the law making the bargain illegal exists").

e. The rules set out in this regulation apply to cases within the EEOC administrative process as well as to cases in court, and are fully consistent with the provisions of EEOC's regulation at 29 C.F.R. § 1625.22(i)(3).



The OWBPA and Issues Raised by the Regulations Both Past and Proposed; Impact of the Oubre Decision

COMMENTS: As a convenience to commentors, the Executive Secretariat will accept public comments transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is 202-663-4114. (Telephone numbers published in this Notice are not toll-free). Only public comments of six or fewer pages will be accepted via FAX transmittal in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff on 202-663-4066.

Comments received will be available for public inspection in the EEOC Library, Room 6502, 1801 L Street, N.W., Washington, D.C. 20507, by appointment only, from 9:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice are available in the following alternative formats: large print, braille, electronic file on computer disk, and audio tape. To schedule an appointment or receive a copy of the Notice in an alternative format, call 202-663-4630 (voice), 202-663-4399 (TDD).

#### Executive Order 12866, Regulatory Planning and Review

Pursuant to § 6(a)(3)(B) of Executive Order 12866, EEOC has coordinated this NPRM with the Office of Management and Budget. Under § 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local or tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

#### Paperwork Reduction Act

EEOC certifies that the rule as proposed does not require the collection of information by EEOC or any other agency of the United States Government. The rule as proposed does not require any employer or other person or entity to collect, report, or distribute any information.

#### Regulatory Flexibility Act

EEOC certifies under 5 U.S.C. § 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this regulation will not result in a significant economic impact on a substantial number of small entities. For this reason, a regulatory flexibility analysis is not required. A copy of this proposed rule was furnished to the Small Business Administration.

In addition, in accordance with Executive Order 12067, EEOC has solicited the views of affected Federal agencies.

List of Subjects in 29 C.F.R. Part 1625

Advertising, Age, Employee Benefits, Equal Employment Opportunity, Retirement.

Signed at Washington, D.C. this 19th day of April, 1999.

\_\_\_\_\_/S/\_\_\_\_\_  
Ida L. Castro, Chairwoman

It is proposed to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

**PART 1625--AGE DISCRIMINATION IN EMPLOYMENT ACT**

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C.301; Secretary's Order No. 10-68; Secretary's Order No. 11-68; sec. 12, 29 U.S.C. 631; Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. In part 1625, sec. 1625.23 would be added to Subpart B--Substantive Regulations, to read as follows:

**1625.23 Waiver of Rights and Claims: Tender Back of Consideration.**

(a) An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency. Retention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver. A clause requiring tender back is invalid under the ADEA.

(b) A covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement, is invalid under the ADEA, whether the covenant or other arrangement is part of the agreement or is contained in a separate document. A provision allowing an employer to recover costs, attorneys' fees, and/or damages for the breach of any covenant or other arrangement is not permitted.

(c) Restitution, Recoupment, or Setoff--(1) Where an employee successfully challenges a waiver agreement and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment, or setoff (hereinafter, "reduction") against the employee's damages award. These amounts never can exceed the lesser of the consideration the employee received for signing the waiver agreement or the amount recovered by the employee.

Consistent with paragraph b. of this section, an employer is not entitled to restitution, recoupment, or setoff for any costs, attorneys' fees or other amounts claimed as damages attributable to an alleged breach of such a covenant or other arrangement.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(3) A nonexhaustive list of the factors that may be relevant to determine whether, or in what amount, a reduction should be granted, includes:

(i) Whether the employer apportioned the amount paid for the waiver agreement among the rights waived, if the waiver purports to waive rights other than ADEA rights. If the employer did not apportion the consideration among the rights waived, the apportionment should be done on an equitable basis;

(ii) Whether the employer's noncompliance with the ADEA waiver requirements was inadvertent or was in bad faith or fraudulent;

(iii) The nature and severity of the underlying employment discrimination in the case, including whether the employer willfully violated the ADEA. If a willful violation occurred, any deduction from the award should be made after the damages are doubled pursuant to §7(b) of the ADEA;

(iv) The employee's financial condition;

(v) The employer's financial condition;

(vi) The effect of the reduction upon the purposes and enforcement of the ADEA and the deterrence of future violations by the employer.

(d) No employer may unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA.

Billing Code 6570-01

Footnotes:

1 No waiver agreement, covenant, or other arrangement may prohibit any person from filing a charge of discrimination or assisting EEOC in its law enforcement activities. See 29 C.F.R. § 1625.22(i).

2 For example, it would be impermissible for an employer to bring an independent legal action, such as a state or federal breach of contract lawsuit, because an employee filed a charge of discrimination or challenged a waiver agreement in court. Such lawsuits would constitute retaliation under § 4(d) of the ADEA and intentional discrimination for purposes of liquidated damages under § 7 of the ADEA.

3 The terms “recoupment” and “setoff” refer to the ability of a defendant to reduce the plaintiff’s award of damages by amounts otherwise due to the defendant. Recoupment and setoff serve to limit the defendant’s recovery to no more than the amount of plaintiff’s damages. Black’s Law Dictionary (6th ed. 1990), at 1275 and 1372. “Restitution is a return or restoration of what the [employee] has gained in a transaction.” 1 Dan B. Dobbs, *Law of Remedies, Damages-Equity-Restitution* § 4.1(1) at 551 (1993). Generally, restitution is required to avoid the “unjust enrichment” of the party who previously obtained the money or property. Dobbs § 4.1(2) at 557. There are several exceptions to the unjust enrichment doctrine that are relevant to ADEA waivers, including when restitution would: (1) interfere with the rights of, or otherwise be inequitable to, the party who received payment; (2) cause significant hardship because an individual changed position based upon the payment; or (3) be contrary to public policy considerations. *Id.* at 563.