Mailing Address
P.O. Box 6133
Williamsburg VA 23188

Office Location
325 McLaws Cr. Suite 2
Williamsburg VA 23185

Courtesy of:
Peter Mellette, Esq.
peter@mellettepc.com

CLIENT ADVISORY
Protecting the Validity of Waivers of Discrimination Claims in Employee Severance Agreements

In today's economy, the business needs of an employer may require the reduction of personnel. Unfortunately, an employer's decision to lay off employees, even carefully conducted, may lead some employees to claim that they are being discriminated against based on their age, race, sex, national origin, religion, or disability.

To minimize the risk of potential litigation over layoffs, employers may offer discharged workers severance packages, which include money or benefits in exchange for a release of liability for all claims arising from the employment relationship, including termination. Such releases generally seek to waive various discrimination claims, including those under the civil rights laws enforced by the Equal Employment Opportunity Commission (EEOC) – the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Equal Pay Act (EPA). However, without careful drafting, incorporating federal statutory and regulatory requirements and recent court decisions, such releases may be invalid and unenforceable. If a court rules such a waiver invalid, the ruling exposes the former employer to the type of liability the waiver sought to minimize.

Last summer, the EEOC released new guidance addressing waivers of discrimination claims in employee severance agreements. The guidance addresses considerations on which the EEOC is likely to focus if asked to consider a waiver's enforceability. Accordingly to the EEOC guidance, a waiver is enforceable only when several elements are satisfied: (1) an employee must knowingly and voluntarily consent to the waiver; (2) the employer must offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of rights; (3) the employer must not require employees to waive future rights; and (4) the agreement must comply with all applicable state and federal laws. While the other elements are equally important, the EEOC takes a particular interest in ensuring that such agreements are entered into knowingly and voluntarily and are supported with adequate consideration.

I. Knowingly and Voluntarily

A. Under Title VII, the ADA, or the EPA

Case law determines whether a waiver of rights under Title VII, the ADA, or the EPA was "knowing and voluntary." Some courts focus primarily on the waiver itself, asking whether the language in the contract was clear. Most courts, however, look

beyond the language of the contract and consider all relevant factors – the “totality of the circumstances” surrounding the waiver. To ensure that waivers are found valid, employers should be careful to address both approaches in drafting and offering waivers to discharged employees.

First, employers should ensure that waivers are written in a manner that is clear and specific enough for the employee to understand based on his or her education and business experience. For example, language in an agreement designed for a nurse who had graduated from college and formerly worked as a paralegal may need to be altered if used for someone with a different educational background. The language should also clearly identify the types of claims being waived, such as employment discrimination claims. A general reference to releasing “any and all claims” is not specific enough to waive all claims under the various statutes. Each statute should be mentioned expressly by name.

Second, the employer should allow the employee an opportunity to consider the waiver and make an informed decision. Any waiver induced by fraud, duress, undue influence, or other improper conduct will be invalid. Employees need enough time to read and think about the advantages and disadvantages of the waiver, and the time spent considering the severance should be documented. The employee should be encouraged to discuss the agreement with an attorney. A court will also look favorably upon any input given an employee in negotiating the terms of the agreement.

B. Under the ADEA

The Older Workers Benefit Protection Act (OWBPA) establishes certain requirements for a “knowing and voluntary” release of ADEA claims brought by persons 40 years or older. These requirements are more specific than those under case law for Title VII, ADA, or EPA claims.

Under the OWBPA, a waiver must be written in a manner that can be clearly understood. While this requirement is similar to those found in case law, the OWBPA specifically requires the elimination of technical jargon and long, complex sentences. Furthermore, the waiver must not have the effect of misleading, misinforming, or failing to inform participants and must present any advantages or disadvantages without either exaggerating the benefits or minimizing the limitation of the waiver.

For waiver of age discrimination claims, the OWBPA specifically requires that a waiver specifically refer to rights or claims arising under the ADEA. Thus, waivers must expressly mention the Age Discrimination in Employment Act by name. Second, the waiver must advise the employee in writing to consult an attorney before signing. Although a wise practice with any waiver, documentation of such advice to the terminating employee is a requirement to waive ADEA claims. Third, the waiver must provide the employee with at least 21 days to consider the offer. It is important to note that if material changes are made to an offer, the 21 day period starts over. Fourth, the

waiver must give the employee seven days to revoke his or her signature. This seven-day period cannot be waived. Fifth, a waiver must not include rights and claims that may arise after the date on which the waiver is executed. Sixth, a waiver must be supported by consideration in addition to that to which the employee is already entitled.

If an employer seeks to implement a group exit incentive program that incorporates a waiver, the OWBPA imposes additional requirements. Aside from the minimum OWBPA "knowing and voluntary" requirements, employers must provided all laid off employees with written notice of the layoff and 45 days to consider the waiver before signing it. The employer must also specifically inform employees of the "decisional unit" – the class, unit or group of employees from which the employer chose the employees who were and were not selected for the program. The decisional unit could be the entire company, a division, a department, employees under a particular manager, or those with a specific job description, depending on the circumstances of each termination program. The employer must then provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were laid off and younger ones retained.

III. Adequate Consideration

Employers offering severance agreements should also be mindful that adequate consideration is offered in return for the employee's waiver of rights. For example, agreements only offering to pay earned salary and accrued vacation pay are not adequate. However, an agreement offering additional compensation beyond what the employee has already earned would be adequate. Typically, this would include unearned wages after termination or other benefits, such as extended COBRA coverage.

IV. Additional Issues

Regardless of any language in a severance agreement or waiver, an employee always has the right to file a charge with the EEOC if they believe they have been discriminated against. In all severance agreements or negotiations, employers should be careful to never to state or imply that waivers limit the right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that purports to waive these rights is invalid and unenforceable.

Employers should also be aware of the financial implications if an employee successfully challenges a waiver in court. Although employers will be liable for any damages set by the court, an employer may be able to recover the amount paid in exchange for an employee's waiver. For example, if an employer paid a former worker $10,000 in exchange for a waiver of ADEA claims and, despite the waiver, the former employee won a court award of $30,000 in damages based on age discrimination, the court could reduce the award by $10,000. If an employee challenges the validity of a signed waiver, the employer may not use the challenge as a reason to avoid its duties under that waiver. During the pendency of the challenge, it is unlawful for an employer to

Courtesy of:
Peter Mellette, Esq.
peter@mellettepc.com

withhold any promised compensation or benefits it agreed to provide, even if the employee has broken his portion of the agreement. In such situations, employers should continue to make promised payments until the validity of a waiver is resolved by the court.

V. Conclusion

These requirements for severance agreements apply to all employers. Please let us know if you have any questions or if Mellette PC can assist you further in reviewing employee severance agreements.

Mellette PC acknowledges with appreciation the assistance of Nathan Mortier and Edward Turnbull, both Class of 2010 law students at the College of William and Mary Marshall-Wythe School of Law, in the preparation of this advisory.