New York Law Journal
LABOR & EMPLOYMENT
Monday, May 21, 2007
ALM

Disclosures Amid Group Terminations

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THE BUREAU of Labor Statistics reports that in the 15 months since Jan. 1, 2006, there have been over 17,000 mass layoffs—defined as each involving the reduction of at least 50 employees from a single establishment.[1] When conducting group terminations employers generally want to obtain valid and enforceable releases, including waiver of claims under the Age Discrimination in Employment Act (ADEA), in exchange for severance.[2] Understanding the intricacies of the Older Workers Benefits Protection Act (OWBPA),[3] a 1990 amendment to the ADEA—including the OWBPA's information disclosure requirements—can be the difference between obtaining valid waivers or unenforceable releases and potential litigation.

One element of the disclosure requirements is properly identifying the decisional unit—defined by Equal Employment Opportunity Commission (EEOC) regulations as "that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver."[4] This article examines the OWBPA, the controlling regulations and recent case law, and provides practical guidance on how to properly identify the decisional unit.

Requirements of the OWBPA

An individual may not waive any right or claim under the ADEA unless the waiver is "knowing and voluntary."[5] The OWBPA established eight minimum requirements that must be satisfied in order to meet the knowing and voluntary standard:

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Properly identifying the decisional unit is integral to validity of releases.

- the release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;
- the release must specifically refer to claims arising under the ADEA;
- the release must not purport to encompass claims that may arise after the date of execution;
- the employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;
- the employee must be advised in writing to consult with an attorney prior to executing the agreement;
- the employee must be given at least 45 days to consider signing the release if the incentive is offered to a group;
- the release must allow the employee to revoke the agreement up to seven days after signing; and
- if the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.[6]

The purpose of the disclosure requirements is to provide employees with sufficient information regarding a group termination program so that they can evaluate any potential ADEA claims they may

have and make an informed choice whether or not to sign a release.[7] Integral to this decision is the proper identification of the decisional unit. The decisional unit includes all classes, units, groups, job classifications or organizational units of employees that the employer considered in effectuating the termination program.[8]

The EEOC regulations provide non-exclusive examples of possible ways to structure decisional units: (1) on a facility-wide basis; (2) by division, department, group or subgroup; (3) based on a reporting structure; and (4) by job category or function.[9] Even if an employer ultimately decides to focus its work force reduction on a narrower grouping of employees, the proper decisional unit for purposes of the OWBPA is the groupings of employees that the employer considered for termination, not just those it ultimately selected for the reductions.[10]

The regulations address other "special situations" that employers and their counsel must keep in mind when describing the decisional unit. If the employees to be terminated are selected from a subgroup of a decisional unit, the employer must nonetheless disclose information for the entire population of the decisional unit. For example, if the employer decides to reduce headcount in a department by 25 percent, yet opts to select employees, based on performance, from the bottom one-third of the department, the decisional unit would still be the entire department—not just the subset of poor-performing department members.[11] Employers engaged in group termination programs that occur over time also should be aware that the information supplied with respect to such a program must be cumulative, i.e., employees terminated pursuant to a later installment of the same program must be provided with age and job title information for all employees in the decisional unit from the start of the program.[12]

Recent Case Law: Lessons

Recent circuit and district court decisions address the criteria for determining the decisional unit and highlight the lack of clarity that exists in the practical application of §7(f)(1)(H)'s informational requirements.

In *Burlison v. McDonald's Corp.*,[13] the U.S. Court of Appeals for the Eleventh Circuit reversed a district court's decision which invalidated a release of claims offered to employees under a national restructuring program; the district court had found that the employer-required disclosure information was insufficient. The dispute centered on the fact that, while the reduction in force (RIF) was nationwide, the employees were selected for termination based on an individualized assessment process performed by regional managers.[14]

McDonald's provided each terminated employee with the ages and job titles of the employees selected and not selected for layoff, but limited the disclosure information to the region in which each particular employee worked.[15] The *Burlison* plaintiffs alleged that the releases they signed were void because they disclosed information only for the Atlanta region, not the nation.

The district court in the Northern District of Georgia held that the OWBPA required McDonald's to provide information national in scope, despite the fact that the layoff decisions were made by region.[16] On appeal, the Eleventh Circuit reversed the district court, finding that McDonald's limitation of disclosure information to the decisional unit that applied to the discharged employees was appropriate. The court determined that, since the selection decisions for the reduction in force were made at the regional level, statistics regarding the employer's national restructuring efforts were not relevant or required for purposes of the OWBPA's disclosure requirements.[17]

Further evidence of the care required in defining the decisional unit is underscored by the U.S. Court of Appeals for the Tenth Circuit's revised decision in *Kruchowski v. Weyerhaeuser Co.*[18] The court held that the employer's releases were invalid because the employer identified the wrong decisional unit in its disclosure to employees.[19] The plaintiffs, part of a group termination program at a specific facility, were provided with disclosure information identifying those employees selected and not selected for termination.[20] In its initial disclosure information, the employer notified plaintiffs that the decisional unit was made up of all salaried employees employed at the facility.[21] The plaintiffs filed suit alleging age discrimination. The district court in the Eastern District of Oklahoma granted the employer's motion for summary judgment, concluding that the employer's releases complied with the OWBPA.[22]

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On appeal, the Tenth Circuit found flaws in, among other things, the employer's information disclosures of the decisional unit. Specifically, in responding to interrogatories, the employer stated that the decisional unit consisted of those salaried employees who reported to the facility manager.[23] Fifteen support staff employees who worked at the facility did not report to the facility manager and thus were not part of the actual decisional unit, even though they were so identified in the employer's disclosure materials distributed at the time of the group terminations.[24] Because the employer disclosed a decisional unit to the employees that was not the actual decisional unit, the court concluded that the employer's information disclosures were inaccurate, rendering its releases invalid.[25]

Three other recent district court decisions provide guidance on the "dos and don'ts" of defining the decisional unit. In *Ricciardi v. Electronic Data Systems Corp.*,[26] the court granted the employer's motion for summary judgment on plaintiff's challenge to the validity of a release executed pursuant to a reduction in force. The plaintiff claimed, inter alia, that he was terminated as part of a national rolling RIF and that the employer was thus required to disclose information on a national basis.[27] The employer produced evidence, however, that the plaintiff was terminated as part of a RIF by a specific division of the company.[28]

The court, in the Eastern District of Pennsylvania, concluded that plaintiff's termination was confined in scope and time, and that the employer was not obligated to provide additional information about other earlier, separately terminated employees when disclosing information to the plaintiff.[29] *Ricciardi* illustrates the importance of careful record-keeping and documentation of decisional unit determinations, including both those employees considered and those ultimately selected for termination programs and whether the terminations are part of a rolling program or constitute a distinct transaction.

Wells v. Xpedx, a Div. of International Paper Co.,[30] illustrates how a lack of attention to detail in implementing a RIF may ultimately result in releases being invalidated. Xpedx implemented a RIF in 2001 after acquiring three companies. While plaintiff was not terminated at that time, in December 2002 plaintiff was dismissed based on performance and later claimed that the release he signed was invalid under the ADEA.[31] Xpedx contended that plaintiff was terminated on an individual basis, or in the alternative, as part of a "reduction in force," but one unrelated to the prior, larger RIFs.[32]

Despite its contention that the plaintiff's termination was on an individual basis, Xpedx "inadvertently" provided plaintiff with the same paperwork used in the 2001 RIF, except that it noted a different decisional unit.[33] Identifying a decisional unit, however, gave rise to the inference that plaintiff's termination was not on an individual basis but was part of a group termination program.[34] Section 626(f)(1)(H) mandates information disclosure to employees terminated as part of a group termination program—but not to employees terminated on an individual basis.

Xpedx alternatively argued that even if plaintiff was terminated as part of a larger RIF, it properly fulfilled the OWBPA's requirements, including the decisional unit disclosures.[35] The court, however, questioned Xpedx's decisional unit determination, which included only the plaintiff (i.e., the company provided plaintiff with only his own age and job title information).[36] Xpedx maintained that the plaintiff was the only employee in his level of management, there were no other comparable positions in the group, and he was the only individual terminated in his group.[37]

The court, in the Middle District of Florida, however, found a genuine issue of fact regarding the scope of the decisional unit because plaintiff's supervisor was located in a different office than plaintiff, from which one could conclude that the entire division, and not just the plaintiff's subgroup, was the appropriate decisional unit.[38] Employers must resist the temptation to use the paperwork from a prior RIF when faced with a new circumstance that has its own set of facts.

Finally, an April 2007 decision presents some new and potentially disturbing challenges for employers considering large-scale RIFs involving

multiple business units. In *Pagliolo v. Guidant Corp.*, the employer simultaneously conducted RIFs at six of its subsidiaries.[39] A centralized senior management committee oversaw Guidant's business units and ordered the RIFs as part of a cost-cutting measure after it determined that the company would not meet its year-end goals.[40] Although not every department in every business unit ultimately reduced staff, each was required to examine how to reorganize and reduce staff.[41] Guidant considered more than 8,000 employees for the RIF and ultimately informed over 700 employees that it intended to terminate their employment.[42] Guidant asked these employees to sign releases in exchange for receiving severance benefits, and at the time of termination, provided them with a nationwide disclosure statement.[43]

Plaintiffs filed an age discrimination suit claiming, inter alia, that: (1) Guidant failed to properly disclose the decisional unit for the RIF by not describing the proper decisional unit in its disclosure materials; and (2) the decisional unit was not legitimate under the OWBPA because Guidant improperly aggregated parts of separate corporations and numerous facilities into a single decisional unit.[44] The court in Minnesota agreed and entered summary judgment for plaintiffs.

First, the court found that Guidant failed to disclose the decisional unit in a manner calculated to be understood by the average individual eligible for the program by listing nearly all of its U.S.-based employees in its disclosure materials.[45] This holding is troubling in light of the company's position that all of these employees were, in fact, considered for termination and determinations were made on a nationwide basis.[46] Second, the court concluded that it was improper for Guidant to combine the employees of the six subsidiary corporations into one decisional unit.[47] While concluding that each of the six separate employers should have been a separate decisional unit because "[n]othing in the statute suggests that multiple corporations can be combined to constitute one decisional unit,"[48] the court ignored the fact that the EEOC's guidance also does not prohibit such a decisional unit determination, and in fact contemplates the use of broad decisional units where operations at several facilities were considered for reduction.[49]

The court also held that Guidant should have limited decisional units by facility because the terminated employees could not reasonably have been expected to draw conclusions from the disclosure materials absent any information regarding employees' locations.[50] The fallacy in the reasoning here lies in the fact that if the scope of the employer's decision-making process included multiple facilities, as did Guidant's, disclosing information on an individual-facility basis would have been inappropriate. While arguably inconsistent with the EEOC's regulations, *Pagliolo*, until reversed or modified, should be considered in any group termination.[51]

Key Questions

In order to avoid the potential pitfalls in determining the decisional unit employers should be asked the following questions:

- What is the reason for this program? Cost-cutting? Consolidation? Merger? Reorganization? Identifying the purpose behind a RIF may reveal who the employer considered for termination.
- Which jobs were looked at for possible consolidation? Was the program confined to one position or department? Was more than one department evaluated? Were employees at other locations considered? Were employees transferred as part of the program?
- Which employees will assume responsibility for the work that the individuals to be terminated are currently performing?
- Who was involved in the employer's decision-making process? Did management solicit recommendations from lower-level managers? Who approved these decisions? Is a central committee or review process involved in deciding which employees to include/not include in the program? What criteria were used in selecting the employees ultimately designated for separation?
- Are there records, notes or memoranda that speak to the decisions on which departments, divisions, facilities, etc. were and were not considered?
- Did RIFs occur in the recent past? What was the purpose behind those RIFs? Which business units were impacted? Distinguishing prior, separate RIFs is critical in preparing disclosure information, as courts will evaluate whether the current RIF may in fact be a continuation of an ongoing termination program.
- Is the employer relying on an earlier model for a subsequent RIF? Reliance on an earlier RIF template may fail to recognize new strategies or initiatives involved in the subsequent program.

Prior to implementing a RIF, inquiries of this nature should be answered with the intensity that accompanies responding to interrogatories. Doing so should elicit answers that reveal not just the employer's selection process, but which employees it considered for the program, and thus enable counsel to advise the employer regarding the proper scope of the informational disclosures. Taking care before the RIF will go a long way in avoiding subsequent litigation.

1. See Press Release, Bureau of Labor Statistics, "Mass Layoffs in March 2007" (April 20, 2007), available at http://stats.bls.gov/news.release/pdf/mmls.pdf. Statistics are seasonally adjusted.
2. 29 U.S.C. §626 et seq.
3. 29 U.S.C. §626(f).
4. 29 C.F.R. §1625.22(f)(3)(i)(B).
5. 29 U.S.C. §626(f)(1).
6. *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093 (10th Cir. 2006) (citing 29 U.S.C. §§626(f)(1)(A)-(H)). The statutory factors are not exclusive and other facts and circumstances may impact whether a waiver is knowing and voluntary, such as if there is a material mistake, omission, or misstatement in the information furnished by the employer to the employees. 29 C.F.R. §1625.22(a)(3).
7. 29 C.F.R. §1625.22(f)(1)(iv); *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1247 (11th Cir. 2006).
8. 29 C.F.R. §1625.22(f)(3)(i)(A).
9. 29 C.F.R. §1625.22(f)(3)(iii).
10. 29 C.F.R. §1625.22(f)(3)(ii)(E).
11. 29 C.F.R. §1625.22(f)(4)(v).
12. 29 C.F.R. §1625.22(f)(4)(vi).
13. *Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006).
14. Id. at 1244.
15. Id.
16. *Burlison v. McDonald's Corp.*, 401 F.Supp.2d 1365 (N.D. Ga. 2005), reversed by, summary judgment granted by, 455 F.3d 1242 (11th Cir. 2006).
17. 455 F.3d at 1247.
18. 446 F.3d 1090 (10th Cir. 2006).
19. *Weyerhaeuser* is perhaps most significant for the Tenth Circuit's omission, in its revised decision, of its earlier, controversial holding that employers seeking to obtain a release in conjunction with a group termination program must fully describe the program's "eligibility factors," i.e., specific factors used in analyzing whether each employee considered would be selected for termination. See *Kruchowski v. Weyerhaueser Co.*, 423 F.3d 1139 (10th Cir. 2005), opinion withdrawn, superseded on rehearing in part by 446 F.3d 1090 (10th Cir. 2006).
20. 446 F.3d at 1092.
21. Id. at 1094.
22. Id. at 1092.
23. Id.
24. Id.
25. Id. at 1094-95.
26. No. 03-5285, 2007 WL 576323 (E.D. Pa. Feb. 20, 2007).
27. Id. at *4.
28. Id.
29. Id.
30. No. 8:05-CV-2193, 2006 WL 3133984 (M.D. Fla. Oct. 31, 2006).
31. Id. at *1.
32. Id. at *8-9.
33. Id. at *2.
34. Id. at *9. The court found that identifying a decisional unit for an individual termination was not Xpedx's only mistake. The company also stated in both the termination letter and termination agreement it provided to the plaintiff that he had 45 days to review the agreement before executing it. Id. at *8. Under §626(f)(1)(F), employers are only required to provide an employee with 21 days to review the agreement if the employee is being terminated on an individual basis and not as part of a group termination program. See id. The company also provided plaintiff with a referral letter explaining that plaintiff's position with Xpedx was impacted by "major restructuring efforts," and included the designation "xpedx-RIF" on his pay stubs—actions which the court found supported the inference that plaintiff was terminated as part of a larger RIF. Id. at *9.
35. *Wells*, 2006 WL 3133984, at *9.
36. Id.
37. Id.
38. Id. at 11.
39. No. 06-943, 2007 WL 1040869, at *1 (D. Minn. April 4, 2007).
40. Id.
41. Id.
42. Id. at *2.
43. Id. at *3.
44. Id. at *7-8.
45. Id. at *8.
46. Id. at *7.
47. Id. at *8.
48. Id.
49. See 29 C.F.R. §1625.22(f)(3)(ii)(E); see also 29 C.F.R. §1625.22(f)(3)(iii) (describing examples of involuntary RIF structures as "not all-inclusive").
50. *Pagliolo*, 2007 WL 1040869, at *8.
51. The *Pagliolo* court also granted summary judgment to plaintiffs on claims that Guidant: (1) materially misrepresented the decisional unit by including approximately 200 employees who were initially notified that they had been selected for termination but ultimately transferred to other positions within the com pany and were never eligible for severance benefits; (2) failed to disclose the eligibility factors the employer used to determine which employees were subject to the termination program; and (3) failed to comply with the regulations by disclosing employees' dates of birth, rather than age, and failing to disclose employees' grade level within job titles. On April 30, 2007, Guidant moved the district court to amend its order to include a statement concluding that the order involves controlling issues of law, including the decisional unit issue, so that Guidant may pursue an immediate interlocutory appeal with the U.S. Court of Appeals for the Eighth Circuit. That motion is pending before the district court.