

Client Alert



A report for clients and
friends of the Firm

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U.S. Equal Employment Opportunity Commission Issues New “Technical Guidance” On Waivers Of Discrimination Claims

On July 15, 2009, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued new Technical Guidance – in a Question and Answer format – to explain to employees and employers the EEOC’s position on waivers or releases of discrimination claims in employee severance agreements. The Guidance was issued, in part, in response to the recent spike in employee layoffs and the resulting increase in age discrimination charges filed with the EEOC. Although the substance of the Guidance itself is neither new nor controversial, and is entirely consistent with Proskauer’s long-standing advice and guidance in this area, we believe it is a useful reminder for all employers – particularly those contemplating future layoffs – to make certain that their severance agreements are being drafted properly and will be enforceable.

This Client Alert briefly summarizes the key points addressed in the Technical Guidance, a copy of which can be accessed at:

http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

- A waiver of claims must be “knowing and voluntary” in order to be valid and enforceable under Title VII, the American’s with Disabilities Act, the Equal Pay Act and the Age Discrimination in Employment Act (“ADEA”).
- In addition to the specific requirements for an enforceable release under the ADEA (discussed in more detail below), in evaluating the enforceability of an agreement containing a waiver of claims courts consider the totality of the circumstances and look at a variety of factors, including:
 - (i) whether the agreement was drafted in a manner that was clear and specific enough for the employee to understand, taking into consideration the employee’s education and business experience;
 - (ii) whether the agreement was induced by fraud, duress, undue influence, or other improper conduct by the employer;
 - (iii) whether the employee had enough time to review and consider the agreement before signing it;
 - (iv) whether the employee had an opportunity to consult with an attorney or was encouraged or discouraged by the employer from doing so;
 - (v) whether the employee had any input in negotiating the terms of the agreement; and
 - (vi) whether the employer offered the employee consideration that exceeded what the employee was already entitled to by law or contract;
- The agreement may not require the employee to waive future rights.
- To validly waive claims of age discrimination under the ADEA (i.e., for employees age 40 and over), the agreement also must :
 - (i) *specifically* refer to the waiver of rights or claims arising under the ADEA – and must spell out the Age Discrimination in Employment Act by name;

- (ii) affirmatively advise the employee in writing to consult an attorney before accepting the agreement;
 - (iii) provide the employee with at least twenty-one (21) days (individual separation) or forty-five (45) days (group termination, i.e., a reduction-in-force) to consider the offer and review the agreement; and
 - (iv) give the employee seven (7) days to revoke the release agreement and waiver, or at least the waiver of any age discrimination claim.
- In addition, under the Older Workers Benefit Protection Act (“OWBPA”) amendments to the ADEA, in a group termination program employers also must provide all employees who are providing an ADEA release with certain additional information, typically in the form of a disclosure statement included in the release agreement itself, or attached as an exhibit to the release agreement, including:
 - (i) details of the “decisional unit” – the class, unit, or group of employees from which the employer chose the employees who were and who were not selected for the program. Examples include the entire company, a division, a department, employees reporting to a particular manager, or workers in a specific job classification;
 - (ii) the “eligibility factors” for the program (to the extent particular individuals or classes of employees within the decisional unit were not eligible);
 - (iii) the time limits applicable to the program; and
 - (iv) the job titles and ages of all individuals who are eligible or selected for the program and those who are not eligible or not selected for the program (but not the names of the employees).
 - Under no circumstances may a severance agreement waive an employee’s right to file a charge with the EEOC or limit his or her right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC. Any attempt to waive such rights will be deemed invalid, and unenforceable. The EEOC has taken the position that such provisions are a form of actionable retaliation. In addition, an employee cannot be required to return his or her severance pay before filing (or because of filing) a charge with the EEOC.
 - Under the ADEA, an agreement may not require an employee to return any severance pay before bringing an age discrimination claim in court. Indeed, employees have the right to challenge the validity of a waiver of age claims in court, and a requirement that an employee “tender back” severance before challenging a waiver of age claims may invalidate the waiver. Courts are split whether an employer can require an employee to “tender back” severance before bringing claims under Title VII and other discrimination statutes. In all cases, however, any monies received as severance likely would reduce or offset the amount of money an employee is awarded if their subsequent challenge to the waiver and discrimination lawsuit is successful.

As the EEOC’s Technical Guidance makes clear, ensuring a valid waiver of discrimination claims requires careful consideration of and adherence to a variety of factors and requirements under the law. Indeed, the EEOC and courts have been increasingly liberal in finding technical reasons for challenging or declaring waivers of age claims ineffective under the OWBPA. Moreover, many states have a patchwork of additional and varying requirements to obtain enforceable releases of certain claims. Each situation must be considered on its facts and circumstances, therefore, prudent employers should consult with their Proskauer attorney contact to ensure that their severance agreements, and, in particular agreements drafted in connection with group termination programs, are designed in compliance with EEOC guidance and applicable federal and state laws.

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