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EEOC Says that Non-U.S Citizen Employees Working Outside the U.S. Need Not Be Included in OWBPA Disclosures

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On January 14, 2021, the U.S. Equal Employment Opportunity Commission ("EEOC") approved a formal opinion letter clarifying that non-U.S. citizen employees of American employers working outside the United States need not be included in disclosures required to waive age discrimination claims under the Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA").

OWBPA Requirements for Releasing ADEA Claims

Employers conducting workforce reductions often seek a release of employment-related claims in exchange for severance. To release a claim of age discrimination under the federal ADEA (which protects individuals age 40 and over), any release agreement with a separated employee must comply with the requirements of the OWBPA. In that regard, when an employer requests a release in connection with an exit incentive or other employment termination program offered to two or more employees, the OWBPA requires the employer to provide terminated employees with a written disclosure describing the "class, unit, or group of individuals covered by such program", known as the "decisional unit". Among other things, the disclosure must also include the job titles and ages of all individuals within the decisional unit who were eligible or selected for the program, as well as the job titles and ages of those individuals within the decisional unit who were not eligible or selected for the program. The governing regulations also make clear that a decisional unit may consist of a department, division, or entire facility, and identifying the appropriate unit is often a fact-specific inquiry that turns on the employer's termination criteria and decision-making process.

The EEOC's Opinion Letter

Employers often confront the challenge of defining and describing the scope of a decisional unit when preparing the required disclosure statements. At times that challenge includes the question of whether a disclosure statement should include non-U.S. based employees who may have been considered for separation alongside U.S. based employees. On that issue, the EEOC's January 14 letter opined that employers need not include non-U.S. citizen employees working outside the United States within OWBPA disclosures, even if they were considered or selected for termination, because such individuals are not considered "employees" for purposes of the ADEA. The EEOC described two justifications for its conclusion.

First, the EEOC noted that the OWBPA and ADEA do not contain a "global mandate", because the ADEA only protects workers in the United States (regardless of their citizenship status) and U.S. citizens working abroad for an American employer or a foreign firm controlled by an American employer. In other words, the ADEA does not protect non-U.S. citizens working outside the United States or U.S. citizens who do not work for American employers or employers controlled by American companies. Second, the purpose of the OWBPA is to ensure that terminated employees are provided sufficient information to evaluate exit incentive or termination programs prior to waiving their rights under the ADEA. The EEOC found that this objective may be frustrated if employees not covered by the ADEA are included in the disclosures, which may allow employers to "present a misleading picture" of the program or "mask potentially unlawful discrimination".

In addition, the EEOC concluded that as a practical matter, the differing statutory and legal requirements present in foreign countries means that a properly defined decisional unit and separation program would be unlikely to encompass non-U.S. citizen employees working outside the U.S. Foreign legal standards may result in an employer applying different selection criteria or eligibility factors to its foreign employees working outside the U.S. The EEOC explained that because a decisional unit must reflect the "*process* by which an employer chose certain employees for a program and ruled out others", the application of different criteria to foreign employees could very well exclude them from the U.S.-based decisional unit. The EEOC also noted that foreign employees who receive separation benefits specific to foreign jurisdictions would not be considered part of the same decisional unit as U.S. employees who would typically receive U.S.-based severance packages.

Takeaways

The EEOC's Opinion Letter provides much-needed clarity on an OWBPA disclosure requirement, and comes at a time when more and more employers are considering (and resorting to) workforce reductions as a means of cutting costs. While this clarity is certainly helpful, there remains a host of other issues and considerations when determining the scope of a decisional unit, and so employers who plan to undertake a workforce reduction should consult with their attorneys to ensure that they are obtaining a valid and enforceable release of claims.

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