

# Managing Change/Reductions in Force Tip of the Month

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**Tip:** When seeking a release of federal age discrimination claims, employers are required to provide employees affected by a reduction in force or similar group termination (of as few as two employees) with information regarding the termination, including the relevant “**decisional unit**,” that is, the “class, unit, or group of individuals” from which termination decisions were made. Given the lack of guidance in this area, defining the decisional unit used in a group termination is one of the toughest challenges posed to employers in implementing workforce reductions. Employers must take the utmost care to properly define and disclose information about the decisional unit, because a failure to do so may serve as a basis for invalidating a release of federal age discrimination claims even though releases were signed and severance was paid.

### **Defining the Decisional Unit in Group Terminations - Beware of the Pitfalls:**

Employers engaging in group terminations often seek a release of federal age discrimination claims in exchange for severance. For a terminated employee to release any claim under the Age Discrimination in Employment Act (which covers individuals age 40 and over), the release agreement must comply with the requirements of the Older Workers Benefit Protection Act (“OWBPA”). If an employer requests a release in connection with an exit incentive or other employment termination program offered to a group or class of employees, the OWBPA requires employers to provide affected employees with a written waiver that includes information identifying:

- any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Significantly, these disclosure requirements apply whenever a business decision to reduce staff or lay off employees results in the termination of as few as *two employees*.

This information must be provided in “a manner calculated to be understood by the average individual eligible to participate.” The purpose is to enable those individuals deciding whether to sign a release to assess the possibility of age discrimination in the employer’s selection of employees for termination. Thus, the failure to provide this information, or to provide it incorrectly, may subject all releases obtained in the RIF to challenge as not being “knowing and voluntary,” possibly invalidating the releases.

The class, unit, or group of individuals is known as the “decisional unit,” which the Equal Employment Opportunity Commission (“EEOC”) defines 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.

The EEOC’s regulations further explain that:

the term “decisional unit” has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

The EEOC’s regulations offer general examples to assist employers in selecting the proper decisional unit:

- If the employer’s goal is the reduction of its workforce at a particular facility, and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program and others are not, then the facility generally will be the decisional unit.
- If an employer seeks to terminate employees at a facility by exclusively considering a particular portion or sub-portion of its operations at a facility, then the decisional unit will be that portion or sub-portion of the workforce at that facility.
- The decisional unit may be larger than one facility if an employer is attempting to combine operations; then the decisional unit would include all considered facilities.

Unfortunately, the regulations and subsequent case law interpreting these requirements do not provide much clear or practical guidance to employers except in the most simplistic layoff situations. As most real-world situations are more complex, the inherently fact-specific exercise of determining the proper decisional unit can be quite challenging. For example, it is often unclear whether employers are required to disclose information regarding affected and non-affected employees on a company-wide basis, or within a particular business unit, job category or physical facility, or by decision-maker.

### **What Employers Need To Consider:**

Compliance with the requirement to define the decisional unit used in a group termination is one of the toughest challenges posed to employers in implementing workforce reductions. The lack of clear guidance in this area exposes employers to risk of discrimination claims and lawsuits. Thus, it is crucial to get these disclosures absolutely right, or companies may find their release and separation agreements invalidated even when severance has been paid. Don't put yourself in that position!

Employers always must give due consideration to the appropriate decisional unit before attempting to comply with the informational requirements of the OWBPA.

The Proskauer Rose Managing Change/Reductions in Force Practice Group has extensive experience in addressing these and related issues in connection with virtually every type of reduction in force. We would be pleased to assist you in navigating through any workforce restructurings or downsizing in which you may be engaged.

If you have any questions, please feel free to contact the Chairpersons of Proskauer's Managing Change/Reductions in Force Practice Group, who are listed below.

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