

PUBLICATION

Don't Let the OWBPA Put a Rift in Your RIF

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Are you considering a reduction in force (RIF) that includes a severance package for employees? Are some of the employees included in the RIF over the age of 40? Before you take another step, make sure you know the requirements of the Older Workers Benefits Protections Act (OWBPA) or you could be faced with paying both a severance package and for a lawsuit demanding more money.

The OWBPA, which is part of the Age Discrimination in Employment Act (ADEA), safeguards older workers' employee benefits from age discrimination. Among other things, this means that employers must take certain precautions when seeking a release from older workers that waives rights under the ADEA.

All release agreements that waive an employee's federal age discrimination claims under the ADEA must comply with the OWBPA. Specifically, the OWBPA requires that older workers provide a "knowing and voluntary" waiver of their age discrimination claims. In order to comply with this requirement, a release must, at a minimum:

- Be in writing.
- Be written in a manner reasonably calculated to be understood by the employee.
- Specifically refer to the ADEA.
- Not require the worker to waive claims that may arise after the date of execution.
- Be in exchange for something of value in addition to which the employee is already entitled.
- Advise the worker to consult an attorney before executing the release.
- Allow the worker 21 days to consider the offer.
- Allow the worker 7 days to revoke the agreement after execution.

The OWBPA imposes additional requirements on employers when the release is sought in connection with a RIF of two or more employees over the age of 40. First, the time period that a worker must be given to consider the agreement increases from 21 to 45 days. Second, the employer must provide the over-40 employee with detailed information about the RIF. Specifically, an employer must disclose, in writing:

- The class, unit or group of individuals covered by the exit program.
- The eligibility factors for the exit program.
- The job titles and ages of all individuals eligible for or selected for the program.
- The ages of all employees in the same class who were not eligible or selected for the program.

The OWBPA equally applies to early retirement plans, exit incentive programs, involuntary terminations and RIFs, but it is important to note that the law applies only to the waiver of federal age discrimination claims under the ADEA – it does not apply, for example, to state law age discrimination claims. Further, it is important to remember that the EEOC can always enforce the protections of the ADEA, so a release cannot prohibit an employee from filing a charge with the EEOC or participating in an EEOC investigation.

The requirements of the OWBPA are detailed and confusing, so it is important to consult counsel before trying to navigate the requirements, because failure to follow the regulations could result in an invalid release and a lawsuit by the employee challenging the employer's RIF decisions.

