

Severance Agreements for Employees Over 40: Understanding the Older Workers Benefit Protection Act

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When drafting a severance offer or release agreement, one of the first questions that legal counsel or human resources asks is, “is the employee over 40?” But why does the employee’s age matter in the context of a release? This article summarizes the extra protections provided to employees age 40 and over, and outlines why one-size-fits-all severance and release agreements just don’t work.

For an employee who is 40 years old or older, the detailed, employee-friendly provisions contained in the Older Workers Benefit Protection Act (“OWBPA”) apply. The OWBPA, which is part of the Age Discrimination in Employment Act (“ADEA”), requires employers to follow a strict timeline to get a valid release of any age discrimination claims. The OWBPA also requires employers to provide additional, detailed information when two or more employees are terminated at or around the same time. Although the OWBPA most commonly applies in the context of involuntary terminations and reductions-in-force, its strict rules apply equally to early retirement plans, exit incentive plans, and other voluntary departures where an employee is asked to sign a release.

General Rules for Employees over 40

Under the OWBPA, for a release of age discrimination claims to be valid, the release must be “knowing and voluntary.” At minimum, this means that the release must:

- be in writing;
- be written in a manner that the employee would understand;
- be in plain, clear language that avoids technical jargon and long, complex sentences;

- not mislead or misinform the employee executing the release;
- not exaggerate the benefits received by the employee in exchange for signing the release, or the limitations imposed on the employee as a result of signing the release;
- specifically refer to the ADEA;
- specifically advise the employee to consult an attorney before signing the release; and
- not require the employee to waive rights or claims arising after the date the employee signs the release.

As with all releases, the employee also must receive additional consideration, above and beyond anything of value to which he or she was already entitled. This means that an employer cannot, for example, require an employee to sign a release to receive his or her final pay for hours worked.

The OWBPA requires employers to give employees a specific amount of time to consider the release. For a single employee, the employee must be given 21 days to consider the release. The consideration period starts to run from the date of the employer's final offer to the employee. Although material changes to that offer will restart the clock, the employer and employee may agree that changes, whether material or not, do not restart the running of the consideration period.

After considering and signing the release, an employee has seven days to change his or her mind and revoke his or her agreement to the release. If these time periods are not specifically included in the release, then the release is unenforceable.

Additional Requirements for Two or More Employees Over 40

When an employer requests release agreements from a group or class of employees (i.e., two or more employees) age 40 or over, those employees receive additional protections. First, the required consideration period increases from 21 to 45 days. Second, the employer must provide the over-40 employees with detailed information about each of the other employees who have been offered severance and asked to sign a release. This requirement applies even when the departures are spaced out over a period of time, as long as it is part of the same decision-making process. For example, if an employer's expense reduction plan calls for staggered terminations over a six-month period, all of the terminations that are part of the plan count as multiple terminations under the OWBPA. The employer must provide the following information to the employees:

- the class, unit, or group of employees that were covered by the exit program (whether voluntary or involuntary);
- the eligibility factors for the program;
- the time limits applicable to the program;
- the job titles and ages of all of the individuals who (in the case of a voluntary exit incentive program) are eligible for the program, or who (in the case of an involuntary termination program) were selected for the program; and
- the ages of all individuals in the same job classification or organizational unit who are not eligible for, or who were not selected for, the program.

The rationale for requiring this information is that it allows employees to make an educated decision about whether to sign the release. This informational requirement exposes the employer's process for selecting employees for termination or determining which employees will be eligible for voluntary exit incentive programs. Again, these rules and the information requirements are very detailed. Employers should work carefully with legal counsel to develop and properly document the eligibility and selection process and to prepare the appropriate releases and notices.

Finally, keep in mind that even if a terminated employee signs a release, the Equal Employment Opportunity Commission ("EEOC") always has the right and responsibility to enforce the ADEA, as with the other laws under its regulation. Accordingly, releases may not include provisions that prohibit employees from (a) filing a charge or complaint with the EEOC, including a challenge to the validity of the waiver agreement; or (b) participating in any investigation or proceeding conducted by the EEOC.

The take away: with any severance or release agreement offered to a worker over the age of 40, be aware that the OWBPA applies, and make sure you consult with legal counsel to ensure you take all proper precautions.

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