



TENTH CIRCUIT UPDATE: FALL 2005

This bulletin provides an update of recent employment laws for employers in states served by the United States Court of Appeals for the Tenth Circuit including Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. Please contact us if you have any questions about these decisions or about their effects on your organization.

Do Your Company's Releases Comply With the OWBPA?

Employers in Tenth Circuit states (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) who require releases from their employees in exchange for severance payments can learn from the case of *Kruchowski v. The Weyerhaeuser Co.*, out of Oklahoma, which was decided by the Tenth Circuit Court of Appeals this month. As a strategy for avoiding litigation, many companies require terminated employees to sign a release of all claims to obtain severance benefits. Making sure your company's releases are effective in barring age discrimination claims against your company may be trickier than you think.

The Older Workers Benefit Protection Act (OWBPA) is a statutory amendment to the Age Discrimination in Employment Act (ADEA) with which you'd better be familiar. Under the OWBPA, your company's standard release of claims, which may be effective to bar gender, race, disability, and many other claims by an employee, **may not** protect the company against age discrimination claims, even if age claims and the ADEA are specifically mentioned in the release. The OWBPA lists specific requirements that releases of age claims must include. These requirements are designed to ensure that a waiver or release by an employee in the protected class, i.e. over 40 years old, is "knowing and voluntary."

For a release to be "knowing and voluntary" under the OWBPA, the release must contain the following elements:

1. The release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;
2. The release must specifically refer to claims arising under the ADEA;
3. The release must not purport to encompass claims that may arise after the date of execution;
4. The employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;

5. The employee must be advised in writing to consult with an attorney prior to executing the agreement;
6. (a) The individual is given a period of at least 21 days within which to consider the agreement; or
(b) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
7. The release must allow the employee to revoke the agreement up to 7 days after signing; and
8. If the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.

Kruchowski v. The Weyerhaeuser Co., 2005 WL 2212312 (10th Cir. Sept. 13, 2005); 29 U.S.C. § 626(f)(1)(A)-(H)). Bear in mind, however, that even if all of the technical requirements under the OWBPA are met, if the enforceability of the release is challenged by the employee, other circumstances, such as whether there was any fraud or duress involved in obtaining signatures, also will be examined.

The recent *Kruchowski* case arose out of a reduction-in-force at Weyerhaeuser's Valliant, Oklahoma mill. All of the employees who later sued the company in this case were terminated in connection with the reduction in force and executed releases in exchange for severance benefits. In preparing the releases, Weyerhaeuser jumped through most of the hoops required by the OWBPA, but made a few mistakes in the process. First, Weyerhaeuser provided incorrect information regarding the decisional unit which was eligible for the exit incentive. It described the decisional unit as all salaried employees of the mill when the decisional unit actually consisted of all salaried employees of the mill who worked for the mill manager. Therefore, it provided job titles and ages of a larger group than those actually eligible. This prevented the eligible employees from properly evaluating how their protected group was affected by the reduction in force. Second, the company did not describe the eligibility requirements to be considered for the exit incentive. The eligibility requirements are similar to, but separate from the decisional unit and must be described. In this case, the factors used to

determine who would be eligible for the exit incentive included leadership, abilities, technical skills, and behavior. The Tenth Circuit Court of Appeals decided that by providing information on the incorrect decisional unit and failing to provide eligibility factors, Weyerhaeuser had not complied with the "strict and unqualified" requirement of the OWBPA and the releases were held invalid. Thus, despite obtaining the employees' signatures on the releases and paying severance to the employees, the employees were allowed to proceed with their age discrimination claims against the company arising out of the reduction in force.

The lesson to be learned here is that, when it comes to releases, one size does not fit all. A company must have releases tailored for employees over age 40 to be enforceable against age claims. But even two different forms, depending on age, are not sufficient. A release which is effective to bar gender, race and other claims is not necessarily effective to bar an age claim. Similarly, a release which is effective to bar an age claim over a simple termination of an employee over 40 years old will not necessarily satisfy the OWBPA as applied in a reduction in force situation. It is a good policy to have any releases reviewed by counsel at the time they are used. Even if you use standard forms, have them reviewed on a regular basis to see if there have been any changes in the law and make sure you understand all that will be required by the OWBPA under different circumstances.

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