

ADEA DISCLOSURE

10.1998

Employment Law Reporter, Ervin Cohen & Jessup LLP

Most employers are aware that employees age 40 and older are protected by the Age Discrimination in Employment Act (ADEA). The ADEA, as amended by the Older Workers' Benefit Protection Act (OWBPA), has certain provisions regarding review and revocation by the protected employee of any separation or severance agreement which includes a release of all employment-related claims. These provisions must be precisely followed in order for the release to be fully effective under federal, as opposed to state, age discrimination law. See, e.g., *Skrbina v. Fleming*, 45 Cal. App. 4th 1353 (1996). Among other things, persons protected by the ADEA must be given 21 days within which to consider a separation agreement. Thereafter, the employee must be given an additional seven days within which to revoke the agreement.

What many employers do not know, however, is that a longer consideration period must be provided under certain circumstances. Specifically, a 45-day period is required by 29 U.S.C. section 626(f)(ii) when a written release is sought in connection with an "exit incentive or other employment termination program offered to a group or class of employees." Although the ADEA does not define the terms "exit incentive" or "employment termination program," courts have held that a reduction in force qualifies as a "termination program" and requires that the affected employees be given additional time within which to consider the proposed agreement. See, e.g., *Blakeney v. Lomas Information Systems, Inc.*, 879 F. Supp 645 (Texas 1995).

In addition, where a written release is sought in connection with a termination program, 29 U.S.C. Section 626(h) requires that the employer provide ADEA protected employees certain information in writing "in a manner calculated to be understood by the average individual eligible to participate." In particular, each employee must be provided the following information regarding the employment termination program that has been offered:

- (i) 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
- (ii) 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

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organizational unit who are not eligible or selected for the program.

This information must be provided at the commencement of the 45-day period. The failure to comply with 29 U.S.C. section 626 will void the release with respect to the employees' rights under the ADEA. Employers should also be aware that the term "job classification" or "organizational unit" means all those persons employed in the same position or classification at any employment facility. Thus, the disclosure must provide information which includes any other facilities operated by the employer.

The bottom line is that where an employer is laying off more than one individual and is offering severance pay in exchange for a release of any claims, the employer cannot simply assume that a standard employment-related release agreement will apply to all possible disputes. Where the group of employees includes one or more persons who are age 40 or older, the agreement must contain a number of additional provisions relating to consideration and revocation periods, review by counsel and reference to the specific types of claims which are being released. In addition, an ADEA disclosure statement must accompany the agreement and must contain additional information to assist the employee in making a fully informed decision regarding the severance package which has been offered by the employer.