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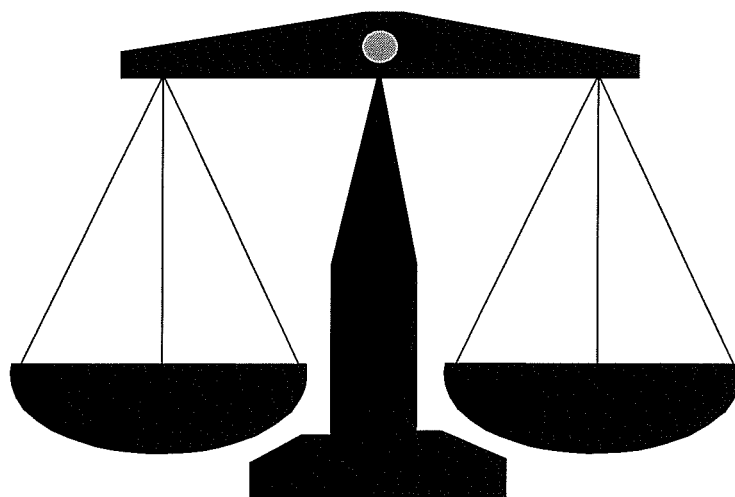
# LEGAL ADVISORY

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RECENT TRENDS OF INTEREST TO BUSINESS AND GOVERNMENT

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## REDUCTIONS IN FORCE AND DOWNSIZING OVERVIEW FOR EMPLOYERS



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## **I. REDUCTIONS IN FORCE**

For many employers, changing business conditions have necessitated consolidation of facilities and elimination of job positions. As a practical matter, employers are often surprised that layoffs can result in significant legal claims by affected employees. A reduction in force is a situation that often serves as the basis for discrimination claims, even though reductions occur because of a loss of business or through a merger or consolidation of business operations. Sound and defensible decisions regarding a reduction can make the difference between a relatively standard termination and one that precipitates legal difficulties.

### **A. Consider Employee Attitudes**

Employers should remember that many employees are attached to their jobs and their companies. Losing a job can be paramount to losing a spouse, particularly with long-term employees who consider themselves to be loyal and productive members of their company. It is therefore important to take employee attitudes into account in any decisions during a reduction in force.

### **B. Establish And Follow Well-Defined Guidelines**

It can be relatively easy in the context of a reduction in force for an age-protected employee to establish a prima facie case of discrimination. It is difficult, however, for an employee to prevail on a discrimination claim where the employer has followed age-neutral termination procedures in conducting the reduction in force. Thus, in advance of making a reduction, it is important to establish and follow well-defined guidelines for the reduction in force. Such procedure-driven reductions are more likely to withstand challenges based on age discrimination, but substantial deviation from established procedures can create a triable issue of fact as to pretextual discrimination. See Mitchell v. USBI Co., 186 F.3d 1352, 81 FEP 1376 (11<sup>th</sup> Cir. 1999) (per curiam); Stiles v. General Elec. Co., 986 F.2d 1415 (4th Cir. 1993). However, some degree of irregularity in following reduction procedures may alone be insufficient to establish age discrimination. Bowles v. Government of the Dist. of Columbia, No. 92-0649, 1993 WL 100085 (D.D.C. Feb. 17, 1993), affd, 38 F.3d 609 (D.C. Cir. 1994). If a challenge does arise, an employer should be able prevail on summary judgment by pointing to an established, age-neutral system of guidelines for the reduction. Notwithstanding an adverse effect on older employees, reduction-in-force selection procedures that are job related and consistent with business necessity will not violate the ADEA. Cullin v. Olin Corp. 195 F.3d 317, 81 FEP 190 (7<sup>th</sup> Cir. 1999), cert denied. 120 S.Ct. 1423(2000) Graffam v. Scott Paper Co., 870 F. Supp. 389, 400-401 (D. Me. 1994), affd, 60 F.3d 809 (1995).

### **C. Document Specific Goals And Reasons For The Reduction**

The reduction procedures should document the specific goals to be accomplished, such as a decrease in the overall work force or a downsizing of the number of employees in a particular department. In conjunction with the goals, there also should be a clear description of valid nondiscriminatory reasons for the reduction, whether a decline in business or a need for cost savings.

See Regal v. K-Mart Corp. 190 F.3d 876, 80 FEP 1546 (8<sup>th</sup> Cir. 1999) (employee's contention that RIF was unnecessary is simply an attack on employers business judgment and not evidence of age discrimination); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104 (8th Cir. 1994), cert. denied, 115 S. Ct. 355 (1994). In the aftermath of a reduction, it is likely that an employer will have to explain why that particular employee was terminated as opposed to being transferred to another position, particularly where long-term employees are terminated. Consequently, an employer will need to come forth with readily available nondiscriminatory reasons to dispel any allegations of discrimination.

#### **D. Utilize Objective Selection Criteria**

A key element in an effective reduction-in-force is making objective decisions about who is to be terminated and who will remain. Reduction-in-force procedures should utilize objective selection criteria to make this determination. There are several options available to an employer in structuring elimination criteria. Nondiscriminatory selection criteria can include interpersonal and technical job skills, length of service, performance level, self management, and versatility. See Cruz-Ramos v. Puerto Rico Sun Oil Co., 202 F.3d 381, 81 FEP 1445 (1<sup>st</sup> Cir. 2000) Graffam v. Scott Paper Co., 60 F.3d 809 (1st Cir. 1995). Avoid age-based criteria, such as salary or benefits levels.

#### **E. Document Performance Levels And Work Histories**

If performance level criteria are utilized, it should be made clear if the numbers of years of service will or will not be a factor. Failure to specify, for example, that years of service are not a criteria for retention may enable long term employees who are marginal performers to argue to create inferences of discrimination when less senior employees are retained. Adams v. Ameritech Services, Inc. 231 F.3d 414, 84 FEP178 (7<sup>th</sup> Cir. 2000). It generally is preferable that performance evaluations relied upon by decision makers in making RIF selections should be prepared well ahead of the time the selection decisions are made. A company should have available documentation of an employee's work history and disciplinary record. Despite the fact that court decisions state that the defendant need only articulate a legitimate nondiscriminatory reason for the employment action, if the employer is facing a lawsuit resulting from the termination of an employee who has worked with the company for many years, a strong defense should include ample documentation. One of the most effective ways to document an employee's performance is a system of meaningful job performance evaluations. Accurate performance appraisals are extremely useful in litigation if the need for such documentation should arise.

It also is important to review in detail an employee's file to determine if, in fact, there are performance evaluations which will support the adverse employment action. If an employee's performance has deteriorated over a long period of time, there should be substantial documentation to back up such claims. If there is not such evidence, then the history should be accurately memorialized before any adverse action is taken. After-the-fact evaluations may be vulnerable to accusations of pretextual discrimination. See Conkwright v. Westinghouse Elec. Corp., 739 F. Supp. 1006 (D. Md. 1990), aff'd, 933 F.2d 231 (4th Cir. 1991). When evaluating employees against the established selection criteria, careful documentation of each employee's observed behavior is necessary to support any termination decisions. This documentation can be in the form of

performance reviews and discussions with employees.

**F. Examine Expected Results Before Implementation Of The Reduction**

Before the selection process is implemented, all decisions regarding the terminations should be examined for any discriminatory impact on protected group members. For example, if statistics show that only employees over 40 years of age will be terminated, the selection criteria may need to be adjusted to avoid this result. An employer typically should make sure that the group of terminated employees is not disproportionately composed of age-protected individuals. In addition, it is a good idea to have a centralized source review the reasons behind all terminations of persons in the protected age group. If a decision to terminate a particular employee cannot be justified by existing documentation, the decision should be carefully reviewed. See Coleman v. Quaker Oats Co., 232 F.3d 1271, 84 FEP 602 (9<sup>th</sup> Cir. 2000).

**G. Maintain Effective Communication With Employees**

One overarching consideration that applies in all stages of a reduction is maintaining effective communication between an employer and its employees. The reason for a majority of employee problems is a breakdown in communications. Even before a reduction in force becomes necessary, it is important to keep employees abreast of changes in their company's future. If an employer is expecting hard times, this should be communicated to its employees. As soon as the possibility of a layoff becomes a reality, an employer should inform its work force of the pending reduction. Throughout the reduction, communication should be maintained to decrease the devastating effects of a layoff. Finally, the termination meeting with each employee selected should communicate as clearly and directly as possible the decision that has been made respecting the reduction.

**H. Supreme Court Places Greater Burden On Employers Defending Age Claims**

The Supreme Court recently held in Meacham v. Knolls Atomic Power Laboratory, 128 S.Ct. 2395, 2406 (2008), that an employer seeking to defend a disparate impact claim under the Age Discrimination in Employment Act (ADEA) with the defense that its decision was based upon a Reasonable Factor Other Than Age (RFOA) has the burden of proving that the factors used in making the decision were reasonable. This ruling carries significant implications for employers, exposing them to greater risk of liability under the ADEA when decisions are made to reorganize or reduce their workforces.

**1. Facts of the Case and Procedural History**

Meacham arose from a reduction in force (RIF) due to poor economic conditions. Knolls Atomic Power Laboratory was forced to cut its budget in the mid-1990s, due to significantly lower demand for its services. When an initial round of voluntary job reductions failed to trim the workforce by the targeted percentage, the company implemented an "involuntary reduction in force" program.

The RIF program used a matrix method to rank employees using objective factors such as years of services, as well as subjective factors such as performance, flexibility and critical thinking skills. Knolls Atomic then selected the employees with the lowest scores and eliminated their jobs. Interestingly, before doing so, the company conducted a disparate impact analysis, considering the factors of race and gender, but not age. As a result, thirty of the thirty-one employees laid off were over the age of forty, and thus protected by the ADEA.

Twenty-eight of those thirty workers eventually filed suit against Knolls Atomic, claiming both disparate treatment and disparate impact in violation of the ADEA. A jury found for the plaintiffs on the disparate impact claim, awarding them nearly \$6 million dollars in damages. Initially, the verdict was affirmed by the Second Circuit Court of Appeals, which found that, even though Knolls Atomic proffered a legitimate business reason for its RIF, the plaintiffs nevertheless could prevail by showing “business necessity,” meaning that Knolls could have utilized an alternative method of designing an RIF with more objective criteria.

Knolls then sought certiorari from the U.S. Supreme court. While that petition was pending, the Supreme Court decided Smith v. City of Jackson, which addressed disparate impact cases under the ADEA. As a result, the Supreme Court vacated the verdict in Meacham and remanded the case. On remand, the Second Circuit reversed it holding, finding that the employer need not prove its decision was motivated by business necessity. Instead, under Smith, the employees bore the burden of proving that the factors used by the employer in making their decision were not reasonable.

The plaintiffs then petitioned the Supreme Court for certiorari on the ground that the circuits were split regarding which party bore the burden of persuasion on the reasonableness element. The Second Circuit in Meacham assigned the burden to the employees to demonstrate that the factors other than age were unreasonable, but the Ninth Circuit had ruled that the employer bore the burden of proving the reasonableness of the factors used in its decision. The Supreme Court granted certiorari and resolved this split in circuits in favor of the employees.

## **2. Disparate Impact Claims Under the ADEA**

The ADEA generally prohibits employers from taking any action against employees 40 or older that would “deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” However, the ADEA specifically includes an exception providing that an employer may take action which would otherwise be prohibited due to its disparate impact on older workers, as long as that action is based on a “Reasonable Factor Other Than Age.” 29 U.S.C.A. § 623(f)(1).

In Meacham, the Supreme Court first noted that it had referred to the RFOA exception in the past as an “affirmative defense.” Moreover, the Court found that the text and structure of the statute compelled the conclusions that the RFOA exception exempts otherwise illegal conduct, thereby creating a defense for which the employer (the party seeking to assert the defense) bears the burden of persuasion. The Supreme Court rejected Knolls Atomic’s argument that the RFOA exception should be construed as an element of liability.

Disparate impact cases under discrimination laws are typically governed by a three-step analysis. First, an employee must identify a specific employment practice and establish that this practice is discriminatory. Next, the burden shifts to the employer, to offer a legitimate “business necessity” for the practice. Finally, the burden shifts back to the employee to show that the demonstrated business necessity either does not support the employment practice or that an equally effective alternate practice would have been less discriminatory.

In the ADEA context, however, the analysis is somewhat different. In Smith v. City of Jackson, the Supreme Court held that the ADEA permits “disparate impact” claims where a specific employment practice (such as a reduction in force or layoff) has the effect of adversely harming older workers even though there was no intent to discriminate. This holding, at least, tracked Title VII cases. Conversely, Smith also made clear that an employer need not present a defense of business necessity in an ADEA disparate impact case, but may instead rely on the “Reasonable Factor Other Than Age (RFOA) defense.

### **3. The Supreme Court’s Holding**

In Meacham, the Supreme Court elaborated on the differences between a Title VII and ADEA disparate impact claim, ruling that, in ADEA cases, the RFOA defense is an affirmative defense, which means that employer bears the burden of: (1) articulating reasonable factors other than age upon which the employment action was allegedly based; **and**, (2) presenting supporting evidence that those factors have merit.

The Court in Meacham held that the “business necessity” test no longer applies in ADEA disparate impact cases, stating that the application of both an RFOA and business necessity test would be wasteful and duplicative. Instead, the Court in Meacham fashioned a two-step analysis that first requires the employee to prove that the employer’s actions had a disparate impact on workers over forty. The employer must then prove the reasonableness of the factors relied upon in making the employment decisions at issue.

With respect to the employee’s burden of proving disparate impact, the Court stated that an employee cannot merely introduce a facial disparate impact based upon the number of older workers impacted by the employment action, but must point to a specific practice which caused the disparate impact. In most cases, however, this is likely a distinction without a difference, and many employer advocates have voiced concerns that Meacham essentially assumes employer liability in disparate impact cases, forcing the employer to carry the primary burden of proof.

### **4. Implications for Future Reductions in Force**

Meacham’s holding means that employers sued under the ADEA will have a more difficult time avoiding liability unless they develop a reasonable reduction in force plan that does not have a disproportionate effect on older workers. The Court recognized this in their opinion, noting that lawsuits over reductions in force could well become harder and costlier to defend. As a result, there will be an increased incentive for older workers to bring disparate impact suits, as well as an increase in settlement values and the number of cases in which the plaintiff prevails.

Ultimately, employers facing tough decisions regarding layoffs and reductions in force must carefully consider the impact such employment decisions have on workers age forty and older. Employers are advised to keep thorough records of layoff decisions and reductions in force which may have a disparate impact on workers over forty, to carefully train management about the implications of such decisions, and to work with counsel in constructing an RIF program that hinges, to the extent possible, on objective and measurable criteria. Without developing reasonable criteria for selection of employees to be terminated in reductions in force, employers will likely be vulnerable to class-wide legal claims by displaced older workers.

## **II. THE OLDER WORKERS BENEFIT PROTECTION ACT**

In October 1990, the Older Workers Benefit Protection Act ("OWBPA" or "Act") was passed to amend the Age Discrimination in Employment Act ("ADEA") by extending coverage to all employee benefit plans notwithstanding whether the benefits are provided under a bona fide employee benefit plan.

Title I of the Act generally prohibits discrimination against older employees on the basis of age in the provision of employee benefit plans. (Benefit plans that differ among employees according to age do not violate the ADEA as long as the distinctions are based on actual costs to the employer.) The legislation also addressed the validity of voluntary early retirement incentive plans and allows employers to offer such programs in compliance with standards established by the Act. If challenged, the employer bears the burden of demonstrating that an applicable plan comports with the purposes of the ADEA.

Title II governs all releases of age discrimination claims, both supervised and unsupervised, by setting minimum requirements for a valid waiver of rights under the ADEA. Unsupervised releases are considered valid if they are "knowing and voluntary" and meet certain requirements set forth in 29 U.S.C. § 626(f).

The impetus for the passage of the OWBPA was the Supreme Court's decision in Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 109 S. Ct. 2854 (1989). In that case, an employee challenged her employer's disability retirement program's provision limiting eligibility only to employees under the age of 60 at retirement. The plaintiff, who was unable to work due to a medical condition, was 61 years old and thus unable to retire under disability benefits. She brought suit alleging her employer's denial of benefits of the disability retirement program to older workers was violative of the ADEA.

Relying on § 4(f)(2) of the ADEA, the Supreme Court held that an employer may regulate eligibility for benefits so long as the benefits are provided pursuant to a bona fide employee benefit plan that is not a subterfuge to evade the purposes of the ADEA. EEOC regulations previously interpreted this defense as allowing age-based reductions in employee benefit plans only where the reductions were justified by cost considerations. The Supreme Court rejected this view and found that a prevailing employee must prove that the plan provided discriminatory benefits on the basis of age and that the plan intended to discriminate with respect to a non-fringe benefit of employment.

The OWBPA reversed Betts and amended § 4(a)(1) of the ADEA to forbid employee benefit discrimination on the basis of age in the provision of both fringe and non-fringe benefits. The Act also incorporates the EEOC's long-standing pre-Betts view that a discriminatory benefit plan is subterfuge to evade the Act unless the employer can show that distinctions on the basis of age in the benefits provided under a plan resulted from the increased costs of providing a greater benefit to an older worker. The Act does make an exception in this regard to voluntary early retirement incentive plans.

#### **A. Early Retirement Plans**

Early retirement incentive plans are provided for in specific requirements set forth in the Act. If challenged in court, the Act places on the employer the burden of proof in demonstrating that an applicable plan is intended to evade the purposes of the ADEA. The Act allows that an employer may define a minimum age as a condition of eligibility for normal or early retirement benefits. Employers may provide pension subsidies to supplement pension benefits, and they may make Social Security "bridge" payments up until the employee reaches the effective age for Social Security benefits. Furthermore, the Act allows an employer to deduct from any severance payments the value of retiree health benefits received by an individual eligible for an immediate pension and also the value of additional pension benefits received by an individual eligible for not less than an immediate and unreduced pension. The Act also states that it is not unlawful for an employee's long-term disability benefits to be reduced by the value of pension benefits that the individual elects to receive or is eligible for at age 62 or normal retirement age.

These benefit provisions apply to any employee benefit plan established or modified on or after the date of enactment and other conduct occurring more than 180 days after the date of enactment of the Act. With respect to collective bargaining agreements in effect as of the date of enactment and that terminate thereafter, the Act became effective at the termination of the agreement or on June 1, 1992, whichever occurs first. The provisions of the OWBPA applied to state employees or political subdivisions of states two years after the date of enactment.

#### **B. The EEOC'S Negotiated Rulemaking Advisory Committee**

Because several important questions relating to releases remained unsolved by the statutory language of the OWBPA, the EEOC appointed the Negotiated Rulemaking Advisory Committee in October, 1995. The Rulemaking Committee consisted of a total of twenty members from private law firms, the EEOC, unions or employee interest groups and private corporations or industry groups. Its purpose was to propose regulations regarding a number of unresolved issues that had arisen under the OWBPA. The EEOC's appointment of the Committee was the first time that the Commission has utilized a rulemaking committee. The use of such a committee marks a fundamentally different approach by the Commission in developing regulations. Previously, the EEOC simply allowed public comment to regulations drafted solely by the Commission. In July, 1996, the Committee reached consensus on regulations and they were thereafter adopted by the EEOC.

**C. Minimum Requirements For Waivers Of ADEA Rights**

The OWBPA sets forth a precise definition of waivers which shall be considered knowing and voluntary and, therefore, an enforceable waiver and release of rights under the ADEA. In this regard, the Act's minimum requirements are as follows:

1. The waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; in other words, employ language that is easily understandable and avoids legalese;
2. The waiver specifically refers to the rights or claims arising under the Act;
3. The individual does not waive rights or claims after the date the waiver is executed;
4. The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; the employee must receive additional consideration, such as money or benefits, that he is not already entitled to under the employer's policies;
5. The individual is advised in writing to consult with an attorney prior to executing the agreement;
6. The individual is given a period of at least 21 days within which to consider the agreement or if the 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 agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement and the agreement shall not become effective or enforceable until the renovation period has expired.

**D. Wording Of Waiver Agreements**

Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

The waiver is part of an agreement between the individual and the employer and written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

The regulations provide that the entire waiver agreement must be in writing. The regulations further state that waiver agreements must be drafted in a way that takes into account such factors as the level of comprehension and education of typical participants. The regulations specifically state that consideration of such factors usually will require the limitation or elimination of technical jargon

and long, complex sentences.

The regulations also specifically state the waiver must refer to the Age Discrimination in Employment Act (ADEA) by name. The regulations also reiterate the requirement of Section 7(f)(1)(E) that a person signing a waiver must be "advised in writing to consult with an attorney prior to executing the agreement."

**E. Waiver Of Future Rights**

Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

The regulations specifically state that the waiver of rights or claims that arise following the execution of a waiver is prohibited. However, the regulations state that Section 7(f)(1)(C) does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date. See Adams v. Moore Business Forms, Inc. 224 F.3d, 83 FEP1241 (4<sup>th</sup> Cir. 2000).

**F. Consideration To Support Agreements**

Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

The regulations state in this regard that "consideration in addition" means anything of value in addition to that which the individual is already entitled in the absence of a waiver.

The regulations further provide that, if a benefit or other thing of value is eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit in connection with a waiver will not constitute "consideration." Determination of whether the elimination is in contravention of law or contract, according to the regulations, may vary depending upon the facts and circumstances of each case.

In Lockheed Corp. v. Spink, U.S. S. Ct. No. 95-809 (6/10/96), the Court ruled that the Employee Retirement Income Security Act (ERISA) did not prevent an employer from conditioning the receipt of benefits upon an employee's waiver of job-related claims against the Company. In Spink, Lockheed amended its pension plan to create a special early retirement program. Employees eligible for the program and accepting the benefits of the program released Lockheed by signing a waiver of claims. See Cruz-Ramos v. Puerto Rico Sun Oil Co., 202 F.3d 381, 81 FEP1445 (1<sup>st</sup> Cir. 2000) (factoring pension status into decisional mix may be unfair but is not age discrimination).

In upholding the Company's action, Justice Thomas reasoned that a pension plan allows an

employer to provide "increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily." Justice Thomas writing for a unanimous court concluded that ERISA does not preclude an employer from conditioning the receipt of early retirement benefits with the requirement that employees sign a release to receive the new severance.

The regulations do not in any way specifically address claims that severance benefits may arise under state contract law principles. See, e.g., Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 115 Ill.2d 482, 490, 505 N.E.2d 314 (1987); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983). The regulations also do not address the controversy over whether an employer may discontinue a severance plan (ERISA or non-ERISA) and then immediately establish an OWBPA program providing the same or similar benefits with the requirement that the employee execute a waiver to receive the new severance. In other words, the question in this scenario is whether the newly created severance plan amounts to an "addition to anything of value to which the individual already is entitled" and constitutes sufficient consideration to support a release. This issue was extremely controversial to the Committee and no consensus could be reached. Therefore, the regulations are silent on this issue.

The regulations specifically address the question of whether an employer may give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40. The regulations state that an employer may do so. This issue arose out of the controversial decision of DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir.), cert. denied, 116 S. Ct. 306 (1995). In that case, the Third Circuit reversed a district court's finding that the OWBPA was violated where a separation plan failed to give enhanced benefits to employees over the age of 40. The Third Circuit found instead that the plan did not treat older workers differently because it did not classify on the basis of age and was made available to all employees willing to sign a release, regardless of their age.

#### **G. Time Periods**

The regulations specifically state that the seven day revocation period under the OWBPA cannot be shortened by the parties. The regulations also state that the 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period. However, non-material changes do not restart the running of the applicable period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

The regulations also clearly state that an employee may sign a release prior to the end of the 21 or 45 day time period, thus commencing the mandatory seven day revocation period.

#### **H. Informational Requirements**

Section 7(f)(1)(H) of the ADEA sets forth informational requirements relating to "exit incentive programs" and "other employment termination programs." In general, this provision of the OWBPA provides that, if a waiver is requested in connection with either an exit incentive program or employment termination program, the employer must make disclosures concerning eligibility factors and time limits applicable to the program. The statute also provides that 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 must be disclosed.

To say the least, Section 7(f)(1)(H) is not a model of clarity with respect to Congress' intent concerning informational requirements. Indeed, the information that must be disclosed and the manner that it must be disclosed has long been among the most difficult to interpret aspects of the OWBPA and the regulations provide some guidance in this regard.

The regulations address two principle issues: (1) to whom must information be provided; and (2) what information must be disclosed to such individuals.

The regulations avoid providing definitions for the various terms used in the Act such as "program," "unit," "class," "job classification," and "organization unit." Instead, the regulations note that an "exit incentive program" is usually a voluntary program offered to a group or class of employees where such employees were offered consideration in addition to anything of value to which the employees already were entitled in exchange for their decision to resign voluntarily and sign a waiver. The regulations further note that, usually, "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who were offered additional consideration in return for the decision to sign a waiver.

The regulations state that the scope of terms such as "class," "unit," "group," "job classification," and "organizational unit" are determined by examining the "decisional unit" at issue. The term "decisional unit" is unmentioned in the Act, and is a term created solely by the regulations.

The "decisional unit" is defined as that portion of the employer's organizational structure from which the employer chose the persons who were offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" was developed to reflect the process by which an employer chose certain employees for a program and ruled out others from the program.

The importance of the decisional unit is that the unit determines to whom the information must be given.

The regulations provide examples to assist in determining the scope of a "decisional unit" and specifically when a "decisional unit" is other than the facility where the terminations occur. The regulations state that the particular circumstances of each termination program will determine the decisional unit. Among the examples cited in the regulations where the decisional unit is other than the entire facility are the following: (1) a number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit; (2) if a company utilizes personnel for a common function at more than one facility, the decisional unit for that unit (e.g., accounting) may be broader than the one facility; (3) a large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (e.g., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

The regulations emphasize that higher level review of decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by a human resources official to monitor compliance with discrimination laws will not affect the decisional unit.

The regulations also provide specific items concerning the presentation of information. The regulations state that information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bans broader than one year (such as "age 20-30") does not satisfy this requirement.

In a determination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information should be broken down by grade level or other subcategory.

The regulations also state that, if an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% reduction in force of the accounting department will come from the accountants, whose performance is in the bottom one third of the division, the employer must still disclose information for all employees in the accounting department, even those who are the highest rated.

The regulations note that an involuntary termination program may take place in successive increments over a period of time. Information supplied with regard to the involuntary termination program should be cumulative, so that the later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of the Act.

The regulations provide a specific example of one way in which required information could be presented to the employee. The example is not presented as a prototype notification agreement that automatically will comply with the ADA. The regulations state that each information disclosure must be structured based upon the individual case, and take into account the corporate structure, the population of the decisional unit, and the requirements of the Act.

The regulations' detailed requirements concerning information are in response, in part, to the Eleventh Circuit's decision in Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368 (11th Cir. 1995).

In Kraft, the company decided to close its Decatur, Georgia grocery products plant as part of a downsizing to eliminate excess production capacity. Four other Kraft plants manufactured most of the same food products as the Decatur plant. Kraft created a plan providing continuing health benefits and severance pay for the laid-off employees at the Decatur plant in return for execution of a general release which explicitly included a waiver of all rights under the ADEA. While the employees were provided with ages and job titles of all employees laid off and, therefore, eligible for

plant benefits, they were given no age data regarding employees at the other plants.

Four of the terminated employees sued Kraft to enjoin it from requiring releases from those who had not yet signed and to void the releases that had been signed. Among other allegations, the plaintiffs claimed that the waivers did not comply with the requirements of 29 U.S.C. § 626(f)(1)(H)(ii) by providing "the age of all individuals in the same job classification or organizational unit who were not eligible or selected for the program." In other words, the plaintiffs contended they were entitled to information regarding the employees of the other four plants that were not closed so they could determine whether age played a factor in the decision to close the Decatur plant.

The court in Kraft agreed with the plaintiffs on an issue which the court characterized as a matter of first impression. The court found that the Act provided that "individuals in the same job classification or organizational unit" could include employees outside a single facility. The court found that neither "job classification" nor "organizational unit" was defined under the Act and neither phrase naturally included only the employees at a single plant. The court in Kraft reasoned that, "given the myriad of organizational structures of the business world, it is easy to conceive that the unit would span more than one plant." 62 F.2d at 372. Therefore, the Eleventh Circuit concluded that the individuals in the same "job classification" or "organizational unit" may include employees at other plants in the same company, in a vacated summary judgment entered by the trial court in favor of Kraft.

As the decision in Kraft clearly shows, the burden on an employer to comply with the OWBPA may be considerable, especially when the employer operates several plants employing hundreds of employees at each. As the case also indicates, an employer does not necessarily comply with the OWBPA merely because it provides information to all employees at a plant that is being closed where the company also operates other plants that manufacturer the same or similar products.

### **I. Eleventh Circuit Ruling and Informational Disclosures in Releases**

Recently, the Eleventh Circuit considered the appropriate scope of the OWBPA's informational disclosure requirements in Burlison v. McDonald's Corp., 455 F.2d 1242 (11th Cir. 2006). In that case, as part of a nationwide restructuring leading to a reduction in workforce, McDonald's merged three regions – Atlanta, Nashville, and Greenville – to create a new, larger Atlanta region. McDonald's retained 142 employees and offered a severance package to 66 discharged employees in consideration for a release waiving claims against the company. To comply with the OWBPA's disclosure requirements, McDonald's provided information regarding the age and job titles of all employees in the Atlanta, Nashville, and Greenville regions who were considered for the workforce reduction. The information McDonald's provided included the job titles and ages of the 208 employees in those three regions, the identity of employees who were selected for discharge and were offered severance packages, and the identity of employees who were retained.

Subsequently, five of the employees who accepted severance packages in consideration for a release of age claims sued McDonald's for age discrimination. The plaintiffs alleged that the

waivers they executed were void on the ground that, since McDonald's engaged in a nationwide reduction in workforce, McDonald's should have provided information about the ages and job titles of all employees considered for retention or termination nationwide, not just the employees in the regions in question.

The Eleventh Circuit in Burlison held that McDonald's satisfied the informational disclosure requirements of the OWBPA by offering region-specific information sheets. The Court reasoned that, even though McDonald's engaged in a nationwide workforce reduction, McDonald's selected the employees to be considered for retention or termination from a specific region – Atlanta, Nashville, and Greenville – rather than from a nationwide pool. In addition, the employees retained by McDonald's were offered employment only in the Atlanta region, not nationwide. Therefore, McDonald's was required to disclose only information about the age and job titles of employees considered for retention or termination in the Atlanta, Nashville, and Greenville regions.

Employers should not construe the Burlison decision to mean that data on terminated employees nationwide never will be required from employers. Rather, the lesson from the Burlison case is that, in the context of a workforce reduction, the scope of disclosure requirements under the OWBPA typically will correspond with the scope of the employee pool considered for retention or termination by the employer.

#### **J. Waiver Provisions Regarding Charges, Filings And Disclosures**

Section 7(f)(4) of the Act states that "no waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADA]." Section 7(f)(4) further states that "no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in investigation or proceeding conducted by the Commission."

The regulations state that no waiver agreement may include a provision prohibiting an individual from filing a charge or complaint with the EEOC, including a complaint challenging the validity of the waiver agreement, or participating in any investigation or proceeding conducted by the EEOC.

The regulations further state that no waiver may include any provision imposing any condition precedent, any penalty, or other limitation adversely affecting any employee's right to file a charge or complaint or participate in any investigation.

In EEOC v. Astra USA, Inc., 94 F.3d 738 (1st Cir. 1996), the court held that employees who privately settled a sexual harassment complaint with their employer may not agree to "non-assistance covenants which prohibit communication with the EEOC." The Astra decision did not involve an age claim, but rather a sexual harassment claim, and the court found that such non-assistance covenants are void as against public policy.

**K. Waivers And Settlement Of EEOC  
Age Charges Or ADEA Court Actions**

The Act also provides that a waiver and settlement of a charge filed with the EEOC or an action filed in court by an individual alleging age discrimination will not be considered knowing and voluntary unless the requirements of Sections 1-5 outlined in Section C above are met and also the individual is given a reasonable period of time within which to consider the settlement agreement. The Act does not, however, require that the seven day revocation period of the specific 21 or 45 day consideration period provided for in the case of non-supervised waivers be applicable to EEOC charges or court cases where age claims are alleged. The Act further provides that the party asserting the validity of a waiver shall have the burden of demonstrating that the waiver was knowing and voluntary. See also EEOC v. U.S. Steel Corp., 671 F. Supp. 351 (W.D. Pa. 1987) (release provision "not to counsel or assist" EEOC in investigation of age claim is void), supplemented, 728 F. Supp. 1167 (W.D. Pa. 1989), rev'd on other grounds, 921 F.2d 489 (3d Cir. 1990); EEOC v. Cosmair, Inc., 1986 WL 68544, 44 Fair Empl. Prac. Cas. (BNA) 566 (N.D. Tex. 1986) (release provision providing for discontinuation of benefits for filing of age claim with EEOC is void), aff'd as modified, 821 F.2d 1085 (5th Cir. 1987).

**L. Return Of Benefits In  
Consideration Of A Release**

In January 2001, the EEOC issued final regulations on the controversial issue of "tender back" under the Older Worker's Benefit Protection Act.

The term "tender back" concerns the issue of whether an individual who believes that a waiver or other legal agreement is invalid must return (i.e. "tender back") the payment received for the waiver before challenging it in court. The EEOC determined that it was important to include a prohibition against tender back in its existing OWBPA regulations on waivers. In addition, the EEOC addressed several other related issues to clarify employer requirements under the OWBPA.

The regulation provides that the contract principles of "tender back" and ratification do not apply to ADEA Waivers. The regulation states that the OWBPA governs ADEA waivers and take precedence over traditional principles of contract law not included in the statute. Therefore, an older worker may retain severance or other benefits, even if he challenges the validity of a waiver agreement under the ADEA.

The regulation also provides that employers may not avoid the "no tender back" rule by using other means to limit an older worker's right to challenge a waiver agreement, or by penalizing an older worker for challenging a waiver agreement. For example, this means that an employer may not require older workers to agree to pay damages to the employer or pay the employer's attorney's fees simply for filing suit.

Under the regulation, an employer may recover money it paid for a waiver if the older worker successfully challenges the waiver, proves age discrimination, and obtains a monetary award. However, the employer's recovery may not exceed the amount it paid for the waiver in the first place, or the amount of the award if it is less.

An employer may not, on its own, abrogate or avoid the duties to which it agreed, even if the waiver is challenged. For example, an employer still is obligated to make the retirement or other payments it agreed to provide to the older worker.

The regulations further provide that, under the OWBPA, that a valid waiver is an affirmative defense with the burden on the employer to prove in court that the waiver is valid. If the employer can prove the waiver's validity, the older worker's lawsuit will be dismissed.

### **III. GENERAL NOTICE REQUIREMENTS OF WARN**

The Worker Adjustment and Retrain Notification Act ("WARN") generally requires that sixty (60) days advance notice of a "plant closing" or "mass layoff" be given to affected employees, bargaining representatives and local government officials. If required WARN Act notices are not given, employees can recover pay and benefits for the period for which notice was not given, up to a maximum of sixty days. 29 U.S.C. § 2104. Conversely, if an employer provides employees pay and benefits in lieu of notice, no other damages should be recoverable.

#### **A. WHO MUST GIVE NOTICE?**

According to the WARN Act Regulations, subsidiaries which are wholly or partially owned by a parent company are treated as separate employers depending upon the degree of their independence from the parent company. Some of the factors to be considered in making this determination are: (1) common ownership; (2) common directors and/or officers; (3) defacto exercise and control; (4) unity of personnel policies emanating from a common source; and (5) the dependency of the operations with one another. 20 C.F.R. § 639.3(a)(2).

#### **B. EVENTS WHICH TRIGGER THE WARN ACT'S NOTICE REQUIREMENT -- MASS LAY OFF**

The term "mass lay off" refers to any reduction in force other than a plant closing which comes within any thirty-day period, results in employment loss at a "single site of employment" of either: (1) a third or more of the site's active employees but at least fifty (50) employees, or (2) at least five hundred (500) employees. For purposes of these calculations, part-time employees are ignored (but notice must be given to part-time employees if WARN Act Notices are otherwise required). However, temporary project employees are counted when applying the mass lay off threshold test even though they are not entitled to WARN Act Notices.

#### **C. KEY TERMS**

1. Active Employees: The DOL has defined "Active Employees" to mean employees "currently on the payroll and in pay status as of the time of the mass layoff." Under this definition, workers on unpaid temporary layoffs or leaves would not be counted as active employees, even if they have a reasonable expectation of recall.

2. **Part-Time Employees:** Part-time employees are not counted in determining whether WARN Act Notices must be given but WARN Act Notices must be given to part-time employees if it is otherwise required. For purposes of this rule, part-time employees are employees who average less than 20 hours per week (during the 90 days preceding the date on which WARN Act Notices is (or would be) required or if shorter, the employees entire period of employment OR those individuals who worked in fewer than 6 of the 12 months preceding the date in which the WARN Act Notices are (or would be) required. Based on this definition, in Solberg v. Inline Corp., 740 F. Supp. 680 (D.Minn. 1990) the court held that 300 employees terminated after 5 months on the job were part-time because they worked less than 6 months before the layoff. This interpretation comports with your understanding.

3. **Employment Loss:** An employee suffers “employment loss” if: (1) the individual’s employment ends for any reason other than a discharge for cause, voluntary departure or retirement; (2) the individual is placed on layoff exceeding six months; or (3) the individual’s hours of work are reduced by more than fifty per cent during each month of any 6-month period.

4. **Single-Site Employment:** According to the WARN Act Regulations, “a single site of employment” is either a single location or group of contiguous locations. 20 C.F.R. § 639.3(i)(1). The Regulations list four interpretations of the term “single-site of employment:”

There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be a single site of employment.

Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

Contiguous buildings owned by the same employer which have separate management, produce different products and have separate workforces are considered separate single sites of employment. 20 C.F.R. § 639.3(i)(2)-(5).

## **D. NOTICE OBLIGATION IN THE SALE OF BUSINESS CONTEXT**

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When part or all of the business is sold, the seller is responsible for providing WARN Act Notices to employees terminated through the effective date of the sale. Thereafter, the purchaser is responsible for providing WARN Act Notices to employees.

### **1. Sales To Which This Special Provision Applies**

An asset sale is the only kind of business sale transaction in connection with which employees normally are laid off by the seller for possible re-hire by the buyer. In other words, it is the only type of sale transaction that truly follows the special provision cited above. Therefore, the aforementioned responsibility would apply to the purchaser and seller.

### **2. What A Buyer And Seller Might Do**

A seller seeking to avoid WARN Act liabilities should attempt to have employees laid off on account of an asset sale after the effective date of the asset sale. Moreover, the seller should notify employees who are laid off that their layoffs are temporary (i.e. expected to be less than six months) in that the buyers are expected to rehire some or all of them. As a result of taking this approach, layoffs incident to the sale should not trigger WARN Act Notice requirements. Rather, these Notice obligations should only arise if the buyer fails to rehire a sufficient number of the seller's employees, rendering the buyer solely responsible for giving any required WARN Act Notices. This approach should be backed-up by a sales contract provision assigning WARN Act obligations to the buyer and indemnifying the seller from all potential WARN Act liabilities.

However, the buyer -- in order to avoid WARN Act liabilities -- may require the seller to permanently lay off its employees before the effective date of the sale, in which case the seller should not assume that the sale of business provision will prevent WARN Act obligations from being triggered. It may come down to what the sales contract says.

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