

EMPLOYMENT LAW

No tender-back clauses in waivers of age claims

EEOC commentary suggests such clauses invalidate entire releases.

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SAVVY EMPLOYERS that settle employment disputes with, or provide severance pay to, departing employees will attempt to obtain a written release and waiver of any legal claims the employee may have at that time in return for the payments made to the employee. In 1990, Congress passed the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. 626(f), to regulate this practice in the context of waivers of age discrimination claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, et seq. The OWBPA provided several procedural protections to ensure that an employee's waiver of any ADEA claims "is knowing and voluntary."

To protect their investments, employers sometimes require the employees who are being paid to give up their employment claims to sign "tender-back" clauses in their separation agreements. See, e.g., *Cole v. Gaming Entertainment LLC*, 2002 U.S. Dist. Lexis 8447 (D. Del. May 6, 2002). Under these clauses, if the separated employee wishes to sue despite having received a payout, the employee must first return all monies or other benefits he or she obtained in return for the promise not to sue. The language of the OWBPA does not expressly allow or forbid these tender-back clauses. To employers, these clauses represent a legalistic

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formulation of the adage, "You can't have your cake and eat it too." This concept has been enforced under the common law of many states for a long time. See, e.g., *Bennett v. Coors Brewing Co.*, 189 F.3d 1221 (10th Cir. 1999).

In December 2000, however, the Equal Employment Opportunity Commission (EEOC) expressly gave employees the right to have their cake (the money or other benefits supplied to them for their agreement

But no reported cases deal with issue.

not to sue) and eat it too (by keeping the money even if they later sue the employer under the ADEA). The final EEOC regulation (29 CFR Part 1625) prohibits employers from relying on tender-back clauses in releases or waivers of ADEA claims. This regulation filled a gap left by a 1998 U.S. Supreme Court case, *Oubre v. Entergy Operations Inc.*, 522 U.S. 422 (1998), which invalidated an employer's release agreement that included a tender-back clause and did not otherwise comply with the 1990 OWBPA restrictions. The EEOC regulation goes further by making clear that tender-back clauses are no longer valid with respect to ADEA claims even if a release otherwise complies with the OWBPA.

One question that remains unanswered under the new EEOC regulation is whether a tender-back clause in a release invalidates the release or waiver in its entirety or whether the offensive clause simply "drops out" of the agreement. The EEOC commentary issued with the regulation suggests that there is a "strong argument" that inclusion of a tender-back clause should invalidate the entire release/waiver because it "would make the agreement misleading in

a material sense" and would violate the OWBPA's requirement that waivers be understandable by an average individual being asked to sign an agreement. See www.eeoc.gov/regs/tenderback.html. Although this part of the EEOC guidance does not have the force of law, it indicates the EEOC's disdain for tender-back provisions and its likely position if faced with the issue.

The answer to this "open" question has important tactical implications for employers that still wish to demand tender-back clauses. Some employers might choose to include a knowingly unenforceable tender-back clause as a deterrent if the only harm stemming from that decision was that the clause could not be enforced. See, e.g., *Commonwealth of Massachusetts v. Bull HN Information Sys. Inc.*, 143 F. Supp. 2d 134, 157-58 (D. Mass. 2001).

Most employers will view such a tactic as too risky, however, knowing that its inclusion might invalidate the underlying waiver of claims. The uncertainty created by the EEOC's refusal to address the issue directly and its articulated guidance seem to be effective deterrents to prevent employers from challenging the EEOC's position when obtaining ADEA waivers/releases: No reported cases since the regulation issued have dealt with this issue.

Liquidated damages

The EEOC's comments to the new regulation reveal another potential pitfall for employers. Releases and settlement agreements with employees sometimes contain a liquidated-damages clause stating that violation of any promises made by the employee in the agreement will result in a

predetermined amount of monetary liability in favor of the employer without any need for the employer to prove actual damages. For example, a simple liquidated-damages clause may provide as follows: "If Employee breaches his or her promises not to sue in this agreement, s/he agrees to pay Employer, even without any proof of actual damages incurred, \$10,000.00 as liquidated damages."

Other such clauses may substitute another deterrent instead of a lump-sum damages amount—such as payment of the employer's attorney fees in any action to sue the employee for breach of an earlier agreement not to sue.

The EEOC's comments caution that such a generally phrased liquidated-damage clause must be written to allow a reasonable employee "to determine that any liquidated damages provisions for breach of non-ADEA clauses have no effect on the employee's ability to bring an ADEA charge or lawsuit challenging the waiver." In order to heed the EEOC's advice, employers must use caution when using liquidated-damage provisions. These clauses are sometimes important terms of a severance agreement, especially when the employer requires an ongoing deterrent to protect against a future harm, such as the breach of a noncompete agreement or a confidentiality or nondisparagement clause.

Employers that do not wish to eliminate liquidated-damages provisions altogether may avoid running afoul of the EEOC's comments in different ways. Most obviously, employers can specifically exempt ADEA claims from those covered by the liquidated damages provision. See, *Cole*, 2002 U.S. Dist. Lexis 8447, at *21. An alternative, but one unlikely to be acceptable to some employers, would be to include language in the agreement that makes it clear to the employee that he or she is not waiving any right to sue and that he or she can challenge the ADEA waiver without fear of having to pay the employer anything for doing so.

Some employers have resorted to creating separate agreements, supported by additional consideration, that include liquidated-damages provisions to address the specific,

foreseeable harms that are most important to them based on the particular situation. For example, to ensure that its noncompete and confidentiality provisions are not called into question, an employer may choose to deal with these important issues in an agreement apart from any ADEA waiver. There have been no reported cases interpreting the EEOC commentary regarding generalized liquidated-damages clauses, which may indicate that employers have heeded the EEOC's advice.

Limits on restitution

The EEOC's regulation also limits the employer's ability to recover the consideration it paid to an employee for not bringing an ADEA lawsuit if the employee challenges the OWBPA waiver and is successful. 29 CFR Part 1625. Claims for "restitution, recoupment or setoff" against an employee's monetary award are expressly limited to the lesser of the consideration the employee received for the OWBPA waiver or the amount recovered by the employee in the subsequent legal action.

Accordingly, if an employer pays an employee \$50,000 for a release and waiver of an age discrimination claim, the employee sues and convinces a court that his or her waiver was not "knowing or voluntary" under the OWBPA, and goes on to win a \$5,000 age discrimination verdict, the employer cannot recover \$45,000 of the money it paid to the employee for his or her agreement not to sue. In other words, the employer may lose all or part of the benefit of its bargain if the release is later found to be invalid under the OWBPA.

Must employers give up tender-back clauses altogether because of the new EEOC regulation? No. The new EEOC regulation applies only to ADEA claims. If an employee does not have an ADEA claim—i.e., the employee is younger than 40 years old—the employer may use a tender-back clause if it is otherwise allowed by applicable law. It remains to be seen whether courts will

require an employer that obtains a general release and waiver (without reference to any ADEA claims) affirmatively to advise the employee that he or she is not waiving any ADEA claims under the waiver. It also remains unclear whether a severability clause stating that any provisions found to be prohibited by law should be "read out" of an agreement would protect an employer in this situation.

Employers that wish to play it safe should eliminate tender-back provisions from any waiver or release obtained from employees of protected age under the ADEA, or, at a minimum, make it very clear to the employees that the tender-back provision does not apply to the ADEA waiver/release. If a ten-

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der-back clause is essential to the deal, employers may wish to obtain two releases from the employees: one for ADEA claims, which meets all the requirements of

the OWBPA, including the new EEOC regulation, and one for all other claims, which contains a tender-back clause. In this situation, separate consideration should be given and described for each release, and the ADEA aspects of the deal should be completely severed from the rest of the terms of the agreement containing the tender-back clause.

Since the EEOC's regulation issued, there has been a dearth of guiding cases to answer questions they left open. The EEOC has a valid interest in ensuring that age discrimination releases are obtained appropriately under the OWBPA. Similarly, employers have a valid interest in ensuring that payments they make for a release or waiver provide repose so that real, perceived or potential problems with an employee go away for good. Drafting agreements that comply with the OWBPA and the new EEOC regulation is the only way to satisfy these competing interests when obtaining an ADEA waiver or release. Employers must make sure they don't pay for the cake and end up with it on their face. **NLJ**