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Reductions-in-Force – Multiple Risks Await the Unwary Employer Who Offers an Age Discrimination Release Without Careful Planning

By Attorney Corie J. Tarara

In This Issue

- ◆ Reductions In Force and Age Discrimination Release and Waiver of Claims
- ◆ MN Supreme Court To Review Recent Ruling Regarding Payment of Vacation/PTO Time Upon Termination
- ◆ Can We Be of Service? (in preparing Vacation/PTO policy, severance or termination agreements)



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The Older Workers' Benefit Protection Act ("OWBPA") requires employers to provide certain information in "plain language" to employees who are offered a release for federal age discrimination claims as a part of a severance or other exit incentive program. Ironically, employers attempting to comply with the Act are presented with less than "plain language" law when they try to do so. As many of our clients are offering releases in connection with recent layoffs, we thought it would be helpful to provide a quick summary of the Act and some new case law clarifications.

The Act's Requirements For A Valid Release or Waiver of Claims

In order for a release of rights or claims for federal age discrimination claims to be valid, the release must be "knowing and voluntary." The release will not meet this criteria if there is a material mistake, omission, or misstatement in the information provided to the employee. Additionally, the release must be in writing and carefully worded in "plain language" geared to the level of understanding of the individual(s) being asked to sign the release. The release should not have any technical jargon or long, complex sentences. If you are using a release that the lowest paid employee cannot understand, then it is not in compliance with the Act.

Additionally, the employee must be provided with compensation for the release that the employee would not otherwise receive without a waiver/release.

If a release is in connection with an exit incentive or other employment termination program offered to two or more employees, the employer must provide at the time the release is given to them, certain summary information about the group of individuals covered by the program, their jobs and the ages of all eligible individuals retained and released.

In addition, the waiver/release must proactively advise the individual(s) to consult with an attorney prior to executing it, not just acknowledge that they have had the opportunity to do so.

Finally, the release must give the employee 21 days to sign it (if an individual) or 45 days if more than two people are being offered the waiver/release as a part of a "program." Thereafter, the employee must be given 7 days to revoke it (15 days for claims under the Minnesota Human Rights Act).

Appeals Court for the 11th Circuit Tells McDonald's Corporation...Have It Your Way!

If a release does not meet the above criteria, it may be stricken as invalid by a court, and the employee could then sue under the Age Discrimination In Employment Act ("ADEA") despite his/her receipt of compensation for the release (note that the other employment claims may still be barred). In a July 2006 case before the Eleventh Circuit, *Burlison v. McDonald's Corp.*, former employees who signed a release waiving age claims attempted to sue McDonald's under the ADEA, even though they signed a release of age claims. The Eleventh Circuit upheld McDonald's release and clarified certain provisions of the OWBPA.

During its 2001 restructuring, McDonald's reduced its workforce by 66 employees in the Atlanta region, and approximately 500 employees nationwide. The 66 employees, including the plaintiffs, were provided with information sheets based on the Atlanta region alone – not nationwide. The plaintiffs attempted to argue that the release was not knowing and voluntary because the "decisional unit" was incorrect and did not allow them to see on a national scale the average age of the terminated employees. The court held that because the general manager of the Atlanta region was responsible for the selection of the terminated employees, the use of region-specific information by McDonald's was a correct "decisional unit." The court noted that this decisional unit definition provided the plaintiffs with the appropriate information to assess whether older employees were unjustifiably terminated in favor of younger employees.

Result of McDonald's

Preparing a release for age discrimination claims for workers over 40 years of age can certainly be done, but should be done carefully, and cautiously. While the release must be in plain language, don't let the "plain language" requirement mislead you into drafting a "homemade" release. Successful employer strategy for enforcing releases and the nuances and ambiguities of the OWBPA itself create many risks that a release of age claims will be unenforceable if the "plain language" isn't based on careful legal analysis.

For more information regarding this case and its impact on your business, please contact the law firm of Seaton, Beck, & Peters, P.A. at (952) 896-1700 and ask for any available attorney or submit a request online at www.seatonlaw.com. We would be happy to assist you.

Can We Be Of Service? Employers should get advice from an experienced labor and employment attorney when preparing a vacation/PTO policy, as well as when preparing a severance or termination agreement, to minimize any potential liability. Employers concerned about payout of vacation upon termination or creating a valid severance agreement and release are invited to consult the law firm of Seaton, Beck & Peters, P.A. at 952-896-1700. Any of our attorneys will be happy to assist you with an initial no-cost consultation.

Minnesota Supreme Court To Review Recent Ruling Regarding Payment of Vacation/PTO Time Upon Termination

By Attorney Corie J. Tarara

In our August Lawfax, we noted the recent case *Lee v. Fresenius Medical Care, Inc.*, in which the Minnesota Court of Appeals concluded that, if an employee has "earned" or "accrued" vacation time, those earnings are "vested," and must be paid to an employee who is terminated for misconduct, even if the employer's policy states that such an employee "forfeits" compensation for unused vacation time at termination under specified conditions. This ruling is rightfully causing employers in Minnesota to take a second look at their vacation and PTO policies to determine if indeed they intended to pay "accrued" vacation/PTO upon termination. Although it is still possible under the Appeals Court decision to have a policy that avoids payout of vacation/PTO time at termination, it will require careful drafting to avoid "vesting" of vacation pay, as in the *Lee* case, and should be reviewed by legal counsel. An appeal was recently filed on the *Lee* case. While employers are encouraged to follow the Court of Appeals ruling (as noted above) until further notice, we will provide an update as soon as the Supreme Court issues a decision on this matter.

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