

AKRON BAR ASSOCIATION
NEW LAWYER TRAINING
EMPLOYMENT LAW BASICS
APRIL 9, 2015

SETTLEMENT AGREEMENTS AND WAIVERS OF CLAIMS

KAREN D. ADINOLFI, ESQ.
ROETZEL & ANDRESS

I. INTRODUCTION

- A. Common legal inquiry from both sides of the employment relationship.
- B. You may be called upon to draft such an agreement or review one drafted by another party.
- C. Caution is required, as there are numerous pitfalls and some of the regulatory requirements are unforgiving.

II. STATUTORY AND REGULATORY SCHEMES

- A. Ohio does not have a statute or regulation governing settlement agreements and waivers of claims.
- B. Federal law
 - 1. Age Discrimination in Employment Act (ADEA)
 - 2. Older Workers' Benefit Protection Act (OWBPA)
 - 3. Accompanying regulations to the OWBPA

III. REQUIREMENTS OF ALL CONTRACTS

- A. A settlement agreement is, at its heart, a contract.
- B. Thus, the requirements applicable to all contracts apply. Reaffirmed in the regulations accompanying the OWBPA. 29 C.F.R. § 1625.22(a)(2).
 - 1. Knowing
 - 2. Voluntary

3. Written in a manner calculated to be understood by the average individual eligible to participate. 29 C.F.R. § 1625.22(b)(1), (b)(3), (b)(5).
4. No waiver of future claims. 29 C.F.R. § 1625.22(c).
5. Consideration. Anything of value in addition to that which the individual is already entitled in the absence of a waiver. 29 C.F.R. § 1625.22(d)(1), (d)(2).
6. Offer, acceptance, and a meeting of the minds

IV. SPECIFIC REQUIREMENTS OF WAIVERS OF CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND OLDER WORKERS' BENEFIT PROTECTION ACT

- A. These requirements are non-negotiable, and parties cannot agree to forego or modify these requirements.
- B. The failure to include any of them is fatal to a waiver of any claim under the ADEA, for those over the age of 40.
- C. Specific requirements:
 1. **Form of agreement.** A settlement agreement containing a waiver of a claim under the ADEA must be in writing. 29 C.F.R. § 1625.22(b)(2).
 2. **Specific language.** A waiver of a claim under the ADEA must mention the ADEA and OWBPA specifically, and may not simply be contained in a waiver of "all state and federal claims." 29 C.F.R. § 1625.22(b)(6).
 3. **Employee protections.** An employee must be informed in writing that he/she has the opportunity to consult with counsel prior to signing. 29 C.F.R. § 1625.22(b)(7).
 4. **Consideration periods.**
 - a. For a one-person separation, an employee must be given at least 21 days to consider the proposed agreement. 29 C.F.R. § 1625.22(e)(1)(i).
 - b. For a "mass layoff," (involving two or more employees) all employees offered a severance agreement must be given at least 45 days to consider the proposed agreement. 29 C.F.R. § 1625.22(e)(1)(ii).

- c. These dates run from the date of the employer's final offer. If material changes are made to the final offer, the running of the consideration period restarts. Here, the parties may agree that any changes, material or immaterial, do not restart the running of the period. 29 C.F.R. § 1625.22(e)(4).
- d. Employee may execute the agreement before the expiration of the appropriate period, so long as he/she does so in a knowing and voluntary manner. 29 C.F.R. § 1625.22(e)(6).

5. Revocation period.

- a. Even after the employee signs, he/she will have seven days following his/her execution in which to revoke it. 29 C.F.R. § 1625.22(e)(2).
- b. The parties may not agree to shorten this period. 29 C.F.R. § 1625.22(e)(5).
- c. The employee must typically provide notice of this revocation in writing to the employer.
- d. Consideration usually not provided until after the seven-day revocation period.

6. Informational Requirements (for “mass layoffs”)

- a. All those offered a severance agreement in a mass layoff must be given certain informational disclosures at the time they are provided with the written agreement, so as to provide employees with the information they need to make an informed decision as to whether to enter into the agreement or pursue a claim.
- b. The employer must provide
 - (1) Any class, unit or group of individuals covered by such exit incentive program, any eligibility factors for such program, and any time limits applicable to such program. 29 C.F.R. § 1625.22(f)(1)(i).
 - (2) the job titles and ages of those in the “decisional unit” eligible or selected for the exit incentive program and the ages of all individuals in the same job classification or organizational unit those who were not eligible for or selected for the program. 29 C.F.R. § 1625.22(f)(1)(ii).
- c. The “decisional unit” from which the scope of the terms “class,” “unit,” “group,” “job classification,” and “organizational unit” will

vary from case to case. 29 C.F.R. § 1625.22(f)(3)(ii)(A). “Decisional unit” means that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. 29 C.F.R. § 1625.22(f)(3)(i)(B).

- d. For example, the decisional unit could be as broad as an entire facility (for a plant closing) or as small as a job title within a certain department (such as all administrative assistants in the sales department).
- e. To define the decisional unit too broadly has the same effect as defining it too narrowly – the ADEA waiver is null and void.
- f. Presentation of this information
 - (1) Must be in writing and written in a manner calculated to be understood by the average individual eligible to participate. 29 C.F.R. § 1625.22(f)(4)(i).
 - (2) Should be broken down according to the age of each person eligible or selected for the program and those not selected. 29 C.F.R. § 1625.22(f)(4)(ii).
 - (3) Additional requirements if there are subcategories or subsets of the decisional unit.
 - (4) If the layoff will take place in successive increments over a period of time, information supplied should be cumulative. No duty to supplement information given to earlier terminees. 29 C.F.R. § 1625.22(f)(4)(vi).

V. CLAIMS THAT CANNOT BE WAIVED IN A SETTLEMENT AGREEMENT

- A. Filing of claims of discrimination with the Equal Employment Opportunity Commission or testifying, assisting, or participating in an EEOC investigation, hearing, or proceeding. EEOC Enforcement Guidance, No. 915.002 (1997). *See also, e.g., EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999). More vigorously enforced recently through the litigation process.
- B. Filing of unfair labor practice charges with the National Labor Relations Board. *See, e.g., U-Haul Co.*, 347 NLRB No. 34 (2006).
- C. Claims for minimum wage or overtime under the Fair Labor Standards Act (unless the settlement agreement is executed under the supervision of the

Department of Labor or a court, which must find that the settlement is fair and reasonable).

- D. Unemployment claims. R.C. 4141.32.
- E. Workers' compensation claims in a general release. Claims can be released with the approval of the Industrial Commission and in compliance with the provisions of the Ohio Revised Code. R.C. 4123.65.
- F. Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits waiver of the right to reemployment.
- G. Future or prospective claims.

VI. TYPES OF CONSIDERATION

- A. Money by far the most common type of consideration.
- B. However, the parties can be creative, and many times that is what pushes them to a successful resolution.
- C. Some examples:
 - 1. Neutral letter of reference
 - 2. Agreement not to contest unemployment claim. Employee should understand that the claim may still be denied, even without opposition from the employer.
 - 3. Reimbursement of a certain period of COBRA payment
 - 4. Forgiveness of employee debts, such as tuition reimbursement
 - 5. Payout of accumulated time off if the employer's policy does not allow it
 - 6. Provision of job search or counseling services
 - 7. Allowing employee to keep cell phone or laptop issued by employer