Ninth Circuit clarifies “knowing and voluntary” requirement under OWBPA for waivers of age discrimination claims

By James Forbes and Sheila Kiernan

The Ninth Circuit has clarified the “knowing and voluntary” requirement under the Older Workers’ Benefit Protection Act (“OWBPA”) for waivers of claims and rights arising under the Age Discrimination in Employment Act (“ADEA”) in Syverson v. International Business Machines Corporation, 2006 U. S. App. LEXIS 22504 (August 31, 2006). Employers must use extreme care in drafting releases to ensure the language will meet the OWBPA standard that a waiver be “written in a manner calculated to be understood” by the average employee eligible to participate in the agreement. An agreement that is technically correct may still not pass muster if it takes a lawyer to understand it.

In January 2001, International Business Machines Corporation (“IBM”) began a reduction in force (“RIF”) and provided employees selected for termination with severance pay and other benefits in exchange for signing a document called a “General Release and Covenant Not to Sue” (“Agreement”). Plaintiffs — former employees — filed charges against IBM, claiming the RIF violated the ADEA. Both the EEOC and the district court found that the IBM Agreement met the OWBPA’s requirements for a knowing and voluntary agreement. On appeal, the Ninth Circuit concluded the Agreement did not meet the OWBPA’s requirements.

A primary OWBPA requirement is that a waiver be “knowing and voluntary.” 29 U.S.C. § 626(f). To meet this standard, a waiver must be part of an agreement between the employer and the individual that “is written in a manner calculated to be understood by the individual, or by the average individual eligible to participate” in a RIF. 29 U.S.C. § 626(f)(1)(A). Employees must also be advised in writing to consult with an attorney before executing the agreement. Id. § 626(f)(1)(E). To satisfy the “manner calculated” requirement, “waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate” in a RIF. 29 C.F.R. § 1625.22(b)(3). Employers are instructed to “take into account such factors as the level of comprehension and education of typical participants.” Id. Generally, this requires limiting or eliminating “technical jargon and long, complex sentences.” Id.

The IBM agreement contained a release of all claims, including claims arising from the ADEA. In a later provision, which IBM said was intended to address attorneys’ fees if a lawsuit was filed, the plaintiffs entered into a covenant not to sue. This provision specifically excepted actions based solely under the ADEA.

The Ninth Circuit agreed with plaintiffs that these seemingly inconsistent provisions in the Agreement misled the employees to believe that, above and beyond their unaffected right to file an ADEA claim with the EEOC, they retained the right to independently sue IBM in court on an ADEA claim. The court found that the phrasing of the release and the covenant not to sue engendered confusion over whether the Agreement covered ADEA claims or excepted them, and, additionally, did not explain how the separate release and covenant not-to-sue provisions “dovetail, either in general or as they relate to the ADEA claims.” Accordingly, the court found that the waiver of ADEA claims, and separate covenant not to sue, were not “knowing and voluntary” and were therefore unenforceable.

Specifically, the court concluded that an average employee reviewing the agreement would not understand the legal distinction between the release and covenant not-to-sue provisions. The court rejected IBM’s argument that the covenant not-to-sue language was permissible under the law, was required for the company to obtain attorneys’ fees in the event that an employee sued, and served two distinct legal purposes. The court noted that case law recognizes a distinction between releases — abandoning or giving up a known right or claim — and a covenant not to sue — a party having a present or future right to action agrees to forbear from asserting that right in litigation. However, the Ninth Circuit found that both legal concepts could not exist within the same document, without creating confusion to an average employee, if, as it ultimately found, the terms “release” and “covenant not to sue” were used as if they were completely interchangeable.

Lastly, the court rejected the argument that language directing an employee to consult an attorney mitigates the confusing language. To the contrary, where an attorney is required to understand the language, the Agreement does not meet the “calculated in a manner to be understood by the participant” standard.

The Ninth Circuit’s Syverson decision that the Agreement did not satisfy the “manner calculated” OWBPA requirement mirrors the earlier Eight Circuit decision in Thomforde v. IBM, 406 F.3d 500(2005), involving a virtually identical agreement used in a different RIF. In the wake of Syverson and Thomforde, employers who will be experiencing a RIF or seeking to have individual employees waive their rights to file ADEA claims must draft their releases
with great care, to ensure that they comply with the strict requirements of the OWBPA and the guidance set forth by the Eighth and Ninth Circuits. Of course, all release agreements must comply with other OWBPA mandates, such as that employees be informed to consult with counsel, and that employees have 21 days to consider the agreement and another seven days after signing to revoke it.

These decisions show that the OWBPA has little tolerance for confusion of any sort. Release agreements should be written in simple, plain language. Sentences should be short and drafted without “legalese.” Employers must consider the level of education and sophistication of the affected employees, and draft the language so the average employee will have no problem understanding all of it without consulting an attorney, Human Resources, or a manager. Employers may consider boldfacing the language in which employees agree to waive their claims or adding boldfaced language at the end of the agreement, summarizing, once again, that all claims are released. If employers prefer to retain language that informs an employee of his or her right to pursue individual-specific relief through the EEOC, notwithstanding having already executed the release, it should be crafted with extreme precision so employees have a clear understanding that the employee is still precluded from pursuing such damages, and that any possible relief available would only be injunctive relief obtained by the EEOC.

The Ninth Circuit, following the Eighth Circuit’s lead, has roiled the waters yet again. Nonetheless, district court judges and other federal circuits are likely to latch onto the language in these two decisions and invalidate releases that do not strictly comply. Employers who draft their own releases should consult with counsel to ensure that their releases are not susceptible to challenge and meet the requirements of the OWBPA and case law.

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