

CLIENT ALERT

Age Discrimination Act Waivers: Final EEOC Regulations Prohibit "Tender Back" Provisions And Set Forth New Requirements For Legally-Valid Waivers

December 1, 2000

Earlier this week, the EEOC issued new regulations concerning waivers under the Age Discrimination in Employment Act (ADEA). The regulations, which will become effective on January 10, 2001, set forth additional requirements for employers who, in voluntary or involuntary terminations, seek to obtain a legally-valid waiver of ADEA claims in exchange for severance payments or other benefits.

These new requirements prohibit waiver agreements that require employees to "tender back" any consideration received prior to filing an ADEA claim against the employer. The regulations also bar waiver provisions allowing employers to recover attorneys' fees or other damages in an ADEA claim filed after execution of the waiver.

The main thrust of the regulations is to resolve the "tender back" issue, which was addressed by the Supreme Court in its 1998 decision in *Oubre v. Entergy Operations, Inc.* Other important portions of the regulations discuss covenants not to sue, the issue of whether an employer can abrogate its ongoing obligations in the event of a subsequent ADEA claim, and an employer's ability to setoff consideration given to an employee in a waiver agreement against any monetary award won by the employee in a subsequent ADEA lawsuit.

Current ADEA Waiver Requirements

The current requirements for waivers under the ADEA are set forth in the 1990 Older Workers Benefit Protection Act (OWBPA), which amended the ADEA, and a final regulation regarding such waivers issued by the EEOC in June 1998.

Under the OWBPA, ADEA waivers are valid only if the waiver is shown to be "knowing and voluntary." A waiver is not considered knowing and voluntary unless, at a minimum, the agreement:

- is written in a manner calculated to be understood by the employee;
- specifically references ADEA rights or claims and advises employees to consult an attorney before signing;
- provides employees specific periods of time to consider the waivers and/or revoke them;
- provides additional consideration in exchange for the waiver; and
- does not waive future rights or claims arising after the waiver.

The legislative history of the OWBPA indicates that a valid waiver acts as an affirmative defense to an employee's ADEA claim. It is the employer's burden to prove that the waiver complies with the Act's requirements.

The 1998 final EEOC regulation set forth the EEOC's interpretation of the OWBPA requirements. But the 1998 regulation did not address the issue of whether an employee can be required to tender back the consideration received in exchange for a waiver before challenging the waiver in court.

Tender Back Provisions Now Prohibited

In *Oubre v. Entergy Operations, Inc.*, the Supreme Court held that workers could not be required to "tender back," or return, severance payments or other benefits given to them in exchange for an invalid waiver agreement prior to challenging its validity in court. Left open by the Court's opinion was whether workers challenging a facially-valid waiver could still be required to tender back payments, under common law principles recognized in other contexts. Also left open was whether workers who fail to tender back the payment received prior to challenging the waiver agreement could be deemed to have ratified, or approved of, the facially-valid waiver.

The EEOC's new regulations both restate and expand on the Supreme Court's holding in *Oubre*, by providing that no "ADEA waiver agreement, covenant not to sue or other equivalent arrangement" may impose any condition precedent or penalty that would adversely affect an individual's right to challenge the waiver agreement including, but not limited to, "provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit."

The EEOC went one step further than the Supreme Court by prohibiting tender back provisions regardless of the waiver's facial compliance with OWBPA requirements. Under the regulations, the "no tender back rule" also applies when facially-valid waivers are challenged by employees on the basis of fraud, duress, coercion, or mistake of material fact. Indeed, the EEOC makes clear that contract principles of "tender back" and "ratification" simply do not apply to ADEA waivers. This interpretation, if accepted by federal courts as an appropriate exercise of agency discretion, is the death knell for "tender back" provisions.

The new regulations also prohibit language in waivers imposing other penalties such as attorneys' fees or damages on employees who bring an ADEA claim. Such provisions, in the EEOC's view, would have a chilling effect on employees' rights to challenge invalid waivers. Left intact, however, is an employer's right to recover attorneys' fees or costs specifically authorized under federal law.

Covenants Not to Sue Are Equivalents of ADEA Waivers

The new regulations also address covenants not to sue. In general, while a waiver is simply a voluntary relinquishment of a legal right, a covenant not to sue is an agreement by which an employee specifically agrees not to sue to enforce a cause of action. Covenants not to sue usually include provisions allowing for recovery of damages and/or attorneys' fees if a claim is filed.

The EEOC has adopted a "unified" approach to covenants not to sue and waiver agreements by extending the OWBPA requirements to such covenants and other equivalent agreements. Because the EEOC has extended the OWBPA requirements and the new regulations to such covenants, the usual provisions of a covenant not to sue providing for recovery of damages and/or attorneys' fees are prohibited.

Although a valid covenant not to sue, like a valid ADEA waiver, would provide an employer with an affirmative defense against an ADEA claim, the EEOC cautioned that such covenants "carry a higher risk of violating the OWBPA by virtue of their wording." The EEOC urged employers to take precautions in drafting such covenants so that employees do not misunderstand their rights.

Employers Cannot Abrogate Obligations Agreed to in a Waiver

The EEOC regulations make clear that, even if a waiver is challenged under the ADEA by an employee, the employer may not abrogate obligations set forth in the waiver agreement. The practical implication for employers is that, when an employee challenges an ADEA waiver or covenant not to sue agreement, the employer is nonetheless required to continue making payments to the employee for any severance or other benefits agreed to in the waiver.

In Certain Circumstances, Employers Can Recoup Payments Made to Employees

One additional issue of employer concern addressed in the new regulations concerns an employer's right to recoupment or setoff of money paid to employees under the waiver agreement. The new regulations state that where an employee successfully recovers damages in an ADEA lawsuit, the employer can, at the court's discretion, recover consideration paid to the employee for the waiver. The new regulations limit the amount of such recoupment to the amount of the waiver or the amount of the damages award (if less than the amount of the waiver). Hence, in instances where the damages award is less than the original waiver, the employer would not be able to recover the full amount originally paid to the employee for the waiver.

Issues Left Open By the EEOC

The EEOC acknowledged that the final regulations do not address the issue of severability, *i.e.* whether inclusion of a tender back or damages provision should invalidate the entire waiver or covenant not to sue. Although the EEOC commented that it believes inclusion of such a provision should invalidate the entire waiver, there might be some wiggle room left for employers who continue to use waivers containing such provisions.

Finally, as with prior agency interpretations, the new regulations leave open the question of whether courts are likely to apply any of the OWBPA requirements to waiver agreements in other areas of employment law.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.

Phone: +1.202.624.2690

Email: tgies@crowell.com