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**Essential Elements of  
Severance Agreements and Releases**

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# Essential Elements of Severance Agreements and Releases

## Introduction

- The source of the problem with enforcing severance agreements is the Fair Labor Standards Act of 1938 (“FLSA”), to which the Age Discrimination in Employment Act (“ADEA”) is an amendment. FLSA prevents employees from waiving their rights to overtime pay or minimum wages. *See e.g., Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815, 822 (D. Mich. 2005).
  - o The rationale underlying the ban on waivers of FLSA claims is public policy:
    - “[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.” *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 704 (1945).
    - However, the FLSA provides that the Secretary is authorized to supervise the payment of unpaid minimum wages or overtime owed to an employee, “and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have . . . to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.” 29 U.S.C.A. § 216(c).
- Similarly, the Family Medical Leave Act (“FMLA”) states: “Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” 29 U.S.C. § 2601 *et seq.*
  - o The Fourth Circuit recently held that rights under the FMLA could not be waived either prospectively or retrospectively. *Taylor v. Progressive Energy, Inc.*, 493 F.3d 454, 456-57 (4th Cir. 2007).
  - o Other courts have found that the FMLA prohibits waiver of substantive rights rather than post-dispute causes of action for retaliation. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 322 (5th Cir. 2003).
- Waivers of ERISA claims are less regulated than discrimination claims

- o Statutes do not mandate that ERISA be mentioned specifically in a waiver. *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) (allowing a general release to waive claims under ERISA).
- Although severance agreements can be challenged under many statutes, the ADEA and its amendments in the Older Worker Benefit Protection Act (“OWBPA”) are the most stringent, and if an agreement satisfies these, it will likely be upheld.
  - o OWBPA allows waiver of rights under ADEA but sets the standard for voluntariness.
  - o OWBPA sets out the requirements for ADEA waivers, separate and apart from contract law and explains what it takes for a waiver to be “knowing and voluntary” as required under the ADEA:
    - An agreement that does not satisfy the ADEA requirements precisely cannot be deemed to be a waiver of ADEA claims. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998);
    - Worse, at least one court has held an invalid OWBPA waiver to be actionable. *Commonwealth v. Bull HN Info. Sys.*, 16 F.Supp.2d 90 (D. Mass. 1998);

**A. The Gist of the ADEA’s Requirements for Valid Waivers (29 U.S.C. § 626(f)):**

- A waiver must be knowing and voluntary, and to be knowing and voluntary at a minimum it must have the following characteristics:
  - a. plain language;
  - b. specifically refer to ADEA rights;
  - c. not waive future rights or claims;
  - d. be made in exchange for consideration in addition to anything of value to which the individual already is entitled;
  - e. advise the employee in writing to consult with an attorney prior to executing the agreement;
  - f. (i) allow the employee at least 21 days to consider the agreement; or
    - (ii) 45 days if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees;

- g. allow the employee at least 7 days following the execution of the agreement to revoke it, and the agreement cannot become effective until that time has expired;
  - h. if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must make certain disclosures to the employees.
- These requirements are strictly enforced. If they are not met, the waiver is invalid, even if the employee actually understood the agreement. *See e.g., Parsons v. Pioneer Seed Hi-Bred Int'l, Inc.*, 447 F.3d 1102, 1103 (8th Cir. 2006).
  - Even if the statutory requirements are met, the waiver may still be invalid if any other circumstances have undermined the voluntariness of the waiver, *e.g.* actual coercion, incapacity, etc.
  - The party asserting the validity of the waiver carries the burden of proving voluntariness (29 U.S.C. § 626(f)(3)).

**B. Drafting**

- 29 C.F.R. § 1625.22(b)(3) expands on the ADEA's requirement by saying waiver agreements must be:
  - o Drafted in plain language;
  - o Geared to the level of understanding of the individual party to the agreement or individuals eligible to participate;
    - Employers should take into account such factors as the level of comprehension and education of typical participants;
    - Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences;
    - An instruction to consult with a lawyer to clear up ambiguities cannot overcome unclear language.
      - In *Thomforde v. IBM*, when an employee asked for clarification of a waiver and covenant not to sue and was told (as the statute seems to require) to consult his own lawyer, the court said “[i]t seems axiomatic that if an agreement needs clarification, it is not written in a manner calculated to be understood.” 406 F.3d 500, 505 (8th Cir. 2005).

**Language Not Satisfying the Statutory Standard:**

In exchange for the sums and benefits received pursuant to the terms of the [agreement], DALE J. THOMFORDE (hereinafter “you”) agrees to release and hereby does release [IBM] ... from all claims, demands, actions or liabilities you may have against IBM of whatever kind including, but not limited to, those that are related to your employment with IBM, the termination of that employment, or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence, or claims for attorneys’ fees.

....

... You also agree that this Release covers, but is not limited to, claims arising from the [ADEA], as amended, ... and any other federal, state or local law dealing with discrimination in employment including, but not limited to, discrimination based on sex, sexual orientation, race, national origin, religion, disability, veteran status, or age.

....

You agree that you will never institute a claim of any kind against IBM ... including, but not limited to, claims related to your employment with IBM or the termination of that employment or other severance payments or your eligibility for participation in the Retirement Bridge Leave of Absence. If you violate this covenant not to sue by suing IBM ..., you agree that you will pay all costs and expenses of defending against the suit incurred by IBM ..., including reasonable attorneys’ fees, and all further costs and fees, including attorneys’ fees, incurred in connection with collection. This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM ... only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys’ fees and other costs and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

*Thomforde v. IBM*, 406 F.3d 500, 501-02 (8th Cir. 2005).

- The language did not meet the statutory standards because:
  - o The agreement used the term “release” to refer to both covenants not to sue and releases and did not explain the difference between them
  - o The distinction between a release and a covenant not to sue is not apparent to a lay reader
  - o The language gave the impression claims under the ADEA were excepted from the general release, not just the covenant not to sue

**Other Language Satisfying the Statutory Standard.**

10. Further, you agree to keep the terms of this settlement and release confidential. You hereby acknowledge that failure to abide by the terms of this Agreement could result in the loss of the consideration provided for in Sections 11(a) and 11(b) herein. If you bring any legal action challenging this Agreement, you agree to immediately repay the consideration set forth in Sections 11(a) and 11(b) herein, unless such legal action directly pertains to the Age Discrimination in Employment Act.

11. In consideration of receipt of a lump sum payment of (a) Nine Thousand Eight Hundred Ninety-Six Dollars (\$9,896.00); (b) the prorated portion of Part II of the Annual Reward Program Bonus in the amount of Eleven Thousand Five Hundred Seventy-Eight Dollars (\$11,578.00) ...; and (c) receipt of the payments and benefits as outlined in this Agreement and identified in the attached Severance ... Summary, you hereby forever release and discharge Pioneer ... from ... any and all other causes of action, claims or demands or expenses of any kind (including attorney fees and costs actually incurred), at law or equity, to settle potential claims you may have pursuant to ... the Age Discrimination in Employment Act or any other Equal Employment Opportunity claims; ... the Iowa Civil Rights Act, Iowa Code Chapter 216; ... whether now known or unknown, foreseen or unforeseen, arising out of, or due to the employment relationship with Pioneer....

....

17. In any action to enforce this Agreement, except a claim pertaining to the Age Discrimination in Employment Act, the prevailing party's attorney fees shall be paid by the party against whom this Agreement is being enforced.

Parsons v. Pioneer Seed Hi-Bred Int'l, Inc., 447 F.3d 1102, 1103 (8th Cir. 2006).

- The language was held sufficient because:
  - o There was no covenant not to sue that could be confused with a waiver
  - o The exceptions for ADEA claims were clearly stated

**Sufficiently Clear Language:**

- Even though the release misstated the law by prohibiting an employee from filing a charge with the EEOC (discussed below), the Third Circuit found “nothing at all inherently incomprehensible about the [following] language:”

Wastak ... herein agrees that [he will not] file a charge, complaint, lawsuit or other claim against [Lehigh Valley] ... for any acts, omissions or statements arising out of any aspect of Wastak's employment or termination of Wastak's employment with [Lehigh Valley]. By way of example only and without limiting the immediately preceding sentence, Wastak promises not to file a claim or

lawsuit under *Title VII of the Civil Rights Act of 1964*, the Age Discrimination in Employment Act (29 U.S.C. § 621), *Section 1981 of the Civil Rights Act of 1866*, the *Equal Pay Act of 1963*, the *Rehabilitation Act of 1973* and *Civil Rights Act of 1991*, Pennsylvania Human Relations Act, Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq., and any other state or federal equal employment opportunity law or statute. In addition, Wastak agrees not to file any cause of action or claim relating to the breach of an oral or written contract, misrepresentation, defamation, interference with contract and intentional or negligent infliction of emotional distress, and any other common law claims and all claims for counsel fees and costs.

*Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 284, 292 (3d Cir. 2003).

**Another Example of Clear Language:**

In exchange for Title Associate's [sic] payment, except for a claim for unemployment insurance benefits, you **RELEASE** Title Associates, its parents, subsidiaries, affiliates, officers, directors, employees and agents from **ANY AND ALL CLAIMS** you may have, known or unknown, **RELATED TO YOUR EMPLOYMENT, YOUR SEPARATION FROM EMPLOYMENT OR OTHERWISE**, from the beginning of time through the date you sign this Agreement.

You understand and agree that you are **RELEASING** Title Associates ... from ... any and all claims for discrimination ... on the basis of ... age.

*Farrell v. Title Associates, Inc.*, No. 03 civ 4608, 2004 U.S. Dist. LEXIS 2243 at \*3 (S.D.N.Y. Feb. 18, 2004).

- Illustration of Plain Language: Covenants Not to Sue vs. Releases
  - o Covenants not to sue and waivers are technically distinct, and they should probably not be in the same agreement.
    - Covenant Not to Sue: "A covenant in which a party having a right of action agrees not to assert that right in litigation"
    - Release: "Liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced; the relinquishment or concession of a right, title, or claim"

Black's Law Dictionary, 7th ed. (1999).

**C. Restrictions on What Can Be Waived**

- An employee cannot waive future rights or claims

- o Failure to Rehire: Claims based on an employer's failure to rehire the former employee may or may not be covered by a release. Whether the claim is covered will depend on "how closely related the rehire is to the original termination in terms of time and subject matter." *Kellogg v. Sabhlok*, 471 F.3d 629, 635 (6th Cir. 2006).
  - If the employee waives the right to sue for age discrimination, and the separation agreement acknowledges that the employer has no obligation to rehire, *Kellogg* holds the failure to rehire arises out of his termination and cannot be the basis for a separate claim. "After releasing an age discrimination claim, the employee cannot resurrect the age discrimination claim by reapplying for employment." *Id.*
  - However, the inquiry is fact sensitive, and a general release does not waive the right to sue for an employer's post-termination conduct. *Id.* citing *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1311 n. 7 (11th Cir. 2001).
- Under 29 C.F.R. § 1625.22(i)(2), no waiver agreement may include any provision prohibiting any individual from:
  - o Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with the EEOC, or
  - o Participating in any investigation or proceeding conducted by EEOC
    - An agreement purporting to waive such rights is void. (EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997)
  - o The right to file a charge and participate in an investigation extends beyond the ADEA and is also true for charges under Title VII, the EPA, and the ADA. (EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997)
- Rationale for restrictions: Public Policy

Agreements that prevent employees from cooperating with EEOC during enforcement proceedings interfere with enforcement activities because they deprive the Commission of important testimony and evidence needed to determine whether a violation has occurred. Furthermore, insofar as such agreements make it more difficult for the Commission to prosecute past violations, an atmosphere is created that tends to foster future violations of the law.

EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997

- Waiver of right to file charges vs. right to recover damages: An employee “can waive the right to recover in his own lawsuit as well as the right to recover in a lawsuit brought by the EEOC on his behalf.” (EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997);
  - o Requiring an employee to drop EEOC charges is retaliatory, whereas requiring him to forego collecting damages is not. *EEOC v. Lockheed Martin Co.*, 444 F.Supp.2d at 416.
- Potentially Retaliatory: Agreements that waive an employee’s right to file a charge or cooperate with an investigation “may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.” (EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes, April, 1997)
  - o A provision requiring an employee to return severance benefits if a charge is filed violates the ADEA and may be considered retaliatory because of the adverse consequences an employee would face for engaging in protected conduct. (*Commonwealth v. Bull HN Info. Sys.*, 16 F.Supp.2d 90 (D. Mass. 1998))
  - o Example: *EEOC v. Lockheed Martin Co.*, 444 F.Supp.2d 414, 416 (D. Md. 2006).
    - Lockheed Martin sent an employee a letter stating that she would be terminated and would receive severance benefits in exchange for a release. The employee refused to sign the release and instead filed a charge with the EEOC claiming race, gender, and age discrimination. However, she claimed she was still entitled to severance benefits. In response, Lockheed sent a letter stating that the employee would have to drop her charge with the EEOC and sign the waiver in order to receive benefits. The EEOC filed an action against Lockheed claiming the letter was retaliatory because Lockheed conditioned her receipt of severance benefits on dropping an EEOC charge. Despite the fact that the employee filed her EEOC charge after Lockheed had given her the release, the court found the letter and release to be retaliatory. Additionally, the court determined that the release was facially retaliatory in supposedly prohibiting the employee from filing charges with the EEOC.
    - The release stated:

***Claims not Released.*** By this agreement, I am not releasing claims for benefits I may have under the Corporation’s other benefit plans (such as the pension plan), any rights to benefits under applicable workers’ compensation statutes or

government-provided unemployment benefits, or any rights to enforce this Release.

**Claims Released.** Subject only to the exclusions noted in the previous paragraph, I agree to waive and fully release any and all claims of any nature whatsoever (known and unknown), promises, causes of action or similar rights of any type (“Claims”) that I may now have or have had with respect to any of the Released Parties listed below. These Claims released include, but are not limited to, claims that in any way relate to my wages, bonuses, commissions, unused sick pay; any claims to severance or other benefits; any claims to expenses, attorneys’ fees or other indemnities; or claims for other personal remedies or damages sought in any legal proceeding or charge filed with any court, federal, state, or local agency either by me or by a person claiming to act on my behalf or in my interest.

... I specifically, but without limitation, agree to release all of the Released Parties under the following:

*Antidiscrimination laws*, such as Title VII of the Civil Rights Act of 1964, ... the Age Discrimination in Employment Act, ... or any other local, state, or federal statutes prohibiting discrimination....

The parties agree that this Release prohibits my ability to pursue any Claims or charges against the Released Parties seeking monetary relief or other remedies for myself and/or as a representative on behalf of others. This agreement does not affect my ability to cooperate with any future ethics, legal or other investigations, whether conducted by the Corporation or any governmental agencies.

- The language was deemed retaliatory because it required employees to waive the right to file “charges . . . seeking monetary relief *or other remedies*”
- o On the other hand, OWBPA does have a provision for waivers in settlement of a charge filed with the EEOC, so it seems illogical that such waivers could be retaliatory. 29 U.S.C.S. § 626(f)(2).
- In a consent decree entered in a suit against Kodak, the EEOC approved of release language:

Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with [Employer] or separation therefrom. You further represent that no claims, complaints, charges, or other proceedings are pending in any court, administrative agency, commission or other forum relating directly or indirectly to your employment by [Employer].

Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC

or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf.

*EEOC v. Eastman Kodak Co.*, No. 06-cv-6489, 2006 U.S. Dist. LEXIS 96433, at \*5-6 (W.D. N.Y. Oct. 6, 2006).

**D. Written Advice to Consult a Lawyer Prior to Execution of the Agreement**

- OWBPA requires that employees be advised to consult with counsel *before* executing a waiver.
  - o In *American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (P.R. 1998), employees were provided a booklet on an early retirement plan; the booklet informed the employees that on their last day of work in several months, they would have to sign a complete release of all claims, including age discrimination claims. The form for election of the early retirement program required the employees to attest that they had read the entire release form before electing to participate in the program. The release stated: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative.” This language was insufficient because it appeared only in the release itself and not in the agreement to enter the early retirement program. Employees were not adequately advised to consult with counsel.
- The employer should very openly advise employees to consult with counsel and should be written in the active voice, perhaps in the cover letter offering the agreement.
  - o A release stating that “[e]mployee acknowledges that he/she has been advised to consult with an attorney prior to executing this Agreement” was insufficient because it did not “use any verbs of command or direction to ‘caution, warn, or recommend’ that the employee consult an attorney. . . . Rather, the release use[d] passive language that require[d] the employee to infer the right to discuss the release with an attorney.” *Cole v. Gaming Entertainment, LLC*, 199 F.Supp.2d 208 (D. Del. 2002).

**E. Statutory Period for Reflection on the Agreement and When Disclosures Are Required**

- ADEA provides that an individual must be given a period of at least 21 days within which to consider the agreement, but if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be given at least 45 days to consider the agreement.
  - o The period for consideration runs from the date of employer’s final offer

- Material changes to the final offer restart the running of the period unless the parties agree otherwise
    - An employee may sign the agreement before the end of the applicable period and trigger the running of the 7 day revocation period
- **Identifying a “Program”**
  - o The statutory period for the employee to consider the agreement and whether the employer must make disclosures depends on whether the termination of employment is part of a “program;”
    - The term “‘exit incentive or other employment termination program’ includes both voluntary and involuntary programs.” 29 C.F.R. § 1625.22(e)(3);
    - 29 C.F.R. § 1625.22(f)(iii)(A) describes the two types of programs:
      - Usually an “exit incentive program” is a voluntary program offered to a group or class of employees where such employees are offered additional consideration in addition in exchange for their decision to resign voluntarily and sign a waiver.
      - Usually “other employment termination program” refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.
    - The existence of a “program” is decided on a case by case basis and exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees.
    - Characteristics of programs (C.F.R. § 1625.22(f)(iii)(B)):
      - A *standardized* formula or package of benefits
        - The terms generally are not subject to negotiation between the parties
        - Termination is not the result of poor performance of the employees
        - Relevant cases:

- *Blackwell v. Cole Taylor Bank*, 152 F.3d 666 (7th Cir. 1998) (finding that employees were terminated in a group program where seven employees were terminated as members of a single class of employees (branch managers), not as individuals);
  - *Campbell v. Amana Co.*, 125 F.Supp.2d 1129 (N.D. Iowa 2001) (finding that employees were terminated in a group program because the terminations were part of a reduction in force, there was no indication employees were performing inadequately, *standardized* severance packages were presented in a group meeting, and an enhanced severance package was offered in return for a release of potential claims; a theoretical potential for negotiation of severance terms did not save the layoffs from being part of a program);
  - *Suhy v. AlliedSignal*, 44 F.Supp.2d 432, 434 (D. Conn. 1999) (finding that employees were terminated in a group program where there was no indication the employee was released because of individual performance, the waivers / severance packages were part of a *standardized* package of benefits targeted at a group of employees, there was no individualized negotiation, and employees who signed releases received enhanced severance packages);
  - *EEOC v. Sara Lee Corp.*, 923 F.Supp. 994 (W. Mich. 1995) (finding termination of four employees who had signed releases to be an employment termination program because there was no indication the employer fired them because of individual poor work performance, and waivers were part of a *standardized* package of benefits offered in a program targeted at a group of employees).
- A series of terminations can be a program (29 C.F.R. § 1625.22 (f)(vi))
  - If distinct terminations constitute a program, information supplied with regard to the program should be cumulative, so that later terminees receive the disclosures, for all persons in the decisional unit at the beginning of the program and all persons terminated to date.

- There is no duty to supplement the information given to earlier tennees so long as the disclosure, at the time it is given, conforms to the requirements of this section.
- To Whom Disclosures Must Be Made
  - o When required, disclosures must be made to each individual in the decisional unit asked to sign a waiver (29 C.F.R. § 1625.22(f))
  - o Defining the Decisional Unit: The regulations defining decisional units are ambiguous. *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1246 (11th Cir. 2006). But, if the decisional unit is defined incorrectly, the entire waiver is invalid and ineffective with respect to any age discrimination claim. *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095-96 (10th Cir. 2006) (where fifteen employees who were not considered for termination were nonetheless listed as being part of the decisional unit).
    - A “decisional unit” is 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
      - If the employer’s goal is the reduction of its workforce at a particular facility, and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not, then that facility generally will be the decisional unit
      - However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit
      - If the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer’s decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.
      - Decisional units can also be defined by job category, department, etc.
      - A higher level review, for example by the Human Resources Department, to monitor compliance with discrimination laws does not affect the decisional unit

unless the reviewer determines that other individuals should also be considered for termination.

- If the terminées are selected from a subset of a decisional unit, the employer must still disclose information for the entire decisional unit.
    - However, employers should not include employees outside a decisional unit in their disclosures since “[e]xtending the information requirement beyond a decisional unit will in reality only obfuscate the data and make patterns harder to detect.” *Burlison v. McDonald’s Corp.*, 455 F.3d 1242, 1247 (11th Cir. 2006).
      - In *Burlison*, divisions were restructured, and three local divisions were combined into one. The employees terminated in the process argued that the decisional unit was nationwide, but the court found the three localities were the appropriate decisional unit because local managers had made the termination decisions; expanding the scope of the decisional unit would obscure the data.
      - However, in *Adams v. Moore Business Forms, Inc.*, the Fourth Circuit intimated that where an employer intends a reduction in force at one plant and considers transferring the work performed at that location to another location, the second location would be part of the decisional unit. *See* 224 F.3d 324, 330 (4th Cir. 2000).
  - **Required Disclosures**
    - o If disclosures are required, the employer must inform the individual employee in writing in a manner calculated to be understood by the average individual eligible to participate as to:
      - Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
      - The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.
- 29 U.S.C.S. § 626(f)(2)(F)

- o Information regarding ages should be broken down according to the age of each person eligible and ineligible or selected and not selected for the program.  
(29 C.F.R. § 1625.22(f))
  - The ages must not be grouped into bands larger than one year (e.g., 20-30)
  - *Ages* should be listed, not dates of birth
  
- o Disclosures must distinguish between grade levels and/or other established subcategories within a job category or title as well as between voluntary and involuntary terminations
  
- o If an employer fails to make the required disclosures, any waiver under the ADEA is invalid. *Faraji v. FirstEnergy Corp.*, No. 1:04 CV 1493, 2007 WL 756750 at \* 6 (N.D.Ohio Mar. 7, 2007).

### Savings Clauses

- Standard practice in “boilerplate” agreements
  - o e.g. “If any provision of this agreement is found to be involved or unenforceable, the remaining provisions shall remain effective.
  
- Consequence may be that if the waiver is not valid, the employer still owes the money.
  - o Alternatives
    - “The waiver in this agreement is an essential part of the parties’ agreement. If it is not valid, the employer has no obligation under this agreement. The employee will repay any money received from the employer as under the terms of this agreement. If any other term except the waiver of rights is found unenforceable, all other obligations of the parties remain effective”; or
    - “If the waiver of rights in this agreement is found to be unenforceable, the parties promise to negotiate a waiver that is enforceable. If any other term except the waiver of rights is found unenforceable, all other obligations of the parties remain effective.”

### Practice Tips: Tips for drafting severance agreements and waivers

- Draft agreements clearly;

- Keep covenants not to sue and waivers separate, and do not confuse technical legal concepts;
- Specify that the employer has no obligation to rehire the employee;
- Explicitly state that employees are not waiving their right to file charges with administrative agencies or participate in investigations; make sure employees are only waiving their rights to monetary damages if they choose to file a charge;
- Do not require employees to return severance benefits if they decide to file a charge (The amount should be setoff against any damages later claimed);
- Advise employees in advance of executing a waiver that they should consult counsel;
- Use strong language in the active voice to advise employees to consult counsel;
- Be aware that terminations could constitute a program, even if the employer intends individual terminations;
- Define the decisional unit as carefully as possible, given the unclear guidance of the statute and regulations;
- Consider possible internal inconsistencies in the document.