

Older Workers Benefit Protection Act: Compliance tips

The Older Workers Benefit Protection Act forbids discrimination by employers based on age when providing employee benefits, like severance. The OWBPA also ensures that no employee is coerced or pressured into signing legal waivers of rights under the [Age Discrimination in Employment Act](#) (ADEA).

In 1990, Congress enacted the OWBPA to protect older workers from discrimination by employers based on age, when providing employee benefits, including severance benefits. The Act, which amends the Age Discrimination in Employment Act (ADEA), ensures that older workers are not compelled or pressured into waiving their rights under the ADEA.

The ADEA prohibits employers from discriminating against employees 40 years of age or older, in any conditions or terms of employment.

Under the OWBPA, employees eligible for early retirement incentive plans must be provided with complete and accurate information concerning what benefits are available under the plan. If certain conditions of the OWBPA are met, employees may legally sign waivers of their ADEA rights to sue for age discrimination.

Key Definitions

Older workers are employees who are 40 years of age or older as defined under the ADEA.

Waivers involve voluntary relinquishment of a known right. A waiver is sometimes referred to as a release.

Conditions Required for Waiver

There are eight main conditions an employer must provide in its retirement waiver in order to comply with the OWBPA.

1. The waiver must be part of an agreement between the employer and the employee and must be written in clear and unambiguous language, absent of any jargon or legalese, and “calculated to be understood” by the employee.
2. The waiver must specifically refer to rights or claims arising under the ADEA, i.e., discrimination because of age in employment or employment benefits.
3. An employee may not waive rights or claims which may arise after the date the waiver is executed.
4. In return for signing the waiver, the employee must be given something more than what he/she is already entitled to by right. If an employer provides a severance package to all employees as a matter of right, then older employees must be given something of value in excess of the severance pay in exchange for their waiver of ADEA rights.

5. The employee must be advised in writing to consult with a lawyer before signing the agreement.
6. The employer must provide employees with sufficient time to consider the waiver. Before signing the agreement, an employee negotiating a waiver must be given 21 days to consider the matter. If the employee is part of a group of employees being offered an early retirement incentive program or other employment termination program, he/she must be provided 45 days to consider the matter before signing the agreement.
7. After signing the agreement, the employee has seven days to revoke it, and the agreement is not effective until the end of the seven days.
8. Prior to the execution of any waiver in connection with an incentive or other employee retirement termination program offered to a group of employees, the employees must be informed in writing about the class, unit, or group covered by the program, any eligibility factors for the program, and any applicable time limits. The employer also must make clear to employees the job titles and ages of all individuals eligible 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.

FAQs About OWBPA

1. *If a waiver is deemed invalid, must an employee return the consideration he/she originally received in exchange for signing it before he/she can challenge it in court?*

In 1998, the U.S. Supreme Court made a landmark ruling in *Oubre v. Entergy Operations, Inc.* that put the onus on employers to draft valid waivers. The High Court ruled that if a signed waiver is later deemed invalid, the employee: 1) can file a discrimination lawsuit; and 2) does not have to tender back (i.e., return) the consideration he/she already received in exchange for signing the waiver.

Under traditional contract law, an individual must tender back the payment received for signing a waiver before challenging it in court. If the individual fails to do so, the waiver is considered ratified, or approved, which prevents the individual from challenging it in court. As evidenced by the *Oubre* ruling, those traditional tender back and ratification rules don't apply when it comes to ADEA waivers. The Equal Employment Opportunity Commission put its two cents into the tender back fray by issuing guidelines, regarding the tender back rule and other issues related to waivers.

- Covenants not to sue, such as agreements in which the employee pays damages and attorneys' fees to the employer if he/she files suit, should be subjected to OWBPA provisions regarding waivers.
- An employer may be able to get back the consideration it paid to an employee in exchange for signing the waiver. If the employee successfully challenges the waiver, proves age discrimination, and obtains a monetary award, the court may use its discretion to reduce the award. The reduction may not exceed the amount the employer paid for the waiver in the first place, or the amount of the worker's monetary award, if it is less.
- An employer cannot avoid its ADEA waiver duties even when an employee has challenged it. Reason: Permitting an employer to stop making payments under the agreement would make it very difficult for the employee to exercise this right.

The burden is on employers to ensure that their waivers are valid. Some experts complain that older employees who are laid off have almost nothing to lose by signing a waiver, cashing the check, and then testing the validity of the waiver in court.

2. *What factors do the courts consider when determining the validity of a waiver?*

Generally, the courts look at the "totality of circumstances," based on the following nonexclusive list of factors, to ensure the validity of a waiver.

- The employee's education and business experience.
- The respective roles of the employer and the employee in deciding the provisions of the waiver.
- The clarity of the agreement.
- The amount of time in which the employee had to study the agreement.
- Whether the employee had independent advice, such as that of legal counsel.
- The consideration the employee received for signing the waiver, such as severance.

3. What can employers do when drafting and executing waivers to make sure that employees can't later claim that they didn't knowingly and voluntarily waive their right to sue?

Here's a list of things employers can do to make sure that their waivers are knowing and voluntary.

- Do make it clear that the employee has the right to contact any state or federal agency. While waivers may preclude employees from taking their claims to court, they should not prevent workers from, say, talking to the EEOC.
- Do list specific federal and state laws covered by the waiver. The more details you provide, the easier it will be for you to show that employees understood what rights they were waiving away. Also include claims for damages, attorneys' fees, etc.
- Do understand that waivers apply to future legal action based on past incidents; they do not cover lawsuits arising from incidents that occur after the waiver is signed.
- Do consider following OWBPA guidelines for non-ADEA waivers. It's a procedure that's already been court-tested. Besides, setting up a standard waiver procedure will also make them easier to administer.
- Do keep in mind that you do not have to offer basic versus enhanced benefits. If you stop providing severance as a matter of course, you can have employees choose between receiving severance or nothing.
- Do document well that you have provided employees with all information required by law.

4. What are the implications if a waiver contains a minor error? For example, a waiver mistakenly states that 154 employees were separated from one location, when the number is actually 152 employees.

There are major consequences. Courts have ruled that waivers must strictly satisfy all eight OWBPA requirements in order to be valid. If a waiver only substantially satisfies the requirements, then the waiver will generally not be considered knowing and voluntary. If a waiver is not knowing and voluntary, then it is not enforceable. This is why drafting waivers is not a do-it-yourself project; have an attorney write, or at least review, your waiver to ensure compliance with the OWBPA.

5. What type of information must be given to employees regarding the "eligibility factors" used to determine who is covered by a group termination program?

The OWBPA does not define "eligibility factors," but at least one court (the 10th Circuit) has interpreted it to include leadership, abilities, technical skills, and behavior, and whether each employee's skills matched the company's business needs. The fact that the company in the case only described those covered by the termination as salaried employees that reported to a particular manager, but did not list the specific criteria it used to determine who would be let go, rendered the waiver invalid.