

be elected after benefit commencement commence at a time during the period that begins on or after January 1 of the calendar year in which an employee attains age 70½ and ends April 1 of the immediately following calendar year.

(d) *Examples.* The provisions of this Q&A-10 are illustrated by the following examples:

*Example 1.* Plan A, a defined benefit plan, provides each participant with a qualified joint and survivor annuity (QJSA) that is available at any time after the later of age 65 or retirement. However, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan A provides that if an employee does not retire by the end of the calendar year in which the employee attains age 70½, then the QJSA commences on the following April 1. On October 1, 1998, Plan A is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence before the employee retires but must commence no later than the April 1 following the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70½. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 2.* Plan B, a money purchase pension plan, provides each participant with a choice of a QJSA or a single sum distribution commencing at any time after the later of age 65 or retirement. In addition, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan B provides that benefits will commence in the form of a QJSA on April 1 following the calendar year in which the employee attains age 70½, except that, with spousal consent, a participant may elect to receive annual installment payments equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan) until retirement, at which time a participant may choose between a QJSA and a single sum distribution (with spousal consent). On June 30, 1998, Plan B is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence prior to retirement but benefits must commence no later than April 1 after the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70½. The amendment further provides that the option described above to receive annual installment payments prior to retirement will not be available under the plan to an employee who is not a 5-percent owner and who attains age 70½ after 1998. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 3.* Plan C, a profit-sharing plan, contains two distribution provisions. Under the first provision, in any year after an employee attains age 59½, the employee may elect a distribution of any specified amount not exceeding the balance of the employee's account. In addition, the plan provides a section 401(a)(9) override provision under which, if, during any year following the year that the employee attains age 70½, the

employee does not elect an amount at least equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan), Plan C will distribute the difference by December 31 of that year (or for the year the employee attains age 70½, by April 1 of the following year). On December 31, 1996, Plan C is amended to provide that, for an employee other than an employee who is a 5-percent owner in the year the employee attains age 70½, in applying the section 401(a)(9) override provision, the later of the year of retirement or year of attainment of age 70½, is substituted for the year of attainment of age 70½. After the amendment, Plan C still permits each employee to elect to receive the same amount as was available before the amendment. Because this amendment does not eliminate an optional form of benefit, the amendment does not violate section 411(d)(6). Accordingly, the amendment is not required to satisfy the conditions of paragraph (b) of this Q&A-10.

(e) *Effective date.* This Q&A-10 applies to amendments adopted and effective after June 5, 1998.

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

**Par. 3.** The authority citation for part 602 continues to read as follows:

**Authority:** 26 U.S.C. 7805.

**Par. 4.** In § 602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

**§ 602.101 OMB control numbers.**

CFR part or section where identified and described	Current OMB control No.
* * * * *	
(c) * * *	
* * * * *	
1.411(d)-4 .....	1545-1545
* * * * *	

**Michael P. Dolan,**  
*Deputy Commissioner of Internal Revenue.*

Approved: May 11, 1998.

**Donald C. Lubick,**  
*Assistant Secretary of the Treasury.*  
[FR Doc. 98-14875 Filed 6-4-98; 8:45 am]

**BILLING CODE 4830-01-U**

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Part 1625**

**Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA)**

**AGENCY:** Equal Employment Opportunity Commission.  
**ACTION:** Final rule.

**SUMMARY:** EEOC is publishing this final regulation on agreements waiving rights and claims under the Age Discrimination in Employment Act, in order to set forth procedures for complying with the Older Workers Benefit Protection Act of 1990.

**DATES:** This final regulation will be effective on July 6, 1998.

**FOR FURTHER INFORMATION CONTACT:** Joseph N. Cleary, Assistant Legal Counsel, or Paul E. Boymel, Senior Attorney-Advisor, Office of Legal Counsel, 202-663-4692 (voice), 202-663-7026 (TDD).

**SUPPLEMENTARY INFORMATION:**

**A. History**

Congress amended the ADEA by enacting the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. 101-433, 104 Stat. 983 (1990), to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f), 29 U.S.C. 626(f).

Section 7(f)(1) provides that "an individual may not waive any right or claim under the [ADEA] unless the waiver is knowing and voluntary." Section 7(f) sets out the minimum criteria for determining whether a waiver is knowing and voluntary.

In light of the OWBPA amendments, EEOC published an Advance Notice of Proposed Rulemaking (ANPRM) in the **Federal Register**, 57 FR 10626 (March 27, 1992), seeking information from the public on various issues under both titles of OWBPA. In response to the ANPRM, EEOC received approximately 40 comments, many of which presented detailed analyses of Title II issues, requesting EEOC to provide formal guidance on waivers of rights and claims under the ADEA. Since the publication of the ANPRM, EEOC also has received numerous written and telephone inquiries requesting information on how to comply with Title II.

On August 31, 1995, EEOC announced in the **Federal Register**, 60

FR 45388 (August 31, 1995), its intent to use negotiated rulemaking to develop a proposed Title II rule.

### B. Purpose of Negotiated Rulemaking

Negotiated rulemaking, under procedures set out in the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*, Pub. L. 101-648, is a relatively new tool used by agencies in connection with the development of regulations. In using negotiated rulemaking, EEOC has reached out to employers, employees, and their representatives to take into account the concerns of all interested communities in the development and drafting of the proposed rule. This procedure contrasts with the more traditional "notice and comment" rulemaking where an agency receives public input only after the proposed rule is published for comment. The advantages of negotiated rulemaking include:

1. The negotiated rulemaking process allows public input from the start, permitting the stakeholders—individuals, organizations, and businesses actually affected by the rule—to explain their concerns and help shape the rule;

2. The agency gains the benefit of the expertise of the stakeholders, enabling it to draft a rule that reflects the realities of the workplace, not just the agency's views;

3. The negotiated rulemaking process requires consensus of the committee members. Since stakeholder representatives from all sides of the issues to be addressed are involved, the stakeholders will be more willing to accept the regulation without legal challenge. While no stakeholder will be happy with every provision of a rule, each will know that the rule represents a reasonable solution to shared problems.

### C. Negotiated Rulemaking on Title II of OWBPA

The August 31, 1995, **Federal Register** notice set out nine issues that EEOC suggested might be discussed during the negotiated rulemaking process. EEOC left open the possibility that the Negotiated Rulemaking Committee would add other issues to the proposed rule and/or choose not to address one or more of the enumerated issues.

The notice also invited members of the public who were interested in serving on the Committee to inform EEOC of their interest and qualifications. EEOC received over 70 requests to participate on the Committee, representing a wide diversity of interests and backgrounds. EEOC chose 18 Committee participants

from members of the public representing labor, management, and employee interests, along with 2 EEOC representatives to serve on the Committee. The members of the Committee were:

Elizabeth M. Barry, Esq., Harvard University, Cambridge, MA  
William H. Brown, Esq., Schnader, Harrison, Segal & Lewis, Philadelphia, PA

Joseph N. Cleary, Esq., Equal Employment Opportunity Commission, Washington, DC

John C. Dempsey, Esq., AFSCME, AFL-CIO, Washington, DC

Raymond C. Fay, Esq., Bell Boyd & Lloyd, Washington, DC

Burton D. Fretz, Esq., National Senior Citizens Law Center, Washington, DC

Peter Kilgore, Esq., National Restaurant Association, Washington, DC

Lloyd C. Loomis, Esq., Atlantic Richfield Co., Los Angeles, CA

Benton J. Mathis, Esq., Drew, Eckl & Farnham, Atlanta, GA

Thomas R. Meites, Esq., Meites, Frackman, Mulder & Burger, Chicago, IL

Niall A. Paul, Esq., Spilman, Thomas & Battle, Charleston, WV

Markus L. Penzel, Esq., Garrison, Phelan, Levin-Epstein & Penzel, and National Employment Lawyers Assn., New Haven, CT

L. Steven Platt, Esq., Arnold and Kadjan, and National Employment Lawyers Assn., Chicago, IL

Pamela S. Poff, Esq., Paine Webber Inc., Weehawken, NJ

Michele C. Pollak, Esq., American Association of Retired Persons, Washington, DC

Jaime Ramon, Esq., Jackson Walker, Dallas, TX

Patrick W. Shea, Esq., Paul Hastings, Janofsky & Walker, Society for Human Resource Management, Stamford, CT

Paul H. Tobias, Esq., Tobias Kraus & Torchia, Cincinnati, OH

Ellen J. Vargyas, Esq., Equal Employment Opportunity Commission, Washington, DC

Robert Williams, Esq., McGuiness & Williams, Equal Employment Advisory Council, Washington, DC

The Negotiated Rulemaking Committee began work on December 6, 1995. Committee meetings were held on December 6-7, 1995, January 23-24, 1996, March 6-7, 1996, April 16-17, 1996, June 18-19, 1996, and July 23-24, 1996. The Committee discussed in detail the issues set out in the August 31, 1995 **Federal Register** notice, as well as other issues that the Committee considered needed to be resolved. The Committee functioned by consensus

which it defined as the absence of objection by any Committee member.

The Committee unanimously forwarded a recommended proposed rule to EEOC for its consideration. As a result of the recommendations received from the Committee, and its deliberations regarding such recommendations, EEOC published for public comment the Committee's negotiated rule in a Notice of Proposed Rulemaking (NPRM) dated March 10, 1997, 62 FR 10787.

### Comments on the NPRM

Fifteen comments were received from the public with regard to the NPRM. Following the end of the 60 day public comment period, members of the Negotiated Rulemaking Committee were given a period of 30 days to provide EEOC with their written views relating to the proposed rule and the comments received. Two Committee members submitted written comments. Several federal agencies provided oral comments during interagency coordination under Executive Order 12067.

EEOC has analyzed carefully the comments received. For the reasons set out herein, EEOC has determined to make only the two changes listed in sections (a)(4) and (b)(1), below. In taking this position, EEOC is particularly mindful of two factors. First, in a negotiated rulemaking involving the active participation of representatives of both employers and employees, it was clear from the outset that compromise would be an integral element of the formulation of the regulation.

Secondly, the fact that only fifteen comments were submitted by members of the public reinforces EEOC's view that the compromise reached and incorporated in this regulation sets forth appropriate standards and strikes a reasonable balance between the various interests. None of the comments was sufficiently persuasive, as a substantive matter, to warrant altering the negotiated rulemaking consensus reached by the Committee.

In analyzing the regulation and the comments, EEOC emphasizes that no inference should be drawn on any issue, including issues discussed in the analysis of the comments received, by reason of the regulation's silence with respect to such issue.

EEOC responds to the principal points raised in the comments on a section-by-section basis, as follows:

#### Section (a): Introduction

1. Several comments asked that section (a)(3) be amended to provide

guidance on the definition of "a material mistake, omission, or misstatement."

EEOC adopts the Committee's view that questions of whether particular changes, mistakes, omissions, or misstatements are material should be analyzed under the existing law regarding "materiality."

Additionally, EEOC does not accept the suggestion by one commentator that a material error will invalidate a waiver agreement only if an employee proves that the error was intentional and that he/she reasonably relied upon the misinformation. Reliance is not an element of proof either in the statute or the regulation, and errors need not be intentional to be material.

2. Another commentator asked for clarification on whether the provisions of a waiver agreement are severable (that is, whether the invalidity of one provision of a waiver agreement would invalidate the entire agreement). Section 7(f) of the ADEA sets out minimum standards for the validity of a waiver agreement. An agreement that fails to meet *all* of the requirements of that section will not be valid.

3. In its verbal comments during the Executive Order 12067 coordination process, one federal agency recommended that the regulation should state explicitly that it applies to employees of the United States Government. EEOC concurs, and has added new section (a)(4) to the regulation.

#### *Section (b): Wording of Waiver Agreements*

1. In section (b)(5) of the NPRM, the word "plan" was inserted erroneously in the quotation. The word is removed in the final rule.

2. One federal agency has pointed out correctly that, among the factors to be considered in determining, under section 7(f)(1)(A) of the ADEA and section (b)(3) of the regulation, whether a waiver agreement is "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate" is a person's ability to understand the language in which the waiver is written. Because this is part of the necessary interpretation of the existing regulatory language, there was no need to amend the regulation.

#### *Section (c): Waiver of Future Rights*

Two employee representatives expressed concern that this section permits the waiver of future rights. The comments misunderstand the rule. The section only states that the waiver agreement properly may contain

agreements to perform certain actions in the future (e.g., the employee may agree to retire at the end of a school year).

Under the statute and the regulation, the waiver agreement cannot provide for the waiver of rights regarding new acts of discrimination that occur after the date of signing.

#### *Section (d): Consideration*

One commentator stated that the regulation should require the payment of "substantial" consideration in exchange for a waiver. Section 7(f)(1)(D) of the ADEA requires "consideration in addition to anything of value to which the individual already is entitled," not "substantial" consideration. The regulation does clarify, however, that an employer may not eliminate, in contravention of a law or contract, a benefit or other thing of value and then claim that the subsequent offer of such benefit or thing of value constitutes the required consideration.

#### *Section (e): Time Periods*

1. One commentator suggested that employees and employers should be permitted to shorten the seven-day waiting period specified in section 7(f)(1)(G) of the ADEA. The legislative history of OWBPA makes it clear that the seven-day waiting period is mandatory, giving an employee the chance to reconsider a possibly hasty waiver of rights. Accordingly, EEOC does not adopt the comment.

2. Section (e)(4) of the regulation states that "[m]aterial changes to the final offer restart the running of the 21 or 45 day period." Several commentators asked for a specific definition of the term "material." As stated in #(a)(1), above, EEOC has determined that the well-established law regarding materiality will govern such determinations.

#### *Section (f): Informational Requirements*

1. Nine of the comments addressed the scope of the information that must be given pursuant to section 7(f)(1)(H) of the ADEA to employees "\* \* \* if a waiver is requested in connection with an exit incentive or other termination program offered to a group or class of employees \* \* \*". Six of these comments requested more details covering a wide range of specific fact patterns, relying in large part on the use of hypothetical questions.

The regulation was not designed to address every possible situation that might arise. Indeed, it is neither feasible nor desirable to provide such detailed guidance in a regulatory context. However, EEOC believes that the regulation does provide a thorough and

practical framework for determining the scope of the informational requirements.

2. Four comments asked that the term "program" in section 7(f)(1)(H) of the ADEA be defined in greater depth. In general, these comments did not address the basic definition of a program, but sought clarification on how to determine how many programs exist, especially in the context of a reduction in force conducted over a period of months or in more than one facility of a large employer.

The regulation already addresses these questions. Section (f)(3)(ii) of the regulation discusses the definition of a program in the context of a reduction in force conducted over a period of time, and section (f)(4)(vi) addresses the question of multiple facilities. EEOC believes that the regulation provides adequate guidance as drafted.

3. Section 7(f)(1)(H)(ii) of the ADEA requires the employer to provide "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." One commentator suggested that the regulation specifically require job titles, in addition to ages, for persons not eligible or selected.

Since the statutory language varies slightly, EEOC has declined to adopt this comment. However, the information about individuals who are not eligible or selected for the program should be provided in a format that compares them to individuals in the same job classification or organizational unit who were eligible or selected.

#### *Section (g): Waivers Settling Charges and Lawsuits*

No comments were received.

#### *Section (h): Burden of Proof*

Several employer representatives suggested that the burden of proving compliance or noncompliance with the OWBPA provisions should rest upon the employee. However, section 7(f)(3) of the ADEA states clearly that the party asserting the validity of a waiver has the burden of proving that a waiver was knowing and voluntary pursuant to section 7(f)(1) or (2) of the ADEA. Because the regulatory language is based directly upon the statute, EEOC has determined not to change the proposed regulation.

#### *Section (i): EEOC's Enforcement Powers*

Seven comments urged EEOC to permit employees to waive the right to file a charge of discrimination with EEOC or another civil rights agency. The proposed regulation prohibited such

waivers. EEOC does not adopt the suggestion to change the proposed regulation.

Section 7(f)(4) of the ADEA states that "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." EEOC believes that permitting such waivers would be inconsistent with this statutory provision. See also, EEOC's Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission Enforced Statutes, No. 915.002 (April 10, 1997). Therefore, subsection (i) of the NPRM is adopted as published in the NPRM.

*Section (j): Effective Date*

No comments were received.

*Section (k): Statutory Authority*

No comments were received.

**Additional Comments**

1. Five of the commentors urged that the regulation address the question of whether employees can be required to tender back any consideration received under a waiver agreement before being permitted to challenge the waiver agreement in court. Three comments urged that a tender back requirement be included in the regulation, while two comments stated that the regulation should clarify that such a requirement would violate the ADEA.

The Supreme Court decided this issue in *Oubre v. Entergy Operations, Inc.*, 118 S.Ct. 838 (1998), holding that a release that does not comply with the OWBPA requirements cannot bar an employee's ADEA claims. The Court held that retention of the consideration given in exchange for a waiver does not amount to a ratification of the waiver agreement, and an employee seeking to challenge the validity of an ADEA waiver is not required to tender back the consideration to the employer before bringing legal action. EEOC is considering the appropriate form of guidance to issue in response to the *Oubre* decision, but has decided that, in order to avoid substantial delay, this regulation should not address the issue of tender back of consideration.

However, with regard to the administrative process, section (i)(3) of the regulation provides that a waiver agreement cannot impose "any condition precedent, any penalty, or other limitation adversely affecting" an individual's right to file a charge or

complaint with EEOC or assist EEOC in an investigation. Thus, a requirement in a waiver agreement that an individual tender back the consideration before filing a charge or complaint of discrimination with EEOC or assisting EEOC in an investigation will be void.

2. Two commentors representing employee interests proposed a series of additions to the regulation. For example, the commentors recommended that the regulation: discuss in detail the various theories of discrimination under the ADEA; adopt a particular statistical framework for evaluating the data provided to employees; and set forth recordkeeping requirements.

EEOC believes that these issues fall beyond the scope of this rulemaking and should not be included in the final regulation.

**Executive Order 12866, Regulatory Planning and Review:**

Under section 3(f)(4) of Executive Order 12866, EEOC has determined that this regulation would be a "significant regulatory action." Therefore, EEOC has coordinated the NPRM and this final regulation with the Office of Management and Budget. However, under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local or tribal governments or communities. The rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Therefore, EEOC has not needed to prepare a detailed cost-benefit assessment of the regulation.

**Paperwork Reduction Act**

The provisions of Title II of OWBPA do require employers to provide certain information to employees (but not to EEOC) in writing.

Accordingly, EEOC, as part of its continuing effort to reduce paperwork and respondent burden, has, as required by the Paperwork Reduction Act for all collections of information, solicited comments concerning the proposed rule with regard to the paperwork requirements contained in Title II of OWBPA. The provisions of the proposed and final rule dealing with informational requirements have been submitted to and approved by the Office of Management and Budget under section 3507 of the Paperwork Reduction Act, OMB Approval No. 3046-0042.

The public reporting and recordkeeping burden for this collection of information is estimated to be 41,139 hours in order for employers to collect the information and to determine: (1) what information must be given to employees; (2) which employees must be given the information; (3) how the information should be organized.

The estimated burden of collecting and distributing the information was calculated as follows:

*Collection Title:* Informational requirements under Title II of the Older Workers Benefit Protection Act of 1990 (OWBPA), 29 CFR Part 1625.

*Form Number:* None.

*Frequency of Report:* None required.

*Type of Respondent:* Business, state or local governments, not for profit institutions.

*Description of the Affected Public:*

Any employer with 20 or more employees that seeks waiver agreements in connection with exit incentive or other employment termination programs (hereinafter, "Programs").

*Responses:* 13,713.

*Reporting Hours:* 41,139.

*Number of Forms:* None.

*Abstract:* This requirement does not involve record keeping. It consists of providing adequate information in waiver agreements offered to a group or class of persons in connection with a Program, to satisfy the requirements of the OWBPA.

*Burden Statement:* There is no reporting requirement nor additional record keeping associated with this rule. The only paperwork burden involved is the inclusion of the relevant data in waiver agreements. The rule applies only to those employers who have 20 or more employees and who offer waivers to a group or class of employees in connection with a Program.

There are 542,000 employers who have at least 20 employees. Programs come into play when, as a result of business activity, employers are forced to cut their work force. Based on statistics from EEOC's private employer survey, it is estimated that in any one year 4.6% of employers are involved in activities, such as mergers or downsizing, which occasion the use of Programs. It is further estimated, based on figures from a General Accounting Office study, and the Bureau of Labor Statistics, that at most 55% of those who use Programs require waivers and thus are affected by this rule.

*Applying the above factors to the total number of employers:* [(542,000 × .046 × .55) = 13,713] yields 13,713 employers that are affected by this requirement. The larger employers are assumed to have computerized record keeping, and

thus can produce the requisite notification with a minimum of effort, while smaller employers have far less information to process.

Therefore, it is estimated that, on the average, a notification can be produced in approximately 3 hours. This would then produce a maximum of  $(13,713 \times 3) = 41,139$  hours annually.

EEOC asked the public to comment on the information provisions contained in the proposed regulation to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of EEOC, including whether the information shall have practical utility;
- Evaluate the accuracy of EEOC's estimate of the burden of the proposed collection of information;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The only comment received in response to the NPRM with regard to the Paperwork Reduction Act, from the American Association of Retired Persons, agreed with EEOC's view of the requirements imposed by that Act. Accordingly, the Paperwork Reduction Act information herein is unchanged from the proposed regulation.

EEOC certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this regulation will not result in a significant economic impact on a substantial number of small entities. For this reason, a regulatory flexibility analysis is not required. A copy of the proposed rule was furnished to the Small Business Administration.

In addition, in accordance with Executive Order 12067, EEOC has solicited the views of affected Federal agencies with regard to the NPRM and the final regulation.

The final regulation appears below.

#### List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee benefit plans, Equal employment opportunity, Retirement.

Signed at Washington, DC this 29th day of May, 1998.

**Paul M. Igasaki,**  
Chairman.

Chapter XIV of title 29 of the Code of Federal Regulations is amended as follows:

#### PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

**Authority:** 81 Stat. 602; 29 U.S.C. 621, 5 U.S.C. 301, Secretary's Order No. 10-68; Secretary's Order No. 11-68; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. In part 1625, § 1625.22 is added to subpart B—Substantive Regulations to read as follows:

##### § 1625.22 Waivers of rights and claims under the ADEA.

(a) *Introduction.* (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is "knowing and voluntary". Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

##### (b) *Wording of Waiver Agreements.*

(1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) 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. 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.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant." The same standards applicable to the similar language in section 7(f)(1)(A) of the ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that "the waiver specifically refers to rights or claims under this Act." Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be "advised in writing to consult with an attorney prior to executing the agreement."

(c) *Waiver of future rights.* (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) *Consideration.* (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum \* \* \* the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) "Consideration in addition" means anything of value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law

or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) *Time periods.* (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum \* \* \*

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) 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 individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term "exit incentive or other employment termination program" includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration

of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) *Informational requirements.* (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . 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 (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) 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

(ii) 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.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") 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.

(B) The question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" 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. Typically, an involuntary

termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. 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 be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their

organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as "school," "plant," or "complex" may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. 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 selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) 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.

(E) Likewise, 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.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) *Facility-wide*: Ten percent of the employees in the Springfield facility

will be terminated within the next ten days;

(B) *Division-wide*: Fifteen of the employees in the Computer Division will be terminated in December;

(C) *Department-wide*: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) *Reporting*: Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) *Job Category*: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be

considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20-30") does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, 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 terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the

decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA: Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees \$20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

- (A) The decisional unit is the Construction Division.
- (B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our

November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I .....	25 .....	21	48
	26 .....	11	73
	63 .....	4	18
	64 .....	3	11
(2) Mechanical Engineers, II .....	28 .....	3	10
	29 .....	11	17
	Etc., for all ages		
(3) Structural Engineers, I .....	21 .....	5	8
	Etc., for all ages		
(4) Structural Engineers, II .....	23 .....	2	4
	Etc., for all ages		
(5) Purchasing Agents .....	26 .....	10	11
	Etc., for all ages		

(g) *Waivers settling charges and lawsuits.* (1) Section 7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1) (A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not

apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) *Burden of proof.* In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) *EEOC's enforcement powers.* (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

- (i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
- (ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

- (i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or
- (ii) Participate in any investigation or proceeding conducted by EEOC.

(j) *Effective date of this section.* (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) *Statutory authority.* The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

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