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 70 1/2 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 70 1/2, 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 70 1/2 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 70 1/2. 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 70 1/2, 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 70 1/2 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 70 1/2. 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 70 1/2 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 59 1/2, the employee may elect to receive annual installment payments prior to retirement. In addition, in accordance with the plan, a participant may 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:


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.

<table>
<thead>
<tr>
<th>CFR part or section where identified and described</th>
<th>Current OMB control No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>* * * * * * * * * * * * * * * * * * * * * * * * *</td>
<td>1411(d)–4 1545–1545</td>
</tr>
</tbody>
</table>

Michael P. Dolan,
Deputy Commissioner of Internal Revenue.


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)


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
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., Sabiner & Segal, Philadelphia, PA
John C. Dempsey, Esq., AFSCME, AFL-CIO, Washington, DC
Raymond C. Fay, Esq., Bell Boyd & Lloyd, Washington, DC
Burton D. Frez, Esq., National Senior Citizens Legal 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 Kajdan, 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
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
agreement. An agreement that fails to 
7(f) of the ADEA sets out minimum 
provision of a waiver agreement would 
clarification on whether the provisions 
intentional to be material. 
Additionally, EEOC does not accept 
suggestion by one commentor 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 
instructional to be material. 
2. A nother commentor 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 
validate 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, the person 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 commentor 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 commentor suggested that 
employees and employers should be 
permitted to shorten the seven-day 
waiving period provided in section 
7(f)(1)(G) of the ADEA. The legislative 
history of OWBPA makes clear that the 
seven-day waiting period is 
mandatory, giving an employee the 
right to reconsider a possibly hasty 
waiver of rights. Accordingly, EEOC 
do 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 commentors 
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 
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 commentor 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 employers; 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, 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. 3046-0002.

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: 

\[
(542,000 \times 0.046 \times 0.55) = 13,713
\]

yields 13,713 employers that are affected by this requirement. The larger employers are assumed to have computerized record keeping, and
PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT


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.

(b) Wording of Waiver Agreements.

(1) Section 7(f)(1)(A) of the ADEA provides, in part: "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 limitaion 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 material, 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 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 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)(2) 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 program (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) The terms “class,” “unit,” or “group” in section 7(f)(1)(H)(ii) 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.

(ii) 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 others from that program.

(iii)(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 workforce 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 a 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 established subcategory 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 terminies 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 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 terminies 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
(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 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 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.