

# Client Bulletin

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## **Ninth Circuit Holds Release Used In Reduction in Force Program Is Unenforceable**

A recent decision from the Ninth Circuit Court of Appeals has held that a release agreement used in connection with a reduction in force program was invalid because it failed to clearly explain to eligible employees the waiver of their rights to bring an employment discrimination action against the employer.

Under the Older Workers Benefit Protection Act ("OWBPA"), which amends the Age Discrimination in Employment Act ("ADEA"), a waiver by an employee of his or her rights under the ADEA is unenforceable unless the agreement waiving these rights is entered into knowingly and voluntarily. 29 U.S.C. § 626(f)(1) (2000). The purpose of the OWBPA amendments is to insure that employees "are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." See S. REP. NO. 101-263, at 5 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1509, 1510.

In order to qualify as "knowing and voluntary" the waiver agreement between the employer and employee must be, among other things, "written in a manner calculated to be understood by the average individual eligible to participate" in the workforce reduction plan. 29 U.S.C. § 626(f)(1)(A).

In *Syverson v. International Business Machines Corp.*, 2006 WL 2506421 (9<sup>th</sup> Cir. Aug. 31, 2006), the release agreement tendered by the employer, IBM, to its eligible employees under the reduction in force program contained waiver language covering claims under the ADEA and other state or local laws dealing with employment discrimination. The agreement also included a covenant not to sue IBM for any employment claims or claims arising from the reduction in force program but advised that the covenant not to sue did not apply to claims arising under the ADEA and that the employees

were still permitted to file claims with the U.S. Equal Employment Opportunity Commission ("EEOC").

The former employees filed a class action against IBM alleging that the release agreement was not enforceable because it violated the waiver requirements of the OWBPA and that IBM's reduction in force program constituted age discrimination under the ADEA.

The employees' primary complaint was that the release agreement misled participating employees into believing that, in addition to retaining the right to file an ADEA claim with the EEOC, they retained the right to commence an independent action based on claims under the ADEA in court. The employees alleged that the phrasing of the release or waiver language and the covenant not to sue engendered confusion over whether ADEA claims were covered by the release agreement.

The Ninth Circuit reversed the lower court's dismissal of the action on the grounds that the release agreement was not written in a manner calculated to be understood by the average employee and, therefore, was invalid and unenforceable.

This case illustrates the importance of drafting release language that complies with federal, state and local laws, especially when dealing with reduction in force or other employee layoff programs. Lastly, it is important to note that although most jurisdictions in the U.S. follow the ADEA, a number of state and local jurisdictions have additional requirements that must be considered when terminating an individual employee or implementing a reduction in force program.



If you would like more information on reduction in force programs, other separation arrangements or a copy of the referenced case please contact:

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