
RECENT UNITED STATES SUPREME COURT DECISIONS AND HUMAN RESOURCE MANAGEMENT DECISION MAKING: THE 2007/2008 TERM

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ABSTRACT

Former Supreme Court Justice, Lewis Powell described the federal judiciary and the United States Supreme Court as perhaps “the most important instrument for social, economic, and political change” (Lazarus, 2008). Recent terms of the Supreme Court have produced a number of important decisions impacting decision making with respect to an organization’s human resources. For example, in the 2007/2008 term, the Court issued important decisions involving age discrimination and retaliation. These decisions have been characterized as expanding an employer’s burden of proof in responding to allegations and potentially increasing the cost to defend themselves in responding to allegations of discrimination (Smith, 2008-B & AHI’s Employment Law Today, 2008). The purpose of this paper is to examine the Court’s decisions in these two areas and to present policy and practice suggestions for organizations to reduce their exposure to litigation and cost in the future.

INTRODUCTION

Former Supreme Court Justice, Lewis Powell described the federal judiciary and the United States Supreme Court as perhaps “the most important instrument for social, economic, and political change” (Lazarus, 2008). The Constitutional origin of the Court is in Article III, §1, of the U.S. Constitution and provides that “the judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish” (A Brief Overview of the Supreme Court, 2008). The jurisdiction of the Court, Article III §2 of the U.S. Constitution, extends “to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” (A Brief Overview of the Supreme Court, 2008). The term of the Court begins on the first Monday in October and runs until the first Monday in October of the following year. In recent years, the caseload of the Court has increased dramatically. While there were only 1,460 cases on

the docket in the 1945 term, and 2,313 in 1960, recently there has been more than 10,000 cases on the docket per term (A Brief Overview of the Supreme Court, 2008). The court will only grant plenary review with oral arguments in approximately 100 cases per term with formal written opinions being delivered in 80 to 90 cases (A Brief Overview of the Supreme Court, 2008). In the 2007/2008 term, the court heard oral arguments for 70 cases and returned opinions in 69 of those cases (Ross, 2008).

In the 2007/2008 term, the Court issued important decisions involving age discrimination and retaliation. These decisions have been characterized as expanding employers' burden of proof in responding to allegations and potentially increasing the cost to defend themselves in responding to allegations of discrimination (Smith, 2008-B & AHI's Employment Law Today, 2008). The purpose of this paper is to examine the Court's decisions in these two areas and to present policy and practice suggestions for organizations to reduce their exposure to litigation and cost in the future.

BACKGROUND

In recent years, with respect to human resource decision making, the Court has been called on to rule on a number of important issues. Some of those rulings have been viewed as pro-employer and others as pro-employee. From the 2007/2008 term, eleven cases with human resource decision making issues were identified (see Exhibit 1). In those cases, the Court ruled in favor of employees seven times and employers/business four times (Ross, 2008).

Exhibit 1 2007/2008 U.S. Supreme Court Decisions with Human Resource Decision Making Implications			
Case	Decided	Statute	Outcome
U.S. Chamber of Commerce v. Brown	6/19/08	NLRA	Pro Employer
Meacham v. Knolls Atomic Power Lab.	6/19/08	ADEA	Pro Employee
Kentucky Retirement Systems v. EEOC	6/19/08	ADEA	Pro Employer
Met Life Insurance v. Glenn	6/19/08	ERISA	Pro Employee
Allison Engine v. United States	6/09/08	False Claims	Pro Employee
Engquist v. Oregon Dept. of Agriculture	6/09/08	Constitution	Pro Employer
CBOCS West, Inc. v. Humphries	5/27/08	1866/Title VII	Pro Employee
Gomez-Perez v. Potter	5/27/08	ADEA	Pro Employee
Federal Express v. Holowecki et al.	2/27/08	ADEA	Pro Employee
Sprint/United Management Co. v. Mendelsohn	2/26/08	Technical	Pro Employer
LaRue v. DeWolff	2/20/08	ERISA	Pro Employee

Exhibit 1 2007/2008 U.S. Supreme Court Decisions with Human Resource Decision Making Implications

(Source: Ross, 2008) (NLRA - National Labor Relations Act; ADEA - Age Discrimination in Employment Act; ERISA - Employee Retirement Income Security Act; Constitution - Equal Protection Clause of the U.S. Constitution; False Claims - False Claims Act; 1866 - 1866 Civil Rights Act; Title VII - Title VII of the 1964 Civil Rights Act; Technical - Technical ruling by the court on Federal Rules of Evidence 401 & 403)

With respect to the purpose of this study, four cases will be examined. Three cases deal with age discrimination under the Age Discrimination in Employment Act (ADEA), *Meacham v. Knolls Atomic Power Lab*, and *Federal Express v. Holowecki et al.*, are most relevant. The *Gomez-Perez v. Potter* case also involved the ADEA, but the key issue in the case was whether discrimination based on age includes retaliation under the ADEA. The *CBOCS West, Inc. v. Humphries* decision addressed the application of the 1866 Civil Rights Act in retaliation cases.

THE RETALIATION ISSUE

The Supreme Court first broadened the retaliation issue in 2006 in its *Burlington Northern & Santa Fe Railway Co. v. White* decision. In that case the Court ruled that employees could have a valid retaliation claim even if they did not experience an economic loss or suffer an ultimate employment decision, such as termination or demotion (*Burlington Northern & Santa Fe Railway v. White*, 2006). "The U.S. Supreme Court opened the door to retaliation claims wider on May 27, 2008" (Smith, 2008-A). Even before the 2008 Court decisions, complaints filed with the Equal Employment Opportunity Commission (EEOC) alleging retaliation have been on the rise. The EEOC saw the number of retaliation claims filed with the agency jump from 22,555 in 2006 to 26,663 in 2007 (EEOC, 2008). The overall number of charge filings with the EEOC increased to 82,792 in 2007 from 75,768 in 2006 (EEOC, 2008). If the observations by Smith and others are accurate, employers can expect even more claims in the future. Exhibit 2 contains the most recent retaliation charge statistics compiled by the EEOC.

Exhibit 2 – Retaliation charges as a Percentage of All Charges filed with the EEOC Fiscal Years 1997 – 2007, and Actual Number of Retaliation Charges.

1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
22.6	24.0	25.4	27.1	27.5	27.0	27.9	28.6	29.5	29.8	32.3%
18,198	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555	26,663

Source: EEOC, 2008 Equal Employment Opportunity Commission, Charge Statistics

EEOC regulations note that there are three main terms that are used to describe retaliation and that "Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity" (EEOC, 2008-A).

The EEOC defines adverse action as an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples include:

Termination, refusal to hire, and denial of promotion, Threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and Any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights

(EEOC, 2008-A).

RECENT RETALIATION CASES

The question before the Court in the Gomez-Perez v. Potter case was "whether a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA" (Gomez-Perez v. Potter, 2008). Gomez-Perez was a 45 year old window distribution clerk for the United States Postal Service who filed an age discrimination complaint against the Postal Service. She alleged that she suffered numerous forms of retaliation as a result of filing the complaint, including "groundless complaints leveled at her, that her name was written on unit sexual harassment posters, that she was falsely accused of sexual harassment, that her co-workers told her to go back to where she belonged, and that her work hours were drastically reduced" (Gomez-Perez v. Potter, 2008). The District Court that initially ruled on Gomez-Perez's law suit granted summary judgment in favor of the Postal Service and the First Circuit Court of Appeals up-held that decision (Gomez-Perez v. Potter, 2008). The Postal Service argued that the United States had not waived sovereign immunity for ADEA retaliation claims and the ADEA federal-sector provision does not reach retaliation. A majority of the Supreme Court disagreed and held that the ADEA does prohibit retaliation against a federal employee who complains of age discrimination, and remanded the case for further proceedings consistent with the opinion (Gomez-Perez v. Potter, 2008). While this decision will expand the number of individuals who may bring retaliation claims under the ADEA, the impact of the CBOCS West Inc. v. Humphries decision will effect even more employers (Smith-A, 2008).

The question before the Court in the CBOCS West Inc. v. Humphries case was whether 42 U.S.C. § 1981 (the Civil Rights Act of 1866) "encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related rights" (CBOCS West Inc. v. Humphries, 2008). Hedrick G. Humphries was an assistant manager of a Cracker

Barrel restaurant owned by CBOCS West, Inc. Humphries alleged that he was dismissed "(1) because of racial bias (Humphries is a black man) and (2) because he had complained to managers that a fellow assistant manager had dismissed another black employee, Venus Green, for race-based reasons" (CBOCS West Inc. v. Humphries, 2008). Humphries initial complaint alleged that CBOCS had violated both Title VII of the 1964 Civil Rights Act and § 1981 of the 1866 Civil Rights Act. The District Court dismissed his Title VII claims "for failure to pay necessary filing fees on a timely basis" and granted CBOCS request for summary judgment on the § 1981 claims (CBOCS West Inc. v. Humphries, 2008). Humphries appealed to the Seventh Circuit Court of Appeals, and while they upheld the District Court's decision with respect to the Title VII claim they upheld Humphries § 1981 claim and remanded it for trial (CBOCS West Inc. v. Humphries, 2008). CBOCS appealed to the Supreme Court to consider the issue. A majority of the Supreme Court agreed with the Seventh Circuit ruling, thus sending this case back for further consideration (CBOCS West Inc. v. Humphries, 2008).

IMPLICATIONS OF THE RETALIATION DECISIONS FOR EMPLOYERS

The most significant implication for employers associated with these two Court decisions is the broadening of employees' rights to file retaliation claims "under two laws that do not expressly state this right" (AHI's Employment Law Today, 2008). The CBOCS West Inc. decision is especially significant, because it now extends § 1981 of the Civil Rights Act of 1866 to include retaliation claims. "Section 1981 of the Civil Rights Act of 1866 ... is a post-Civil War statute that gives "[a]ll persons...the same...right...to make and enforce contracts...as is enjoyed by white persons" (AHI's Employment Law Today, 2008, CBOCS West Inc. v. Humphries). The CBOCS West Inc. decision will extend § 1981 protection from retaliation "to all private employers, even those that do not have the 15 employees needed to be covered by Title VII" (Smith-A, 2008). Additionally, under Title VII, individuals have 180 days (300 days in states that have "work sharing agreements" with the Equal Employment Opportunity Commission (EEOC)) to file complaints with the EEOC and 90 days to file a lawsuit once the EEOC has issued a right-to-sue letter (EEOC, 2008-B). Under § 1981, a four-year statute of limitations applies (Smith-A, 2008). Smith asserts that these differences may make it more difficult for employers to defend against retaliation claims under § 1981 "if key witnesses have departed" and, quoting Florida attorney Allan Weitzman, "will result in more old retaliation claims" (Smith-A, 2008). AHI's Employment Law Today notes even "more bad news for employers: Section 1981, unlike Title VII, does not place a cap on damages"(AHI's Employment Law Today, 2008).

AGE DISCRIMINATION ISSUE

Attention to age discrimination has received significant attention in recent years, and the EEOC saw the number of age discrimination claims filed with the agency jump from 16,548 in 2006 to 19,103 in 2007 (EEOC, 2008). While the increase in age discrimination allegations has drawn attention, some believe that the number of age discrimination cases relative to those in the workforce who are age 40 and older is relatively small. "In 2007, according to the U.S. Bureau of Labor Statistics (BLS), 76.9 million people in the workforce were age 40 and older. Last year, 99.98 percent of them did not complain to the EEOC about discrimination" (Grossman, 2008, 64). Exhibit 3 contains the most recent age discrimination charge statistics compiled by the EEOC.

Exhibit 3 – ADEA Charges as a Percentage of All Charges Filed with the EEOC Fiscal Years 1997- 2007 and Actual Number of ADEA Charges Filed.										
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
19.6	19.1	18.3	20.0	21.5	23.6	23.5	23.6	22.5	21.8	23.2%
15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548	19,103
Source: EEOC, 2008 Equal Employment Opportunity Commission, Charge Statistics										

As a result of *Federal Express v. Holowecki* and *Meacham v. Knolls Atomic Power Laboratory* Supreme Court decisions, it has been reported employers can expect "more litigation" under the ADEA, and that claims under the ADEA will be "harder and costlier for employers to defend" (Hofmann, 2008, Smith-B, 2008, & Morris, 2008).

RECENT AGE DISCRIMINATION CASES

In *Federal Express v. Holowecki*, the central question before the Court was the "timeliness of the suit filed by one of the plaintiffs" and a "requirement in the ADEA that an employee file a charge of discrimination with the EEOC before pursuing a case in federal court (*Federal Express v. Holowecki*, 2008). Those requirements are "intended to give the EEOC a chance to notify the company, investigate the claim and seek conciliation between the employer and employee before lawyers and judges become involved" (Barnes, 2007). The plaintiffs in this case, 14 current and former FedEx couriers over the age of 40, alleged that two programs initiated by the company to make the "courier network more productive", were "veiled attempts to force older workers out of the company before they would be entitled to receive retirement benefits" (*Federal Express v. Holowecki*, 2008). One of the plaintiffs had filed EEOC Form 283, an Intake Questionnaire on December 11, 2001. The plaintiffs then filed their law suit on April 30, 2002. Federal Express moved to dismiss the suit, "contending respondent had not filed her charge with the EEOC at least

60 days before filing suit, as required by 29 U.S.C § 626(d)" (Federal Express v. Holowecki, 2008). The District Court granted Federal Express's motion but the Second Circuit Court of Appeals reversed (Federal Express v. Holowecki, 2008). Federal Express contended that because the EEOC did not act on the Form 283 filing, the lawsuit should be precluded (Hofmann, 2008). The Court rejected Federal Express's argument in a 7-2 decision. Critics of the decision, included Associate Justices Scalia and Thomas who wrote that in the decision, "the majority had decided that a charge of age discrimination under the ADEA is whatever the EEOC says it is" (Hofmann, 2008). Justice Scalia, and the justices were described as "unsparing in their criticism" of the EEOC and "the role it played in the tangled legal issues the court was picking through in the case"(Hofmann, 2008). Another critic of the decision noted that "if your an employer, it eliminates some of the procedural defenses that previously existed when employees did not jump through the correct hoops to access the EEOC's machinery"(Hofmann, 2008).

In Meacham v. Knolls Atomic Power Laboratory, the question before the Court was "whether an employer facing a disparate-impact claim and planning to defend on the basis of a Reasonable Factor Other than Age (ROFA) must not only produce evidence raising the defense, but also persuade the fact finder of its merit"(Meacham v. Knolls Atomic Power Laboratory, 2008). The plaintiffs in this case were twenty-eight former salaried employees of Knolls Atomic Power Laboratory. They were part of a group of 31 employees laid off in a reduction in force (RIF), "30 who were at least 40 years old"(Meacham v. Knolls Atomic Power Laboratory, 2008). The plaintiffs alleged that Knolls had "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA protected employees"(Meacham v. Knolls Atomic Power Laboratory, 2008). Responding to a change in demand for its products, Knolls was ordered to reduce its work force. After a number of employees had accepted the Knoll's buyout offer, they still had 31 jobs to cut. Knolls instructed its managers to select employees for layoff based on three scales, "performance", "flexibility", and "critical skills"(Meacham v. Knolls Atomic Power Laboratory, 2008). The employee "scores were summed along with points for years of service, and the totals determined who should be let go"(Meacham v. Knolls Atomic Power Laboratory, 2008).

The RFOA exemption under the ADEA creates exemptions for employer practices "otherwise prohibited under" the ADEA. The RFOA exemption is in § 623(f) of the statute and states "it shall not be unlawful for an employer...to take any action otherwise prohibited under subsections (a), (b), (c), or (e)...where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age...."(Meacham v. Knolls Atomic Power Laboratory, 2008). At the District Court level, the jury found for Meacham on the disparate-impact claim. The Second Circuit Court of Appeals, while initially affirming the District Court decision, eventually ruled in Knolls favor and determined that Meacham "had not carried the burden of persuasion"(Meacham v. Knolls Atomic Power Laboratory, 2008). The Supreme Court, responded to a conflicting decision issued

by the Ninth Circuit Court of Appeals, granting certiorari. The Supreme Court concluded that "the burden was improperly placed on the employees to show that the employer's criteria were unreasonable, since RFOA was an affirmative defense for which the employer bore both the burden of production and the burden of persuasion"(Meacham v. Knolls Atomic Power Laboratory, 2008). Further, the Court noted that "while employees were required to identify the challenged layoff factors, the employer that sought to benefit from the RFOA exemption was required to prove that the exemption applied"(Meacham v. Knolls Atomic Power Laboratory, 2008). The Court noted that the burden being placed on employers might "encourage strike suits or nudge plaintiffs with marginal cases into court" but, "such concerns have to be directed at Congress, which set the balance by both creating the RFOA exemption and writing it in the orthodox format of an affirmative defense"(Meacham v. Knolls Atomic Power Laboratory, 2008).

IMPLICATIONS OF AGE DISCRIMINATION DECISIONS FOR EMPLOYERS

For employers, the primary implication of the Federal Express v. Holowecki decision is that it may "eliminate some of the procedural defenses" that employers had available (Hofmann, 2008). The EEOC reported that "as the Court noted, the EEOC has taken steps to ensure timely notification to respondents of receipt of intake questionnaires or other correspondence that constitute charges" and, that they "will continue to review our procedures as the Court has suggested to ensure that they are clear to the public and consistent with our statutes and regulations" (Hofmann, 2008). Employers and their legal representatives must stay abreast of EEOC pronouncements and changes in regulations in light of this ruling. While the key question in this case focused on the timeliness of the suit, in light of the Meacham v. Knolls Atomic Power Laboratory decision, employers must be sure to check for adverse impact on older workers and employ procedures and criteria that will be perceived as reasonable. While that may be a tall and costly order for employers, the jury in the Meacham v. Knolls Atomic Power Laboratory case awarded the plaintiffs damages and attorney fees of more than \$6 million (Meacham v. Knolls Atomic Power Laboratory, 2002). In developing RIF criteria, objectivity is a key element. Employers must "take a more critical look at their factors for reduction in force" and "that the more subjective the factors, the more they might be subject to challenge" (Smith-B, 2008).

POLICY AND PRACTICE SUGGESTIONS FOR EMPLOYERS

With respect to the retaliation issue, in light of the "broad stance on employment retaliation" taken by the Court, AHI's Employment Law Today provides an excellent list of suggestions for employers to follow "after an employee has filed a discrimination, harassment, or safety complaint in order to protect the company from the additional threat of a retaliation charge":

Avoid knee-jerk reactions. An aggressive reaction to a complaint could be seen as retaliatory in nature. Treat complaints as an opportunity to correct mistakes and avoid liability, and not to automatically consider the employee as a troublemaker.

Prevent further incidents of mistreatment. You must be even handed when separating employees who are at odds. Be careful not to penalize the complainant.

Implement your organization's system for receiving and investigating complaints.

Keep the investigation focused on the complaint, and avoid getting sidetracked by the complainant's performance. Even if your investigation reveals shortcomings in the employee's performance, keep the investigation centered on the allegations at hand.

Deal with the performance problems separately.

Orally review the entire complaint and your organization's retaliation policies with employees and subordinates when a complaint is filed, when an investigation is concluded, and as often as needed in between.

Don't punish an employee who files an unfounded complaint or grievance. Remember that even if an employee's complaint is groundless, if it was filed in good faith, he/she could still be protected against retaliation

(AHI's Employment Law today, 2008).

Joel Rice, prominent Chicago attorney adds, that "the added exposure to retaliation claims means that employers should take preventative steps" and that "any kind of complaint, external or internal, that could be construed as protected raises a huge red flag for employers"(Smith-B, 2008). In light of the Court's CBOCS West Inc. v. Humphries decision, employers "have to be even more certain that they can show that an adverse employment decision is well-founded" (Smith-B, 2008).

A number of the legal and professional "experts" since Burlington Northern have been busy advising employers what they should be doing, and in many respects it looks like more of the same. For example, instead of your policy simply stating discrimination and harassment will not be tolerated in your organization, the new policy suggestions is to make sure you "make it crystal clear that workplace retaliation will (also) not be tolerated" (Janove, 2006). Michael Patrick O'Brien a prominent Salt Lake City, Utah attorney recommends that your policy should include the following:

A clear statement that, like discrimination and harassment, retaliation is prohibited by both law and company policy, and that retaliatory acts will lead to discipline and/or discharge.

A brief illustration of types of conduct that might be prohibited by the policy.

A mechanism for reporting possible acts of retaliation.

A statement that complaints will be promptly investigated and resolved as appropriate

A statement that complaints will be maintained as confidential to the extent practicable, given the need to investigate and resolve issues

(Janove, 2006, 66).

Mary Jo O'Neill, regional attorney with the EEOC's Phoenix District Office recommends that employers provide "specific training on the subject of retaliation, including using the Burlington Northern (case) to explain what can constitute retaliation" (Janove, 2006, 67).

With respect to the age discrimination issue, with the current state of the American economy pushing more firms to tighten expenses, more employers have been looking to reduce their largest cost, people, by relying on reductions in force. Adrienne Fox cited two reports that support this trend. In a report from outplacement firm Challenger, Gray and Christmas in Chicago, found January 2008 layoffs rising 69 percent from December 2007 (Fox, 2008). In another survey by Career Protection's Annual 2008 Layoffs Forecast, a 37 percent increase in layoffs for 2008 compared to 2007 was predicted (Fox, 2008).

As a result of the Court's age discrimination decisions, employers should put more resources into developing and implementing RIFs. A number of proactive options are available to employers to not only reduce their exposure to litigation when utilizing RIFs, but options that can also facilitate employers ability to retain their most talented and productive employees, employees who are critical when organizations are dealing with difficult times. Kirk Nemer, president and chief executive officer of Denver-based Career Protection, advises HR professionals that may decide to employ RIFs to utilize a "performance system and reviews to determine who can be let go" (Fox, 2008). Nemer adds that to do this, HR professionals must

Make sure appraisals are up-to-date.

Identify top performers and get them working on the company's future.

Have leaders committed to the company's turnaround

(Fox, 2008, 68).

Matt Angello of Bright Tree Consulting Group adds, "Organizations do themselves a disservice when they don't have a rigorous performance management system that supports HR decisions, particularly around layoffs"(Fox, 2008, 68).

Other legal issues that can arise when employers utilize RIFs include compliance with the Worker Adjustment and Retraining Notification (WARN) Act, the Older Workers Benefit Protection Act (OWBPA), and COBRA regulations. The WARN Act requires employers with at least 100 employees to provide 60 days notice before a plant closing or mass layoff. Under the WARN Act, a plant closing occurs when a single employment site or one or more facilities within a single site institute a layoff of 50 or more employees during a 30-day period. A mass layoff is defined as a reduction of at least 50 employees comprising at least 33 percent of the workforce or a layoff involving at least 500 employees. Employees entitled to advance notice under WARN include managers and supervisors as well as hourly and salaried workers. Failure to comply with the WARN Act can make employers liable to each employee for back pay, benefits, and attorney's fees (U.S. Department of Labor, 2008)

OWBPA regulations cover the use of releases and waivers of employees' right to sue. An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

Be in writing and be understandable;
Specifically refer to ADEA rights or claims;
Not waive rights or claims that may arise in the future;
Be in exchange for valuable consideration;
Advise the individual in writing to consult an attorney before signing the waiver;
and
Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it

(EEOC, 2008-C).

The 21 day period to consider the agreement must be extended to 45 days if offered in a reduction in force (RIF) and the employer must "inform as to the eligibility as to class, unit, and time limits and the job titles and ages of all individuals eligible or selected for the program and the job titles and ages of those not selected for the program § 626(f) (1) (H)" (Peterson v. Seagate US LLC, 2008).

Employers and their legal counsel should be advised that courts hold employers to "strict compliance" with respect to OWBPA requirements. In Peterson v. Seagate US LLC, in invalidating

the waivers employees had signed, the court noted that Seagate did not properly disclose the job titles and ages of all employees terminated in the RIF. The plaintiffs were able to identify two employees that were terminated from Seagate's Normandale facility, who could not identify themselves on the chart provided. Plaintiffs went on to "note that it remains unclear how many employees were terminated from the Normandale facility pursuant to the 2004 RIF. Initially, it was reported that 154 employees were terminated. In response to an EEOC inquiry, however, the number changed to 152" (Peterson v. Seagate US LLC, 2008). The Supreme Court has interpreted OWBPA as providing for a "strict, unqualified statutory stricture on waivers" and found that it incorporates no exceptions or qualifications (Peterson v. Seagate US LLC, 2008 citing Oubre v. Entergy Operations, Inc., 1998). "Thus, to comply with OWBPA, a waiver must comply with each prerequisite" (Peterson v. Seagate US LLC, 2008).

The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events. Qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan. COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage (called continuation coverage) in certain instances where coverage under the plan would otherwise end (U.S. Department of Labor, 2008-A).

One final bit of traditional advice for reducing a firm's exposure to litigation during a reduction in force involves the offering of terminated employees some assistance to reduce the negative effects of the RIF. Typical assistance suggested includes employment counseling, relocation assistance, resume preparation, and outplacement assistance (Collyer, 2008). There is support for these types of programs in the literature, and "some studies indicate that employees who receive these services are less likely to initiate litigation against their former employers"(Collyer, 2008).

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