AN 'UNSETTLED' AREA OF THE LAW: A CHANGING LANDSCAPE FOR SEPARATION AGREEMENTS, WAIVERS, AND RELEASES

Fredric C. Leffler and Jason Schatz

After an extended period of relative calm, the landscape regarding the enforceability of separation agreements has recently experienced a number of tremors. Federal agencies, particularly the Equal Employment Opportunity Commission ("EEOC" or "Commission"), have recently changed their approach, aggressively scrutinizing settlement agreements and bringing a host of suits against "blue chip" companies, including Lockheed Martin Corp., Sara Lee Corp., and Eastman Kodak, to name but a few. At the same time, courts across the county have questioned the enforceability of agreements that are not in strict compliance with the Age Discrimination in Employment Act ("ADEA"),[1] as amended by the Older Workers' Benefit Protection Act ("OWBPA"),[2] and have expressed a renewed interest in whether and, if so, to what degree an employee may waive rights and claims under protective labor standards laws, such as the Family and Medical Leave Act ("FMLA").[3] Because no employer wants to provide valuable consideration to a departing employee in exchange for a release of claims or a covenant not to sue that proves to be invalid or unenforceable, it is imperative that those responsible for preparing such agreements be vigilant in staying current with the state of the law.

Since companies as diverse as IBM, McDonald's, Weyerhaeuser, and Guidant Corp. have had their settlement agreements challenged over the last two years, human resources professionals and their counsel who fail to integrate the lessons learned do so at their peril. This article will highlight those provisions that have come under scrutiny, summarize key decisions with respect to enforcement of release provisions, and describe the practical effect of these developments.

FRED LEFFLER is Senior Counsel at Proskauer Rose LLP, and JASON SCHATZ is an Associate at the firm. They represent and counsel management clients exclusively in a broad range of industries and in all aspects of labor and employment law, including the representation of employers in complex and standard litigation and in administrative proceedings at the federal, state and local levels. Each has extensive experience counseling employers in connection with separation and severance agreements. *The authors thank Elise Bloom, Lawrence Lorber, Marc Mandelman, Katherine Parker and Greg Rasin for their respective insights. Nevertheless, the views expressed in this article are entirely those of Messrs. Leffler and Schatz and should not be attributed to Proskauer Rose LLP.*

THE EEOC'S RENEWED OPPOSITION TO WAIVERS OF RIGHTS

A common element of many separation agreements is the requirement that, in consideration for accepting the benefits set forth in the agreement, an employee *not* pursue a claim with the EEOC with the goal of obtaining a monetary recovery and/or that the employee withdraw any pending employment discrimination charges filed with a Fair Employment Practices agency ("FEP"). While such provisions have been common, they conflict with the EEOC's long-standing position that public policy precludes any attempt by an employer to inter-

fere with an employee's ability to file a charge or participate in the investigation of a charge. As the filing of a charge, or participation in the investigation thereof, is distinguishable from an employee's right to receive a monetary recovery by pursuing a claim with the EEOC, separation agreement provisions barring a monetary recovery must be carefully drafted so as not to impinge on the ability to file a charge or participate in an EEOC investigation.[4]

The EEOC's underlying authority for its position stems from the powers Congress conferred upon it to enforce the anti-discrimination laws in the public interest. Thus, in 1996, the U.S. Court of Appeals for the First Circuit held that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest."[5] Consistent with this holding, the EEOC has long believed that separation agreement provisions that restrict employee communications with the EEOC violate the anti-retaliation provisions found in various federal anti-discrimination statutes.[6] Taking this belief one step further, the EEOC also asserts that the mere distribution of an agreement with such a condition is facially retaliatory due to the chilling effect created by the clause.[7]

In the aftermath of the Supreme Court's recent articulation of a more liberal retaliation standard in *Burlington Northern & Santa Fe Railway v. White*,[8] the EEOC has aggressively pursued retaliation claims against employers who condition severance on an employee's promise not to file a charge of discrimination. In the EEOC's view, conditioning the payment of severance in a separation agreement on an employee's promise to withdraw a charge, or not file a charge, or to refrain from participating in an EEOC investigation "chills" employee rights and interferes with the EEOC's ability to eradicate unlawful discrimination in the public interest as it was vested by Congress to do. The suits, which have generally been filed against large, sophisticated, high-profile employers, have challenged what were once thought to be commonplace settlement provisions as facially invalid because they clearly required an employee to relinquish his/her right to file an administrative agency charge in exchange for severance. As a result of EEOC's litigation efforts, many of these employers agreed to eliminate the offending provisions from the agreements (thus permitting employees to file charges with the EEOC and/or cooperate with an EEOC investigation) and restore severance benefits to employees who declined to sign releases.[9] In the two published court opinions addressing the EEOC's pursuit of these claims, discussed below, the agency's rationale has met with success, although the decisions rendered were mixed. In light of EEOC's newly aggressive enforcement approach, it can be expected that the Commission will continue to look for opportunities to establish and broaden its position. A review of these cases offers insights that will benefit prudent employers.

On August 8, 2006, the U.S. District Court for the District of Maryland ruled in favor of the EEOC in a case brought against the Lockheed Martin Corporation ("Lockheed"), holding that Lockheed unlawfully retaliated against a laid off employee by refusing to pay her severance when she refused to sign the company's standard release agreement.[10] The letter notifying the employee that her position would be eliminated provided that severance benefits would only be offered "in exchange for" signing an accompanying "Release of Claims," which waived all known and unknown claims against Lockheed, including those sought in a charge with any government agency.[11] The employee refused to sign the agreement, filed a charge with the EEOC alleging discrimination, and then sent a letter asserting a right to receive benefits even if she did not sign the release.[12] Lockheed responded by informing her it would not change the terms of the release, that the receipt of severance benefits was conditioned on her signing the release and dismissing her EEOC charge, and that if she did not sign the release she would be terminated in 10 days and forfeit the opportunity to receive the benefits.[13]

The court found that Lockheed's actions constituted unlawful retaliation under several different anti-discrimination statutes, on two separate grounds.[14] *First*, Lockheed's denial of severance benefits because of the employee's refusal to withdraw/dismiss her EEOC charge was sufficient to establish a prima facie case of retaliation.[15] *Second*, the court also found the release provision facially retaliatory, meaning that the mere presentation of the agreement conditioning severance on the employee's promise not to file a charge or to withdraw a charge was sufficient to support

a claim of retaliation. The court rejected Lockheed's position that the release merely waived the right to collect monetary damages and, accordingly, was not facially retaliatory. Accordingly, the court granted EEOC's motion for summary judgment finding the definition of "claims" impermissibly expansive and because the release barred the pursuit of "charges" on behalf of the employee or others. This was found to effectively prohibit the employee from filing a charge with the EEOC.[16]

However, in *EEOC v. Sundance Rehabilitation Corporation*, decided a few months after *Lockheed*, the U.S. Court of Appeals for the Sixth Circuit reversed a lower court ruling that a release provision conditioning severance benefits on an employee's promise not to file an administrative charge with the EEOC was facially invalid and retaliatory.[17] The Sixth Circuit conducted a more nuanced analysis than the *Lockheed* court and determined that, although the agreement may *not* have been enforceable, it was *not* facially retaliatory.[18] Without ruling on the enforceability of the agreement in question—because SunDance had not sued for the return of any severance payments upon an employee's filing of an EEOC charge—the court strongly suggested that a charge-filing ban in a separation agreement would be unenforceable had the employer attempted to bring a suit or counterclaim against an employee on the basis of such a provision.[19] That is so, the court opined, because of the importance of employee charge-filing to the EEOC's investigatory and enforcement mechanisms.[20] Nevertheless, the Court did not find that the separation agreement at issue was retaliatory or discriminatory on its face because Sundance employees were free to reject the offer, were *not* deprived of anything arising from the offering of the agreement, and those who rejected the agreement did not give up any of their rights.[21] Ultimately, the *Sundance* decision can be read as a vindication of EEOC's position that a release conditioning the payment of severance benefits on an employee's promise not to file EEOC charges would be unenforceable.[22]

THE NEED TO PRESENT INFORMATION TO EMPLOYEES IN A 'MANNER CALCULATED TO BE UNDERSTOOD' BY AN AVERAGE EMPLOYEE WHEN OBTAINING A RELEASE OF ADEA CLAIMS

The release of claims under the Age Discrimination in Employment Act ("ADEA") is another particularly sensitive area that requires compliance with the explicit requirements set forth in the OWBPA.[23] The OWBPA provides that "an individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary," and specifies eight specific conditions that must be satisfied for a waiver to be considered knowing and voluntary.[24] If these eight conditions are met, then courts will typically consider other relevant circumstances to determine if the waiver was truly "knowing and voluntary."[25] Two of these conditions, which require that information be clearly presented to employees, have been the subject of much litigation of late. The first condition, expressed in 29 U.S.C.A. § 626(f)(1)(A), mandates that the waiver be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate."[26] The other condition is found in 29 U.S.C.A. § 626(f)(1)(H), and requires that employers disclose, in writing, information about the program and the individuals who have, and have not been, deemed eligible or selected. Despite these strict requirements, it is generally recognized that the OWBPA does not create an independent cause of action that would enable employees to assert a claim for damages based merely on procedural violations of a release.[27] Nevertheless, the consequences for violating the OWBPA can be dire when employees challenge their separations as impermissibly based on age while thwarting employer attempts to enforce the severance agreements and bar the litigation due to technical violations of the OWBPA's procedural requirements.

To Be Enforceable, Waivers Must Be Drafted in a "Manner Calculated to be Understood"

The requirement that a waiver of potential age claims be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate"[28] has presented problems for employers who have attempted to draft waivers compliant with other discrimination laws while still satisfying the requirements of the ADEA and OWBPA. Following the Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*,[29] and the EEOC's promulgation of the "tender back" regulations,[30] employers have come to understand that employees must be permitted

to challenge the enforceability of an ADEA release without having to tender back the severance provided in exchange for the release. Accordingly, a covenant not to sue, in which an employee agrees to not bring suit to enforce potentially valid claims, cannot apply to ADEA claims. The use of a release, however, whereby an employee gives up an existing right or claim, is enforceable. Consequently, many employers have included a broad covenant not to sue provision in their separation or settlement agreements in conjunction with a general release of claims, but carved out ADEA claims from the covenant in an effort to ensure the enforceability of the release provision.

The interplay of these requirements has presented a significant challenge for employers who need to draft fairly complex agreements in a manner that can be readily understood by the average person. The drafting quagmire this presents employers is highlighted in two decisions rendered by the Eighth and Ninth Federal Circuit Courts of Appeals, which invalidated agreements IBM entered into on the grounds that "they were not written in a manner calculated to be understood by the intended participants," because the combined effect of the general release, covenant not to sue, and the "carve out" of ADEA claims was inherently confusing to the affected employees.[31] The agreements at issue contained both a "release" of rights for all claims and a "covenant not to sue" that excluded age claims. In *Thomforde v. IBM Corp.,* the agreement provided, in part, that the employee released IBM from all claims of whatever nature, including age claims, and that the employee agreed never to sue IBM over such released claims. Later, the agreement referenced a "covenant not to sue" provision, but stated its prohibition did not reach actions based solely under the ADEA. Because references to the "release" and "covenant not to sue" were used interchangeably throughout the agreement, the distinction between the two terms was considered beyond the grasp of an average employee.[32] It was suggested that the agreement was flawed because the term "covenant not to sue" was unfamiliar to lay people and the agreement did not adequately explain how the release and the covenant were related or how they related to ADEA claims.[33] As the Eighth Circuit stated in *Thomforde*, "[o]nce IBM chose to use the legal terms of art in the Agreement, IBM had a duty to carefully explain the provisions."[34]

In addition to considering the text of the agreements, the courts also evaluated other factors in determining whether the releases lacked clarity. In *Thomforde*, the court noted that when the Plaintiff asked for clarification of the agreement's terms, IBM's in-house counsel refrained from offering an explanation, recommending instead that the employee consult with his own attorney.[35] Although IBM had instructed affected employees within the text of the agreement, in accordance with the OWBPA's requirements, to consult an attorney, the court considered the company's unwillingness to clarify the terms of its own agreement as a factor in its decision.[36] Similarly, in *Syverson v. IBM Corp.*, the Ninth Circuit rejected IBM's argument that the direction to "consult an attorney or an IBM employee mitigates confusing waiver language."[37] In light of these two decisions, reliance on an agreement's direction that the employee seek legal advice, as required by 29 U.S.C.A. § 626(f)(1)(E), cannot be used as a defense to the distinct requirement set forth in 29 U.S.C.A. § 626(f)(1)(A): that the agreement be "written in a manner calculated to be understood" by the participant (as opposed to his attorney).[38] Thus, to satisfy the initial inquiry of whether the agreement meets OWBPA's statutory requirements, the party asserting the validity of the waiver has the burden of establishing that the agreement is written in a manner calculated to be understood, and external factors, such as the employee's state of mind are irrelevant.[39]

Identification of the Decisional Unit in a Group Termination

The other most frequent ground for deeming an ADEA release unenforceable is the failure of employers engaged in a mass layoff to provide requisite information about the termination program, and the individuals affected, in the manner prescribed by 29 U.S.C.A. § 626(f)(1)(H). The OWBPA explicitly provides that a waiver "requested in connection with an exit incentive or other employment termination program offered to a group or class of employees" will not be considered "knowing and voluntary" unless, at a minimum, it:

> 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.[40]

The group disclosure requirements apply to employees in "exit incentive programs," in which an employee is offered consideration to voluntarily resign and sign a waiver, and "other employment termination programs," which refers to groups of employees (two or more) who have been involuntarily terminated but "offered additional consideration in return for their decision to sign a waiver."[41] These requirements exist so that older employees have sufficient information regarding a group termination program in order to evaluate any potential ADEA claims and make informed decisions before they agree to release age claims."[42] Until recently, there was little case law interpreting the scope of disclosures required by OWBPA and no decisions that directly addressed the meaning of 29 U.S.C.A. § 626(f)(1)(H)(ii) or the implementing EEOC regulations. In light of recent developments, employers are well advised to comport with all of OWBPA's technical disclosure requirements.

As noted below, employers are frequently subjected to litigation because of their failure to comply with, or properly construe a technical disclosure requirement. In *Ruehl v. Viacom, Inc.*, a September, 2007 decision, the U.S. Court of Appeals for the Third Circuit held that a release violated the OWBPA because Viacom did not attach the required disclosure information to the separation agreement or otherwise inform an employee, whose department had been eliminated, of the relevant information or how he could review it.[43] Although Viacom's separation agreement explicitly referred to the disclosure requirements in the text of the release, the Company argued that the information was voluminous and that it would have provided it to the plaintiff upon request.[44] The court rejected this argument, stressing the need for strict construction of the disclosure requirements and emphasizing that the burden is on employers to inform individuals of the demographic information.[45] The court, however, limited its holding by not explicitly requiring employers to "include boxes of paper with each and every waiver."[46] Instead, the court observed, an employer should either attach the required information to the release or inform the affected employee, in writing, where s/he can obtain it.[47] Similarly, in *Faraji v. FirstEnergy Corp.*, FirstEnergy failed to provide an employee with eligibility factors used to determine individuals selected for a reduction-in-force and, as a result, the court rendered the plaintiff's release ineffective as a matter of law.[48]

Equally instructive are cases where employers made efforts to comply with OWBPA's procedural requirements, but their efforts were challenged as deficient. In one such case, *Burlison v. McDonald's Corp.*, the scope of a decisional unit, defined as the "portion of the employer's organizational structure from which the employer chose the persons" who would be offered consideration for signing a waiver, was clarified.[49] Here, it was alleged that the restaurant chain failed to comply with informational requirements when it conducted a national layoff because it provided employees selected for layoff with disclosure information limited to employees in their geographic region rather than nationwide demographic information.[50] A lower court invalidated the release agreements reasoning the disclosure information was insufficient because it was limited regionally, whereas the reduction-in-force was nationwide. On appeal, the Eleventh Circuit Court of Appeals overturned the lower court's decision, holding that McDonald's acted properly by limiting the disclosure information to individuals in the regional unit considered by the decisionmakers for layoff, reasoning, that statistics regarding the national restructuring were neither relevant or required.[51] Since the selection decisions were made on an individualized assessment done regionally by regional managers, those were the relevant statistics, notwithstanding that the downsizing was national in scope.

Other cases have rendered releases invalid because of an unwitting failure to comply with the OWBPA's strict requirements. In *Kruchoswski v. Weyerhaeuser Corp.*, the U.S. Court of Appeals for the Tenth Circuit invalidated a release agreement because the employer identified the wrong decisional unit.[52] The company's response to interrogatories identified a group of employees in the decisional unit that was ten percent fewer than what had been disclosed at the time the release was provided.[53] Thus,

while the employer notified all those impacted that the decisional unit was *all* salaried employees at the facility, in truth, the actual decisional unit was smaller and confined to salaried employees reporting to the facility manager. This inaccuracy invalidated the releases because the employer was unable to show that the plaintiffs' releases were truly knowing and voluntary as the actual decisional unit was different than that appearing in the release agreement.[54]

In *Pagliolo v. Guidant Corp.*, an employer's release agreements were invalidated on several grounds.[55] The Court held that the disclosure information put an unreasonable burden on employees by disclosing affected employees' dates of birth, but not their ages in years as the statute explicitly provides, and by disclosing employee's job titles, but not their grade level, which would have provided the employees with more information.[56] Equally alarming to the Court, Guidant listed nearly all its U.S.-based employees in the disclosure materials, combining employees of six subsidiary corporations into one list, whereas, the Court ruled, each of the six separate employers should have been a separate decisional unit, reasoning that "[n]othing in the statute suggests that multiple corporations can be combined to constitute one decisional unit."[57]

As these cases illustrate, there are many ways an employer might fail to comply with the disclosure requirements of the OWBPA. To avoid these problems, it is imperative that employers pay close attention to the applicable laws and regulations when engaged in a group termination program and take extraordinary care to ensure that there are no potential grounds for challenging the agreements for failure to provide the needed disclosures.

THE RELEASE OF RIGHTS AND CLAIMS UNDER THE FAMILY AND MEDICAL LEAVE ACT

Another recent hotbed of activity has involved the enforceability of a release provision in a separation or severance agreement that purports to waive rights or claims under the FMLA. Until recently, the release of FMLA claims has received scant attention. Even now, most federal appellate courts have not addressed this issue and, therefore, the enforceability of an FMLA waiver usually depends on where an employer is located. Notably, the text of the FMLA is silent concerning the waiver or settlement of claims, and the applicable U.S. Department of Labor ("DOL") regulation simply states "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA."[58] Courts interpreting this regulation have reached different conclusions as to whether the term "rights" includes legal claims, whether the regulation distinguishes between prospective and retrospective waivers of an employee's FMLA rights (claims), and whether FMLA waivers contained in release provisions are enforceable *without* court or DOL approval.

A Primer on FMLA Rights and Waivers

In determining whether employees can waive their FMLA rights, courts have distinguished between three different types of rights. *Substantive rights*, such as the right to take leave (including intermittent leave or leave on a reduced work schedule) and the right to reinstatement following such leave, are the basic rights the FMLA provides to covered employees.[59] The waiver of these rights is especially limited. *Proscriptive rights* include the right *not* to be interfered with, or discriminated or retaliated against for exercising one's substantive FMLA rights.[60] Although waiver of these rights is, generally, prohibited, at least one court has found such a waiver permissible.[61] The third category of rights are *remedial rights*, such as the right to the recovery of damages or an employee's right to obtain equitable relief for the violation of substantive and/or proscriptive rights.[62] There is a dispute as to whether these are technically "rights" under the FMLA, and, recently, the DOL has opined that these should be considered "claims" not subject to 29 C.F.R. § 825.220(d)'s prohibition on the waiver of "rights."[63]

Leaving aside the question whether a specific category of FMLA rights is enforceable in a release *without* court or DOL approval, courts have issued conflicting opinions as to whether the waiver of rights should be limited to the release of past (retrospective) or future (prospective) claims.[64] Generally, retrospective waivers are viewed more favorably than prospective waivers, in which employees agree to forego future protections under the FMLA, including the right to assert legal clams for violations that occur *after* the release is signed. No court that has addressed these issues has permitted employers to obtain a prospective waiver of an employee's *substantive* FMLA rights.

The Department of Labor's Shifting Position

As employers have struggled to understand whether unsupervised waivers of FMLA claims are enforceable, the DOL's position has evolved and is likely a key source giving rise to the confusion. When the regulations were first promulgated, the DOL advocated that the FMLA, like the Fair Labor Standards Act ("FLSA"),[65] prohibited the unsupervised waiver of rights and claims both retrospectively and prospectively.[66] Subsequently, as expressed in *Taylor II*, the DOL adopted the holding of *Faris v. Williams WPC-I, Inc.*, that the regulations allow an employee to waive prospectively his/her proscriptive and remedial rights, but bar the waiver of prospective substantive rights.[67] However, this was not the DOL's final posture. In *Dougherty v. Teva Pharmaceuticals USA, Inc.*, decided in April 2007, the DOL argued that the regulation only barred the prospective waiver of rights, and did not oppose the waiver of "claims," otherwise referred to as remedial rights.[68]

Analysis by the Courts of FMLA Releases

In *Taylor II*, the U.S. Court of Appeals for the Fourth Circuit, in a carefully reasoned opinion, reaffirmed its view that the public policy reasons enunciated at the time DOL adopted 29 C.F.R. § 825.220(d) remained sound and, as is the case with other labor standards statutes, held that employees cannot waive *any* of their rights or claims under the FMLA *without* the approval of the U.S. Department of Labor or a court.[69] The court reconsidered its earlier holding that unsupervised FMLA waivers were unenforceable and reaffirmed its decision that "without prior DOL or court approval, 29 C.F.R. § 825.220(d) bars the prospective and retrospective waiver or release of rights under the FMLA, including the right to bring an action or claim for a violation of the Act."[70] As the court explained, "[B]ecause the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute."[71] Thus, "[t]he settlement or waiver of claims is not permitted when 'it would thwart the legislative policy which [the employment law] was designed to effectuate.'"[72] As such, the Fourth Circuit's decision arises from a broad interpretation of "rights" under the FMLA, the considered view that statutes setting labor standards are distinctly different from anti-discrimination statutes, and is based on an analysis of the DOL's original interpretation of the regulation.

Although the Fourth Circuit requires court or DOL approval for the waiver of any rights or claims under the FMLA, other courts have not been so restrictive. In *Faris*, the U.S. Court of Appeals for the Fifth Circuit placed the fewest restrictions on employers, ruling that the phrase "rights under the FMLA" only prohibited the prospective (future) waiver of substantive rights (e.g., the right to take FMLA leave and to be reinstated from leave).[73] Therefore, in the Fifth Circuit, without court or DOL approval, an employee can lawfully waive his/her retrospective FMLA claims as well as prospectively waive his/her proscriptive rights (e.g., the right to be free from employer retaliation for asserting FMLA rights) and remedial rights (e.g., the right to sue and the right to recover money damages). In addition, the U.S. Courts of Appeals for the Sixth and Ninth Circuits had each previously enforced FMLA release provisions after applying general contract principles, but did so without analyzing 29 C.F.R. § 825.220(d).[74] However, a district court in the Sixth Circuit recently cited *Taylor II* and asked for additional briefing to determine whether a settlement agreement purporting to waive FMLA claims was enforceable.[75]

In *Dougherty*, decided just three months before *Taylor II*, the District Court for the Eastern District of Pennsylvania held that the waiver of legal claims for *future* violations of the FMLA required court or DOL approval, but that such approval was not required for employers to obtain employee waivers of rights or claims that had already accrued.[76] This decision reflects the DOL's current interpretation of 29 C.F.R. § 825.220(d); however, this decision does not have substantial precedential value in its own right because it is merely the analysis of one district court judge.

As the holding in *Taylor II* is contrary to the opinions expressed by federal courts in the Third and Fifth Circuits, which have permitted the waiver of rights *and* claims in certain circumstances, and is at odds with DOL's current interpretation of its own regulation, the state of the law regarding FMLA waivers is uncertain. As a result, in all states other than those within the Fourth Circuit (e.g., Maryland, North Carolina, South Carolina, Virginia, and West Virginia), the inclusion of

a retrospective waiver/release of FMLA rights/claims in a separation agreement without DOL or court approval, remains viable today, although not without risks.

CONCLUSION

For many employers, the lack of clarity and stability regarding the enforceability of separation agreements is troublesome and requires that they stay current with court opinions and agency pronouncements addressing these issues. Given recent developments, employers must be careful to consider the potential risks that arise from a settlement agreement and shape the agreement accordingly. Although there have always been claims, such as those under the Fair Labor Standards Act, that may not be waived in an agreement (without court or agency approval), employers must be aware of the new issues that courts and EEOC have addressed over the last two years and revise their separation and release agreements accordingly. Simply put, if your separation or severance agreement attempts to prevent an employee from filing a charge with the EEOC, restricts the ability to exercise rights provided by the FMLA, or, in the case of separation agreements offered to employees covered by the ADEA, is not sufficiently clear or otherwise in compliance with the OWBPA requirements, then an employer should be prepared to deal with the consequences that may arise from those provisions and make a considered judgment of risks, recognizing that the agreement may not be worth more than the paper it is printed on.

Practically speaking, separation and severance agreements that have the best chance of enforceability, if challenged, contain the following elements:

- they are written in plain language with a minimum of legalese so that they can be understood by the average employee;
- the agreement does not include a covenant not to sue;
- the agreement does not contain a "tender-back" provision;
- the agreement does not include a release of claims waiving rights under the FLSA and/or FMLA;
- the agreement makes an effort to define legal terminology so that the average employee has a clear understanding of what s/he is being asked to sign;
- the agreement clearly identifies which claims are released and which claims are not waived;
- the agreement states that an employee is not precluded from filing a charge with the EEOC or an FEP agency or cooperating in an administrative agency investigation;
- the agreement identifies the minimum statutory review periods, revocation periods, and effective date;
- the agreement is supported by adequate consideration, entered into voluntarily and knowingly, and the employee must be free from the influence of duress, fraudulent inducement, and/or misrepresentation by the employer; and
- agreements in group termination programs must conform to the technical requirements of the OWPBA, particularly with respect to disclosure information so that an employee can reasonably evaluate whether age was an impermissible factor in the separation decisions.

As is probably evident from the analysis herein, we believe that the trend in the case law compels the conclusion that satisfaction of the minimum criteria for an enforceable release under the ADEA is probably the most prudent, risk-averse approach to ensure the enforceability of separation or settlement agreements with respect to *any* claim under the federal anti-discrimination statutes. Note, as well, state law requirements, such as those in California, must be referenced in certain jurisdictions to have a bulletproof settlement agreement. Finally, employers seeking to insulate themselves from FMLA claims should probably include a provision wherein the employee affirmatively acknowledges that she or he has been afforded all leaves (paid and unpaid) to which she or he he was eligible and entitled and has not been subjected to retaliation for having exercised his/her rights in that regard. ■

NOTES

1. 29 U.S.C.A. § 621 *et seq.*
2. Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C.A. §§ 621, 623, 626 & 630).
3. 29 U.S.C.A. § 2601 *et seq.*
4. *See, e.g.*, E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1089, 8 Employee Benefits Cas. (BNA) 2185, 44 Fair Empl. Prac. Cas. (BNA) 569, 43 Empl. Prac. Dec. (CCH) P 37261 (5th Cir. 1987) (distinguishing between claims filed for one's own benefit and the filing of a charge with the EEOC "to inform the EEOC of possible discrimination.").

5. E.E.O.C. v. Astra U.S.A., Inc., 94 F.3d 738, 744, 71 Fair Empl. Prac. Cas. (BNA) 1267, 68 Empl. Prac. Dec. (CCH) P 44220 (1st Cir. 1996).
6. See EEOC Notice No. 915.002, Enforcement Guidance on Non-Waivable Employee Rights Under the Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 1997).
7. See EEOC Notice No. 915.002, Enforcement Guidance on Non-Waivable Employee Rights Under the Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 1997).
8. Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 165 L. Ed. 2d 345, 98 Fair Empl. Prac. Cas. (BNA) 385, 87 Empl. Prac. Dec. (CCH) P 42394 (U.S. 2006).
9. *See EEOC v. Eastman Kodak*, No. 06-cv-06489 (W.D.N.Y. Sept. 29, 2006) (providing that employees who sign a separation agreement cannot assist the EEOC in bringing lawsuits and if they did, they would tender back all severance payments and pay all of Kodak's legal fees and costs), *EEOC v. Ventura Foods, LLC*, No. 05-cv-663 (D. Minn. filed Mar. 31, 2005) (severance agreement and release required employees to promise to never file a discrimination charge and to request that the body assuming jurisdiction of the charge dismiss it with prejudice); *EEOC v. Land O'Lakes, Inc.*, No. 06-cv-03828 (D. Minn. filed Sept. 25, 2006) (separation agreement required employees to represent that they had not filed a charge with an administrative agency and had no intent to do so). *See also EEOC v. Sara Lee Corp.*, No. 1:06-cv-645 (S.D. Ohio filed Sept. 29, 2006) (voluntarily dismissed with prejudice on unspecified grounds).
10. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
11. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 416, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
12. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 416, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
13. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 416, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
14. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 417-418, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
15. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 420, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
16. U.S. E.E.O.C. v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 418-419, 420-421, 88 Empl. Prac. Dec. (CCH) P 42626 (D. Md. 2006).
17. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006).
18. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 494-494, 501, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006).
19. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 499, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006).
20. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 499, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006).
21. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 501, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006).
22. E.E.O.C. v. SunDance Rehabilitation Corp., 466 F.3d 490, 499, 18 A.D. Cas. (BNA) 1189, 99 Fair Empl. Prac. Cas. (BNA) 1, 88 Empl. Prac. Dec. (CCH) P 42568, 2006 FED App. 0390P (6th Cir. 2006). *See also* Kellogg Co. v. Sabhlok, 471 F.3d 629, 636 n.4, 99 Fair Empl. Prac. Cas. (BNA) 741, 88 Empl. Prac. Dec. (CCH) P 42647, 153 Lab. Cas. (CCH) P 60338, 2006 FED App. 0466P (6th Cir. 2006) (*citing Sundance* for this proposition).
23. 29 U.S.C.A. § 626(f).
24. 29 U.S.C.A. §§ 626(f)(1)(A)-(H). The eight conditions are as follows:
    (1) the release must be written in a manner calculated to be understood by the employee signing the release, or by the average individual eligible to participate;
    (2) the release must specifically refer to claims arising under the ADEA;
    (3) the release must not purport to encompass claims that may arise after the date of execution;
    (4) the employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled;
    (5) the employee must be advised in writing to consult with an attorney prior to executing the agreement;
    (6) the employee must be given at least 21 days to consider signing the release, or, if the incentive is offered to a group, the employee must be given at least 45 days;
    (7) the release must allow the employee to revoke the agreement for a minimum of seven days after signing; and
    (8) if the release is offered in connection with an exit incentive or group termination program, the employer must provide the eligibility factors and time limits that apply to the program, information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program.

    See also 29 C.F.R. § 1625.22.
25. *See* Syverson v. International Business Machines Corp., 472 F.3d 1072, 1077 n.7 (9th Cir. 2007) (considering other facts and circumstances after the statutory factors are met); Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 87 Empl. Prac. Dec. (CCH) P 42352 (10th Cir. 2006) ("the statutory factors are not exclusive"); Wells v. Xpedx, No. 8:05-CV-2193 (M.D. Fla. Sept. 11, 2007) (utilizing the Eleventh Circuit's totality of the circumstances test).
26. 29 U.S.C.A. § 626(f)(1)(A).
27. *See* Syverson v. International Business Machines Corp., 101 Fair Empl. Prac. Cas. (BNA) 1273, 2007 WL 2904252 (N.D. Cal. 2007) at *2-5; Whitehead v. Oklahoma Gas & Elec. Co., 187 F.3d 1184, 80 Fair Empl. Prac. Cas. (BNA) 790 (10th Cir. 1999).
28. 29 U.S.C.A. § 626(f)(1)(A) .
29. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 118 S. Ct. 838, 139 L. Ed. 2d 849, 21 Employee Benefits Cas. (BNA) 2345, 75 Fair Empl. Prac. Cas. (BNA) 1255, 72 Empl. Prac. Dec. (CCH) P 45117, 180 A.L.R. Fed. 711 (1998).
30. 29 C.F.R. § 1625.23(b).
31. *See* Syverson v. International Business Machines Corp., 472 F.3d 1072, 1077 n.7 (9th Cir. 2007); Thomforde v. International Business Machines Corp., 406 F.3d 500, 95 Fair Empl. Prac. Cas. (BNA) 1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005).
32. *See* Thomforde v. International Business Machines Corp., 406 F.3d 500, 504, 95 Fair Empl. Prac. Cas. (BNA) 1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005).
33. Syverson v. International Business Machines Corp., 472 F.3d 1072, 1085 (9th Cir. 2007).
34. Thomforde v. International Business Machines Corp., 406 F.3d 500, 504, 95 Fair Empl. Prac. Cas. (BNA) 1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005).
35. Thomforde v. International Business Machines Corp., 406 F.3d 500, 502, 95 Fair Empl. Prac. Cas. (BNA) 1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005).
36. Thomforde v. International Business Machines Corp., 406 F.3d 500, 504 n. 1, 95 Fair Empl. Prac. Cas. (BNA) 1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005); *see also* 29 U.S.C.A. § 626(f)(1)(D).
37. Syverson v. International Business Machines Corp., 472 F.3d 1072, 1086 (9th Cir. 2007).
38. Syverson v. International Business Machines Corp., 472 F.3d 1072, 1086 (9th Cir. 2007) quoting Thomforde v. International Business Machines Corp., 406 F.3d 500, 504 n. 1, 95 Fair Empl. Prac. Cas. (BNA)

1145, 86 Empl. Prac. Dec. (CCH) P 41928 (8th Cir. 2005.

39. *See* Parsons v. Pioneer Seed Hi-Bred Intern., Inc., 447 F.3d 1102, 1104, 98 Fair Empl. Prac. Cas. (BNA) 203, 87 Empl. Prac. Dec. (CCH) P 42372 (8th Cir. 2006) (applying *Thomforde*, the court rejected an attempt to invalidate an agreement, where the inter-relationship between the "release" and "covenant not to sue" provisions of the agreement were neither ambiguous or contradictory).
40. 29 U.S.C.A. § 626(f)(1)(H).
41. 29 C.F.R. § 1625.22(f)(1)(iii)(A).
42. Burlison v. McDonald's Corp., 455 F.3d 1242, 98 Fair Empl. Prac. Cas. (BNA) 778, 88 Empl. Prac. Dec. (CCH) P 42435 (11th Cir. 2006)
43. Ruehl v. Viacom, Inc., 101 Fair Empl. Prac. Cas. (BNA) 907, 90 Empl. Prac. Dec. (CCH) P 42947, 2007 WL 2555244 (3d Cir. 2007).
44. Ruehl v. Viacom, Inc., 101 Fair Empl. Prac. Cas. (BNA) 907, 90 Empl. Prac. Dec. (CCH) P 42947, 2007 WL 2555244 at *3 (3d Cir. 2007).
45. Ruehl v. Viacom, Inc., 101 Fair Empl. Prac. Cas. (BNA) 907, 90 Empl. Prac. Dec. (CCH) P 42947, 2007 WL 2555244 at *3-4 (3d Cir. 2007).
46. Ruehl v. Viacom, Inc., 101 Fair Empl. Prac. Cas. (BNA) 907, 90 Empl. Prac. Dec. (CCH) P 42947, 2007 WL 2555244 at *4 (3d Cir. 2007).
47. Ruehl v. Viacom, Inc., 101 Fair Empl. Prac. Cas. (BNA) 907, 90 Empl. Prac. Dec. (CCH) P 42947, 2007 WL 2555244 at *4 (3d Cir. 2007).
48. Faraji v. FirstEnergy Corp., 2007 WL 756750 (N.D. Ohio 2007) (citing 29 U.S.C.A. § 626 (f)(1)(H)(i)).
49. Burlison v. McDonald's Corp., 455 F.3d 1242, 1245 n.1, 98 Fair Empl. Prac. Cas. (BNA) 778, 88 Empl. Prac. Dec. (CCH) P 42435 (11th Cir. 2006).
50. Burlison v. McDonald's Corp., 455 F.3d 1242, 1244, 98 Fair Empl. Prac. Cas. (BNA) 778, 88 Empl. Prac. Dec. (CCH) P 42435 (11th Cir. 2006).
51. Burlison v. McDonald's Corp., 455 F.3d 1242, 1247, 98 Fair Empl. Prac. Cas. (BNA) 778, 88 Empl. Prac. Dec. (CCH) P 42435 (11th Cir. 2006).
52. Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 87 Empl. Prac. Dec. (CCH) P 42352 (10th Cir. 2006).
53. Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 1094, 87 Empl. Prac. Dec. (CCH) P 42352 (10th Cir. 2006).
54. Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 1095, 87 Empl. Prac. Dec. (CCH) P 42352 (10th Cir. 2006).
55. Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 41 Employee Benefits Cas. (BNA) 1247 (D. Minn. 2007), certification granted, judgment modified, 2007 WL 1567617 (D. Minn. 2007).
56. Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 862-863, 41 Employee Benefits Cas. (BNA) 1247 (D. Minn. 2007), certification granted, judgment modified, 2007 WL 1567617 (D. Minn. 2007).
57. Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 859, 41 Employee Benefits Cas. (BNA) 1247 (D. Minn. 2007), certification granted, judgment modified, 2007 WL 1567617 (D. Minn. 2007).
58. 29 C.F.R. § 825.220(d).
59. *See* 29 U.S.C.A. §§ 2612(a)(1)(D), 2614(a)(1); Taylor v. Progress Energy, Inc., 493 F.3d 454, 457, 12 Wage &
Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
60. *See* 29 U.S.C.A. § 2615(a)(2), Taylor v. Progress Energy, Inc., 493 F.3d 454, 457, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
61. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 8 Wage & Hour Cas. 2d (BNA) 1288, 84 Empl. Prac. Dec. (CCH) P 41394, 148 Lab. Cas. (CCH) P 34716 (5th Cir. 2003).
62. *See* 29 U.S.C.A. §§ 2617(a)(2), (a)(4); Taylor v. Progress Energy, Inc., 493 F.3d 454, 457, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
63. Dougherty v. Teva Pharmaceuticals USA, Inc., 12 Wage & Hour Cas. 2d (BNA) 1252, 2007 WL 1165068 *1(E.D. Pa. 2007).
64. *Compare* Dougherty v. Teva Pharmaceuticals USA, Inc., 12 Wage & Hour Cas. 2d (BNA) 1252, 2007 WL 1165068 (E.D. Pa. 2007). and Taylor v. Progress Energy, Inc., 493 F.3d 454, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007) (limiting the waiver to prospective rights) *with* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 8 Wage & Hour Cas. 2d (BNA) 1288, 84 Empl. Prac. Dec. (CCH) P 41394, 148 Lab. Cas. (CCH) P 34716 (5th Cir. 2003) (permitting the waiver of both prospective and remedial rights).
65. 29 U.S.C.A. §§ 201-19.
66. *See* Taylor v. Progress Energy, Inc., 493 F.3d 454, 461, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
67. *See* Taylor v. Progress Energy, Inc., 493 F.3d 454, 458, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007) (*citing* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322, 8 Wage & Hour Cas. 2d (BNA) 1288, 84 Empl. Prac. Dec. (CCH) P 41394, 148 Lab. Cas. (CCH) P 34716 (5th Cir. 2003)).
68. Dougherty v. Teva Pharmaceuticals USA, Inc., 12 Wage & Hour Cas. 2d (BNA) 1252, 2007 WL 1165068 *6 (E.D. Pa. 2007).
69. Taylor v. Progress Energy, Inc., 493 F.3d 454, 463, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
70. Taylor v. Progress Energy, Inc., 493 F.3d 454, 463, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
71. Taylor v. Progress Energy, Inc., 493 F.3d 454, 460, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007)
72. Taylor v. Progress Energy, Inc., 493 F.3d 454, 460, 12 Wage & Hour Cas. 2d (BNA) 1220, 89 Empl. Prac. Dec. (CCH) P 42886, 154 Lab. Cas. (CCH) P 35308 (4th Cir. 2007).
73. Faris v. Williams WPC-I, Inc., 332 F.3d 316, 320, 8 Wage & Hour Cas. 2d (BNA) 1288, 84 Empl. Prac. Dec. (CCH) P 41394, 148 Lab. Cas. (CCH) P 34716 (5th Cir. 2003).
74. Halvorson v. Boy Scouts of America, 215 F.3d 1326 (6th Cir. 2000); Schoenwald v. Arco Alaska, Inc., 191 F.3d 461 (9th Cir. 1999).
75. Bieber v. The Manufacturing of America, Inc., 2007 WL 2688272 (S.D. Ohio 2007).
76. Dougherty v. Teva Pharmaceuticals USA, Inc., 12 Wage & Hour Cas. 2d (BNA) 1252, 2007 WL 1165068 *6 (E.D. Pa. 2007).