

THE ESSENTIALS OF ADEA WAIVERS IN SEVERANCE AGREEMENTS

Navigating the end of an employment relationship is often a delicate balancing act, particularly when it involves severance agreements. While these agreements provide a financial cushion for departing employees, they also serve as a legal shield for employers. Under the Age Discrimination in Employment Act (ADEA), specifically as amended by the Older Workers Benefit Protection Act (OWBPA), there are strict, non-negotiable requirements that must be met for employees who are 40 years of age or older to validly waive an age discrimination claim.

Timing is perhaps the most critical technical hurdle in these agreements. Federal law mandates a “reflection period” to prevent employees from feeling pressured into signing away their rights in the heat of a termination meeting. Generally, an employee must be given at least 21 days to consider the agreement before signing. Once agreement is signed, however, the employee has a mandatory 7-day revocation period during which they can change their mind and cancel the deal. For employers, this means the agreement is not truly “final” until that eighth day, and payments are typically withheld until the revocation period expires.

In addition, the cornerstone of a valid ADEA waiver is the concept of “knowing and voluntary” consent. An ADEA waiver must be written in plain, everyday language that the average person can actually understand. It cannot be buried in legalese or hidden in fine print. Most importantly, the waiver must specifically refer to rights or claims arising under the ADEA by name. If the agreement fails to explicitly mention the Act, the employer may find themselves paying out a severance package only to be met with an age discrimination lawsuit anyway. Further, a waiver must not include rights and claims that may arise after the date on which the waiver is executed, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer. Lastly, a waiver must be supported by consideration in addition to that to which the employee already is entitled.

When offering severance packages, employers should work with their employment counsel to ensure the severance package actually buys the peace of mind the employer is paying for, while respecting the robust protections the law affords to the seasoned members of the workforce.

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