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SEVERANCE PLANS

To comply with OWBPA, you must share termination data within 'decisional unit'

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the Age Discrimination in Employment Act (ADEA) to prohibit employers from discriminating against older workers by denying certain employee benefits to them. In some circumstances, an employee's rights under the OWBPA and the ADEA can be waived if specific criteria are met. Of utmost importance is the requirement that the waivers of potential age discrimination claims be "knowing and voluntary."

With regard to restructuring programs and early retirement plans, the OWBPA requires employers to provide information about the ages of both discharged and retained employees to those who are considering releasing their age claims. In the case of large national or international corporations, it may be difficult to determine the extent of that requirement. Does the employer need to provide information for the entire workforce? Or will providing information for a certain division or region suffice? The following case sheds some light on that murky legal requirement.

You deserve a break today

McDonald's Corporation underwent a significant corporate restructuring in the fall of 2001, hoping to become more efficient and competitive. It reduced its U.S. divisions from five to three and its U.S. regions from 38 to 21. The Atlanta, Nashville, and Greenville regions were merged into one region, the new Atlanta region. The company also reduced its workforce by about 500 employees nationwide. Of the 208 employees in the new Atlanta region, 66 were selected for termination.

Carolyn Burlison and four other employees were among those whom McDonald's fired in the restructuring. Each had worked for the company for about 15 years (or more). Each was over the age of 40 before the company let them go. They were offered termination packages in exchange for their signed releases waiving any claims that they might have against the company.

Burlison and her coworkers signed the releases but sued McDonald's two years later for age discrimination. The trial court ruled in the former employees' favor, reasoning that the releases were void because they didn't meet the OWBPA's informational requirements. The company appealed, arguing that the trial court misinterpreted the Act's requirements. According to the company, the trial court's decision would require employers to

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provide "uncalled for and unhelpful information to departing employees."

So get up and go away

The federal appeals court over Florida agreed with McDonald's argument, *reversing* the trial court. The appeals court analyzed the specific legal requirements, noting their ambiguity, and applied rules that courts usually apply to determine the intent of OWBPA's informational requirements. To do so, the court looked at the Equal Employment Opportunity Commission's regulations and decided that the law's informational requirements were limited to the "decisional unit" that applies to the terminated employees.

Since the informational requirements are supposed to provide employees with data to assist them in evaluating possible age discrimination claims, extending the data beyond their decisional unit would make the data more confusing and discrimination more difficult to detect. In Burlison's case, the decision about which employees to discharge was made by senior managers in the local Atlanta region itself and not at some top level of the corporate headquarters. Nationwide statistics simply wouldn't be relevant in the case, according to the court.

So what *is* the appropriate "decisional unit" in Burlison's case? The court determined that the appropriate unit consisted of those employees who were considered for jobs in the same process as the terminated employees. Burlison and her coworkers — along with the other 203 employees in the former Atlanta, Nashville, and Greenville regions — were considered for jobs in the new Atlanta region, which therefore was the "decisional unit." The company had provided the required data for that unit before Burlison and the others signed the releases.

It's important to note that the unit may vary in different corporations.

As a result, the court determined that the releases were valid and that Burlison and her coworkers were barred from filing an age discrimination lawsuit. *Burlison, Eady, Floyd, Gunter, and Reinsch v. McDonald's Corporation* (11th Cir., July 11, 2006).

'Happy meal' for employers?

Although the court limited the decisional unit to the regional level in Burlison's case, it's important to note that the unit may vary in different corporations depending on the methods of corporate decisionmaking. In this case, the decision on who should go and who should stay was made by McDonald's regional managers. But if corporate headquarters controls the restructuring and all decisions are made at the highest echelons of the corporation, the decisional unit may encompass a broader range of employees than those at McDonald's.

As a result, when you're determining your decisional unit in a corporate reduction in force, look at the level of the decisionmaking authority and the "employee pool" in deciding what termination information must be shared with employees in a restructuring program. ❖

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