

June 17, 2008

Columbus, OH
52 East Gay St.
Post Office Box 1008
Columbus, Ohio 43216
tel 614.464.6400
fax 614.464.6350

Washington, D.C.
1828 L Street N.W.
Eleventh Floor
Washington, DC 20036
tel 202.467.8800
fax 202.467.8900

Cleveland, OH
1375 East Ninth St.
2100 One Cleveland Ctr.
Cleveland, Ohio 44114
tel 216.479.6100
fax 216.479.6060

Cincinnati, OH
221 East Fourth St.
Suite 2000, Atrium Two
Post Office Box 0236
Cincinnati, Ohio 45201
tel 513.723.4000
fax 513.723.4056

Alexandria, VA
277 South Washington St.
Suite 310
Alexandria, VA 22314
tel 703.837.6999
fax 703.549.4492

Akron, OH
106 South Main St.
Suite 1100
Akron, Ohio 44308
tel 330.208.1000
fax 330.208.1001

AGE DISCRIMINATION RELEASES: THE DEVIL IS IN THE DETAILS

A federal district court in Minnesota recently ruled that release agreements offered to a group of employees were invalid because of a minor calculation error in the mandatory disclosures provided to the employees in connection with an exit incentive program. Specifically, the employer indicated that 154 employees would be affected by the RIF, while the number was actually 152. This case underscores the need for strict compliance with the Older Workers Benefits Protections Act ("OWBPA") and is consistent with the increasing trend of courts invalidating agreements for seemingly minor OWBPA deficiencies.

Pursuant to OWBPA, an individual cannot waive any right or claim under the Age Discrimination in Employment Act (the "ADEA") unless the waiver is knowing and voluntary. A waiver is not considered "knowing and voluntary" unless, at a minimum, the waiver satisfies the following requirements:

- the waiver must be written in a manner reasonably calculated to be understood by the individual;
- the waiver must refer to rights or claims arising under the ADEA;
- the waiver cannot extend to rights or claims that may arise in the future;
- the waiver must be in exchange for consideration in addition to anything of value to which the individual already is entitled;
- the waiver must advise the individual in writing to consult with an attorney;
- the waiver must provide at least 21 days to consider the agreement, 45 days if offered in a RIF;
- the waiver must provide a seven day period to revoke; and
- if offered in connection with an exit incentive program or RIF, at the start of the 45 day period, employers must give each employee information in writing, in a way calculated to be understood by the average employee eligible to participate, on: (1) any class, unit, or group of employees covered by the program, any eligibility factors for the program, and any time limits applicable to it; and (2) the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the job classification or organizational unit who are not eligible or selected for the program.

A defective waiver under OWBPA does not bar any claim that the individual might have had under the ADEA. In addition, an employee who signs a waiver that does not comply with OWBPA is not required to "tender back" benefits, typically severance pay, as a precondition to bringing suit under the ADEA. In other words, the employee may keep any severance monies and use those funds to sue the employer. The employer may recover money it paid for a waiver only if the employee successfully challenges the waiver, proves age discrimination, and obtains a monetary award.

The recent Minnesota case exemplifies an increasing trend of courts invalidating agreements for seemingly minor OWBPA compliance issues.

If you have any questions about this or any other employment-related issue, please contact your Vorys lawyer.