



WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS

By: Christopher A. Tinari, Esquire
Margolis Edelstein



Introduction

- Employer's Decision To Terminate
- Minimize Risk of Potential Litigation
- Offer Departing Employees Money or Benefits in Exchange for a Release
- Employers Need a Waiver for All Claims Connected with the Employment Relationship



Severance Agreements & Release of All Claims

- Contract
- B/W Employer & Employee
- Must Be Supported By Consideration
- Consideration=Value to which a person is not already entitled i.e. Lump sum payment
- Severance Agreements Set Typically Forth:
date of termination, severance payment amount, general release language, waivers



Validity of Waivers

- Waiver in a Severance Agreement is Valid if:
 - Employee Knowingly & Voluntarily Consents
 - Rules are Defined by each Statute



Statutes

- Age Discrimination in Employment Act (ADEA)
- Older Workers Benefit Protection Act (OWBPA)
- Title VII

Other Requirements



- Consideration
- No Requirement for Employee to Waive Future Rights
- Comply with Applicable Statutes and Federal and State Laws



Determination that Waiver is Knowing and Voluntary

- Written in clear, specific language
- Understandable to employee based on his/her educational background
- Whether induced by fraud, duress, undue influence, improper conduct
- Employee had enough time to read and think
- Employee consulted with an attorney or encouraged to do so
- Employee input
- Consideration



Waivers of ADEA Claims

- Employees 40 Years and Older
- Specific requirements under the OWBPA for a Knowing and Voluntary Release
- Additional Requirements under the Statute when Waivers are Requested from a Group or Class of Employees



Age Claim Waivers: Knowing & Voluntary

- Be Written & Understandable
- Refer to Rights or Claims Arising under the ADEA
- Advise Employee to Consult with Attorney
- Consideration
- Provide at Least 21 Days to Consider the Offer (45 Days Group)
- 7 days to Revoke Agreement
- Not Include Rights & Claims After the Date Waiver is Executed



Issues

- Even with a Valid Waiver an Employee May Still File a Charge with the EEOC or State Agency
- Provision in Release that Attempts to Waive Right to File Charge is Not Enforceable
- Employee Not Required to Return Severance Payment if Filed Charge After Signing Release Since Not Enforceable



Issues

- Under ADEA, Employee Not Required to Return Severance Payment if Release is Defective
- Under Title VII, ADA, and EPA, the Courts are Split
- Releases Cannot Limit, Impede, Prohibit Employee From Testifying or Participating in EEOC Investigation