

Labor and Employment Law Section: 10th Circuit Case Invalidates 'Release of Claims' Signed during Reduction-in-Force

By Robyn Funk and Kimberly Lambert Love

With an ever increasing number of company-wide layoffs, a recent 10th Circuit decision could have a significant impact on the validity of the release of claims agreements used by employers during a reduction-in-force.

In *Kruchowski v. The Weyerhaeuser Company*, 423 F.3d 1139 (10th Cir. 2005), the plaintiffs filed an age-discrimination claim under the Age Discrimination in Employment Act (ADEA) against their former employer after their employment was terminated as part of a reduction-in-force (RIF). During the RIF, Weyerhaeuser terminated the employment of 31 employees. Each plaintiff had signed a release of claims waiving his or her right to assert an ADEA age discrimination claim in exchange for a severance package. At the time that each plaintiff's employment was terminated, and before signing the release of claims, each plaintiff received a group termination notification. Attached to the notice was a list of employees by job title and age selected for lay off and eligible for severance pay and those employees not selected for lay off and therefore not eligible for severance pay. The notice informed the employees that the "decisional unit" — the group of employees selected to have their employment terminated in the RIF — was "all salaried employees at the mill." The notice did not list the "eligibility factors" used to make the termination decisions, which Weyerhaeuser had indicated in discovery responses were "leadership, abilities, technical skill and behavior."

The plaintiffs argued that the release of the age discrimination claims was invalid because the release did not comply with the Older Workers Benefit Protection Act¹ which is designed to ensure that the waiver of age claims is "knowing and voluntary." Specifically, the act provides that if offered to a group of two or more employees as part of an exit incentive or other termination program, the release must:

- be written in plain language and understandable to the employee;
- specifically refer to the employee's rights and claims under the ADEA;
- exclude future claims arising after the date of execution;
- include additional consideration to the employee;
- advise the employee to consult an attorney prior to execution;
- allow the employee at least 45 days to consider the agreement or at least 21 days if the waiver is not part of an exit incentive or termination program; and
- allow the employee at least seven days following execution to revoke the agreement.

Further, the employer must disclose in writing any group of individuals eligible for the program, any "eligibility factors" for the program and any applicable time limits. The disclosure must also include the job titles and ages of all employees eligible or selected for

the program and all employees in the organizational unit or job classification who were not eligible or selected for the program.

The district court granted summary judgment in favor of the employer finding that the release of claims was valid because it complied with the statutory requirements for a release under the ADEA and the Older Workers Benefit Protection Act. On appeal, however, the 10th Circuit held that the waiver was void because it did not meet the requirements of the Older Workers Benefit Protection Act to ensure the waiver was "knowing and voluntary."

Specifically, the court held that because the waiver was offered to a group of employees as part of a layoff incentive, the waiver had to include a correct identification of the group of employees subject to the layoff. The court reasoned that Weyerhaeuser had not correctly identified the decisional unit in its notice because the unit was described as "all salaried employees." The actual decisional unit, however, was all salaried employees who reported to the mill manager. With the change in the decisional unit, over 10 percent of the employees were omitted from the job titles and ages provided in the notice.

The court further held that the waiver was void because the waiver did not disclose the "eligibility factors" or selection criteria used to make the lay off decisions. The court held that the Older Workers Benefit Protection Act required the waiver to disclose the factors considered when selecting employees for the RIF, such as skills, leadership, etc. Because the subject release did not include these requirements, it was void as a matter of law.²

In the wake of this decision, employers should carefully review any release or waivers of claims agreements both for accuracy and comprehensiveness prior to presenting the release to an employee during a reduction-in-force. In addition to other Older Workers Benefit Protection Act requirements, the *Weyerhaeuser* case mandates that an employer's release accurately describe the group of employees subject to the layoff. For instance, it is not sufficient to describe the group as "all salaried employees" when the group is limited to all salaried employees who report to a certain manager or are within a particular organization or department. Furthermore, the release must include the

specific selection criteria used by the employer to determine which employees were subject to discharge as part of the layoff. For example, if the company looked at such factors as leadership, abilities and technical skills, those factors should be included in the release. A company should also make sure that the criteria disclosed in the release are consistent with the company's practice so as not to be challenged later in a lawsuit as pretextual. Further, before advising an individual client that they have no claim, plaintiff's counsel should carefully study the release to determine if the Older Workers Benefit Protection Act criteria as explained by the 10th Circuit has been included. Given the fact that many companies have experienced company-wide layoffs, an invalidated release of claims could have far-reaching implications.

1. 29 U.S.C.A. § 626(f).

2. On Sept. 26, 2005, Weyerhaeuser filed a Petition for Panel Rehearing and Suggestion For Rehearing En Banc. The Williams Companies, the Equal Employment Advisory Council ("EEAC") and The Chamber of Commerce of the United States of America filed amici briefs in support of Weyerhaeuser's petition. The joint brief filed by the EEAC and The Chamber of Commerce argued that the 10th Circuit misinterpreted the meaning of "eligibility factors" and that "eligibility factors" are not the factors used to make termination decisions. Rather, eligibility factors are the factors used to enable the employee to receive a benefit, e.g. severance pay. At the time of submission of this article for publication, the court had not ruled on the petition.

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