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## For Clarity's Sake: Redefining the Knowing and Voluntary Standard in Severance Agreements

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# FOR CLARITY’S SAKE: REDEFINING THE KNOWING AND VOLUNTARY STANDARD IN SEVERANCE AGREEMENTS

*Samantha Padilla\**

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### INTRODUCTION: LAYOFFS AND OLDER WORKER PROTECTION

According to the Bureau of Labor Statistics, between December 2016 and December 2017, around 1.6 million workers in the United States were laid off or discharged each month.<sup>1</sup> When employers are faced with the decision to reduce workforce size, which occurs even during stronger economic times, numerous legal issues arise if the reduction is not executed properly.<sup>2</sup> Federal and state law govern the workforce reduction process, but certain classes of workers receive more protection than others.<sup>3</sup>

Older workers have received considerable protection over the past fifty years through the Age Discrimination in Employment Act of 1967 (“ADEA”), which makes it illegal to discriminate against employees over the age of forty due to their age.<sup>4</sup> Even under the ADEA, an employee may waive an age discrimination claim if such a waiver is “knowing and voluntary.”<sup>5</sup> Waivers of claims occur when companies offer departing employees severance payments in exchange for those employees relinquishing their rights to sue the company over certain types of claims.<sup>6</sup> In essence, when an employee

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1. See Table 5, *Layoffs and Discharges Levels and Rates by Industry and Region, Seasonally Adjusted*, U.S. DEP’T OF LAB., BUREAU OF LAB. STAT. (Feb. 6, 2018), <https://www.bls.gov/news.release/jolts.t05.htm> [<http://perma.cc/4W8K-SGKX>].

2. Executive Legal Summary 396, *Reductions in Force*, Westlaw (database updated Dec. 2017).

3. See *id.*

4. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 (codified at 29 U.S.C. §§ 621–634 (2012)).

5. 29 U.S.C. § 626(f)(1) (“An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary.”).

6. See Whiteford, Taylor, Preston LLP, *Severance Agreements: Drafting Tips to Make Sure They Stick – Part 1*, MD. EMP. L. LETTER (Sept. 2009).

signs a severance agreement, he agrees not to assert any legal claims against the employer, marking the end of their employment relationship.<sup>7</sup> Severance agreements are powerful tools that “buy[] peace” for the employer and can mean additional compensation for the employee.<sup>8</sup> Some employers have historically taken advantage of these tools, going as far as manipulating or coercing employees into waiving their ADEA rights for the security of obtaining a signed agreement, knowing the employee can never sue again.<sup>9</sup>

To combat this, Congress amended the ADEA by enacting the Older Workers Benefit Protection Act of 1990 (“OWBPA”), which, in part, clarified what it meant for an employee to “knowingly and voluntarily” waive an age discrimination claim.<sup>10</sup> The OWBPA reiterated that ADEA waivers must be “knowing and voluntary,” a contract term that sets the standard for what it means to consent to something by ensuring that the signee understands that it is his or her choice whether or not to enter into an agreement and requiring that such a decision is voluntary and is made knowingly.<sup>11</sup> Importantly, the OWBPA includes a unique series of specific notice and information requirements as necessary elements for a waiver to qualify as knowing and voluntary.<sup>12</sup>

The need for employee protections became clear during the economic recessions of the 1970s and 1980s.<sup>13</sup> In an attempt to remain compliant with the 1978 ADEA amendment that prohibited arbitrary terminations of older workers, employers began offering special early retirement deals known as “golden handshakes,” which

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7. MICHAEL DELIKAT, ORRICK, HERRINGTON & SUTCLIFFE LLP, STRATEGIES IN DRAFTING EFFECTIVE SEPARATION AGREEMENTS 2 (2008).

8. *Id.*

9. S. REP. NO. 101-79, at 968 (1989) (“Other older workers who testified before the Subcommittee on Labor described signing waivers without knowing or understanding the facts of any claim they might have.”).

10. 29 U.S.C. § 626; 29 C.F.R. § 1625.22 (2017).

11. *See generally* Romero v. Allstate Ins. Co., No. 01-3894, 2016 WL 2619853, at \*7 (E.D. Pa. May 4, 2016) (denying Allstate’s request for a new trial because the jury instructions regarding OWBPA compliance, in which Plaintiffs argued that determining whether a release was signed “knowingly and voluntarily” required giving employees a “meaningful choice,” were not misleading: “If the ordinary contract principle of procedural unconscionability mandates a showing of ‘meaningful choice,’ it is logical the ‘more stringent’ voluntariness standard under the totality of the circumstances test would have to meet, at a minimum, the same standard.”).

12. 29 U.S.C. § 626(f)(1)(A)–(H).

13. Jonathan Peterson, *Early Retirement: The Golden Handshake—or Shove?*, L.A. TIMES (June 7, 1985), [http://articles.latimes.com/1985-06-07/news/mn-15975\\_1\\_early-retirement/2](http://articles.latimes.com/1985-06-07/news/mn-15975_1_early-retirement/2) [<http://perma.cc/P6HK-JH9K>].

were cash inducements for older workers to retire.<sup>14</sup> These take-it-or-leave-it inducements put pressure on employees, because they were given little time to decide if they should sign up, and made older workers, even those who could not afford to do so, feel like they had to retire.<sup>15</sup> Older workers affected by these programs had little reason to suspect that the severance packages they were offered could have been an act of unlawful age discrimination under the ADEA.<sup>16</sup> During this same time period, older workers were also generally unable to tell whether they were selected for an involuntary Reduction in Force (“RIF”) program based solely on their age, which is per-se age discrimination.<sup>17</sup> The OWBPA offers older employees enhanced protection against these types of discrimination.<sup>18</sup>

This Note will evaluate the first twenty-five years of practice under this novel federal statutory approach to waiving rights, suggest areas for improvement, and demonstrate how the OWBPA could act as a model for discrimination claim waivers in other statutory settings. Though this Note argues that the OWBPA has provided a higher level of protection to older workers, the OWBPA has not completely remedied the issue of age discrimination in the United States.<sup>19</sup> There is still room for improvement, particularly through clarification of select OWBPA waiver provisions.

Part I describes the background of the OWBPA. Part II examines the statutory ambiguity that has arisen since the passage of the OWBPA, and how courts have attempted to clarify this ambiguity. Part III proposes that the Equal Employment Opportunity Commission (“EEOC”) can reinterpret select elements of the OWBPA and suggests a legislative amendment to other anti-

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14. *Id.*

15. *Id.*

16. *Id.*

17. See generally Virginia L. Hardwick & Tiffanie C. Benfer, *Proving Disparate Treatment in a Reduction in Force: Ideas to Help Plaintiff's Counsel Demonstrate Pretext*, AM. BAR ASS'N, Nov. 4, 2011, at 1, [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/ac2011/017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/017.authcheckdam.pdf) [<https://perma.cc/3P77-TFP3>]. See also *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 130 (5th Cir. 1981) (stating the evidence of an involuntary RIF must lead the factfinder to reasonably conclude either (1) the defendant consciously refused to consider relocating or retaining a plaintiff because of his age or (2) that the defendant regarded age as a negative factor in such consideration).

18. See generally GEORGETOWN UNIV. LAW CTR., *EARLY RETIREMENT INCENTIVE PLANS AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT* (2010).

19. See Liz Ryan, *The Ugly Truth About Age Discrimination*, FORBES (Jan. 31, 2014), <http://www.forbes.com/sites/lizryan/2014/01/31/the-ugly-truth-about-age-discrimination/#316ce0471f1e> [<http://perma.cc/TXE9-PGXX>].

discrimination laws that would codify the knowing and voluntary standard in a similar way to how it is codified under the OWBPA. The purpose of this Note is to act as a starting point to spark conversation about raising the bar of the knowing and voluntary standard for waiver agreements signed by employees facing layoffs and to show how increased disclosures can be beneficial to both employers and employees in the workforce reduction process.

## I. BACKGROUND

Under the ADEA, passed in 1967, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.<sup>20</sup> The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is forty years of age or older.<sup>21</sup> The ADEA is enforced by the EEOC, a federal agency responsible for implementing and overseeing federal laws prohibiting employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.<sup>22</sup>

In 1990, Congress passed the OWBPA, which amended the ADEA in order to bolster the ADEA and realize its original goals, in response to some employers manipulating or coercing employees into waiving their ADEA rights.<sup>23</sup> In the late 1980s, Congress grew concerned about employers taking advantage of older workers due to the workers' lack of information or expertise regarding age discrimination law, combined with the fact that older workers increasingly became the targets of corporate down-sizing.<sup>24</sup> To this end, the OWBPA amended Section 7 of the ADEA to include a

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20. *Facts About Age Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/age.cfm> [<https://perma.cc/97NH-BEH3>].

21. *Id.*

22. *Administrative Enforcement and Litigation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [https://www.eeoc.gov/eeoc/enforcement\\_litigation.cfm](https://www.eeoc.gov/eeoc/enforcement_litigation.cfm) [<http://perma.cc/WQT3-UNUG>].

23. S. REP. NO. 101-79, at 968 (1989).

24. *Id.* ("2. Lack of information or expertise. Other older workers who testified before the Subcommittee on Labor described signing waivers without knowing or understanding the facts of any claim they might have. The demographics of cost-cutting are seldom shared by employers with their workforce."); *Waivers Under the Age Discrimination in Employment Act: Joint Hearing Before the Select Comm. on Aging & the Subcomm. on Emp't Opportunities of the Comm. on Educ. & Labor*, 101st Cong. 1003-04 (1989) [hereinafter *1989 Joint Hearing Before the Select Comm. on Aging*] (statement of Edward R. Roybal, Chairman, Select Comm. on Aging).

statutory definition of a knowing and voluntary waiver of an ADEA claim.<sup>25</sup>

### A. The Origins of the OWBPA: Supervision Requirements

Prior to the enactment of the OWBPA, an important unanswered question before the EEOC and federal courts was whether an ADEA waiver had to be supervised by the EEOC or the federal courts in order to be valid.<sup>26</sup> Did the government need to get involved in the contracting between employers and employees over age discrimination concerns?

The Fair Labor Standards Act (“FLSA”), which established the minimum wage, among other things, has such a supervisory requirement.<sup>27</sup> One cannot consent to work for less than what is prescribed by the FLSA without the consent of the Department of Labor or a court, and courts have imposed strict limitations on when and how claims under the FLSA can be settled.<sup>28</sup> Advocates for an ADEA supervision requirement noted the ADEA’s incorporation of the FLSA’s enforcement procedures, implying incorporation of its accompanying supervision requirement.<sup>29</sup> However, in 1986, the Sixth Circuit rejected this argument and a supervision requirement for the ADEA in *Runyan v. National Cash Register Corp.*<sup>30</sup> The court held that under particular circumstances, employers and employees may negotiate a valid release of ADEA claims privately and without government supervision.<sup>31</sup> Further, the court noted that the EEOC, at the time, specifically proposed guidance allowing for unsupervised waivers with the intent of encouraging voluntary

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25. 29 U.S.C. § 626(f) (2012).

26. Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a “Waiver Certainty” Test*, 58 FLA. L. REV. 305, 313 (2006).

27. See *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/flsa/> [http://perma.cc/H5ND-PEZ3].

28. See 29 U.S.C. § 216(b)–(c) (2012); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (holding that “in the absence of a bona fide dispute between the parties as to liability,” one cannot release one’s right to liquidated damages under § 16(b)).

29. See 1989 Joint Hearing Before the Select Comm. on Aging, *supra* note 24, at 1005.

30. 787 F.2d 1039, 1040 (6th Cir. 1986).

31. *Id.* at 1043.

resolution of ADEA disputes and the court agreed with the agency's views.<sup>32</sup>

In 1987, the EEOC issued a final rule permitting older workers to waive their rights without supervision.<sup>33</sup> Justice Clarence Thomas, the then-Chairman of the EEOC, explained in a letter to the United States Senate Committee on Labor and Human Resources that mandating a supervision requirement impractically increases the workload of the government while limiting an employee's existing choice to waive his or her rights privately, without first filing an age discrimination complaint with the EEOC.<sup>34</sup> The EEOC advised that its regulation permitting older workers to waive their rights without supervision was "adequate to protect employees against pressure to waive their rights while preserving their choice to waive without filing a claim with the EEOC or in court."<sup>35</sup>

However, despite the EEOC's assurances, Congress feared that the EEOC's position would not adequately protect older workers and proposed House Bill 1432 and Senate Bill 54, which comprised the Age Discrimination in Employment Waiver Protection Act of 1989.<sup>36</sup> The proposed legislation provided that ADEA waivers were invalid except when employers obtained the waiver in a settlement of an older worker's charge of age discrimination or where the waiver was reviewed by a court.<sup>37</sup>

One side of the supervision requirement debate can be demonstrated by the testimony of Chairman Edward R. Roybal of the U.S. House of Representatives, Select Committee on Aging. In his opening statement in the April 18, 1989 Joint Hearing before the Select Committee on Aging and the Subcommittee on Employment Opportunities of the Committee on Education and Labor, he alleged that the EEOC's position on supervision violated congressional intent because it permitted employers to extract the waiver of rights from

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32. *Id.* at 1045; Senn, *supra* note 26, at 332–33 (“From 1986 through 1990, five federal circuits—the Second Circuit in *Bormann*, the Third Circuit in *Coventry*, the Fifth Circuit in *O’Hare*, the Sixth Circuit in *Runyan*, and the Eighth Circuit in *Lancaster*—concluded that a person could privately waive an ADEA claim without government supervision.”).

33. Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA, 39 C.F.R. § 1627 (1987).

34. *See 1989 Joint Hearing Before the Select Comm. on Aging, supra* note 24, at 1130 (letter from Clarence Thomas, Chairman, EEOC).

35. *See id.*

36. *See id.* at 1106 (statement of Edward R. Roybal, Chairman, Select Comm. on Aging).

37. *See id.*



older workers coercively due to the inherently unequal relationship between employee and employer.<sup>38</sup> “Employers should not be permitted to exploit their superior bargaining position, and the vulnerable conditions of their older employees, by forcing them to sign away their rights.”<sup>39</sup>

The other side of the argument emphasizes that employees and employers should be able to freely contract with each other.<sup>40</sup> Mark Dichter, a prominent labor and employment defense attorney, demonstrated such a position when testifying on his own behalf during a hearing before the Subcommittee on Labor of the Committee on Labor and Human Resources of the United States Senate on March 16, 1989.<sup>41</sup> Mr. Dichter explained that Senate Bill 54 was “unreasonable, unworkable and inconsistent with the ADEA and the national employment policy to encourage voluntary resolutions of potential disputes.”<sup>42</sup> He noted that responsible employers already ensured that employees, when given the opportunity to sign a release, were not discouraged from seeking the advice of counsel in connection with the release and were provided with a reasonable period of time to consider whether or not to enter into such an agreement.<sup>43</sup> As his testimony was given prior to the passage of the OWBPA’s set waiver provisions, Mr. Dichter predicted that employers would view the knowing and voluntary standard as inherently reasonable: “I do not believe that most responsible employers would object to including specified language in their releases which would inform employees of their rights under the ADEA and encourage employees to consult with either the EEOC or a private attorney prior to entering into the release.”<sup>44</sup>

The Supreme Court’s June 1989 decision in *Public Employees Retirement Systems of Ohio v. Betts*<sup>45</sup> interrupted the debate over the Age Discrimination in Employment Waiver Protection Act of 1989. *Betts* did not concern the issue of the validity of ADEA waivers, which makes the details of the case irrelevant to this Note. It

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38. *See id.*

39. *See id.* at 1104.

40. *Age Discrimination in Employment Waiver Protection Act of 1989: Hearing on S. 54 Before the Subcomm. on Labor of the Comm. on Labor & Human Res.*, 101st Cong. 1209 (1989) [hereinafter *1989 Hearing on S. 54*] (statement of Mark Dichter).

41. *See id.*

42. *See id.*

43. *See id.* at 1203.

44. *See id.* at 1207.

45. 492 U.S. 158 (1989).

did, however, re-establish Congress's opposition to age discrimination in the employee benefits area and set the stage for the passage of the OWBPA.<sup>46</sup> It is important to recognize that the true genesis of the waiver provisions of the OWBPA originated with the Age Discrimination in Employment Waiver Protection Act of 1989.

### B. Compliance with the OWBPA Waiver Provisions

The OWBPA codified what is functionally equivalent to the knowing and voluntary standard by establishing a two-tiered scheme for evaluating the legal sufficiency of a voluntary waiver of an employee's ADEA rights.<sup>47</sup> The first tier establishes the minimum requirements that must be met in order for a release agreement to be enforceable.<sup>48</sup> The Supreme Court held in *Oubre v. Entergy Operations, Inc.*<sup>49</sup> that a waiver may not be considered knowing and voluntary unless, at a minimum, it satisfies these enumerated requirements.<sup>50</sup> The second tier includes additional statutory requirements for waivers "requested in connection with an exit incentive or other employment termination program offered to a group or a class of employees."<sup>51</sup>

Before the passage of the OWBPA, courts, by default, had the discretion to determine which factors made waivers of discrimination claims knowing and voluntary.<sup>52</sup> Some courts relied strictly on traditional contract principles to determine the validity of releases, while others required an examination of the totality of the circumstances.<sup>53</sup> The stringent contract approach looked to ordinary contract principles to evaluate the legal sufficiency of waiver agreements, such as whether proper consideration was given in exchange for the waiver and the absence of fraud, duress, or mutual

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46. Mark D. Pomfret, *All Betts Are Off: How Employers Should View Older Workers' Benefit Protection Act*, 18 J. LEGIS. 87, 88 (1992).

47. See generally U.S. EQUAL EMP'T OPPORTUNITY COMM'N, UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS (2009) [hereinafter UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS], [https://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html) [http://perma.cc/P363-A66Y].

48. 29 U.S.C. § 626(f)(1)(A)–(F)(i), (G) (2012).

49. 522 U.S. 422 (1998).

50. *Id.* at 422.

51. 29 U.S.C. § 626(f)(1)(F)(ii).

52. See Senn, *supra* note 26, at 310–11.

53. See *id.* at 309.

mistake.<sup>54</sup> By contrast, courts that employed the more deferential totality of circumstances approach looked to other factors to determine whether a waiver was entered knowingly and voluntarily.<sup>55</sup> For example, the Third Circuit, in *Coventry v. United States Steel Corp.*,<sup>56</sup> considered the following factors when determining whether or not ADEA-related claims were sufficiently waived:

- 1) the plaintiff's education and business experience, 2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.<sup>57</sup>

The Second Circuit adopted this totality of the circumstances approach prior to the passage of the OWBPA.<sup>58</sup> The court used the factors enumerated in *Coventry* and added a seventh factor: whether an employer encourages an employee to consult, or discourages an employee from consulting, an attorney.<sup>59</sup> The court noted that the Third Circuit's totality of the circumstances standard was consistent with the congressional purpose underlying the ADEA and stressed the need to carefully examine any situation in which an older worker bargains away the statutory right to be free from age discrimination.<sup>60</sup>

While many of the ultimately codified requirements of the knowing and voluntary standard were drawn from case law, academic literature, and even other statutes,<sup>61</sup> the OWBPA took the critical step to make these factors mandatory. Such factors include, at a minimum, that:

- The waiver is written in a manner calculated to be understood by the average individual eligible to participate;
- The individual waives rights or claims only in exchange for consideration;

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54. Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261, 275 (1996).

55. *Id.*

56. 856 F.2d 514 (3d Cir. 1988).

57. *Id.* at 523 (citing *DiMartino v. City of Hartford*, 636 F. Supp. 1241 (D. Conn. 1986)).

58. *Bormann v. AT&T Comm., Inc.*, 875 F.2d 399, 403 (2d Cir. 1989).

59. *Id.*

60. *Id.*

61. See discussion *infra* Section II.B.

- The individual is advised in writing to consult with an attorney prior to signing the agreement;
- The individual is given at least 21 days to consider the agreement or at least 45 if in connection with an exit incentive or other termination program offered to a group or class of employees;
- If in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must inform the employee in writing and in manner calculated to be understood by the average employee, the class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; as well as the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.<sup>62</sup>

Although the OWBPA established a framework for determining the minimum conditions under which a waiver can be deemed a knowing and voluntary release of one's ADEA rights, employees retain recourse in traditional contract defenses such as fraud, coercion, and mutual mistake.<sup>63</sup> In other words, if an employer proves that all of the statutory minimums have been satisfied, then an employee may still be able to prove that the waiver was not knowing and voluntary.<sup>64</sup>

For example, the appellants in *Bennett v. Coors Brewing Co.*<sup>65</sup> argued that the releases they signed as part of a termination program violated the OWBPA because they were fraudulently induced into doing so.<sup>66</sup> Coors, however, argued that the releases were valid because they complied with the express requirements of the OWBPA.<sup>67</sup> On appeal, the Tenth Circuit reversed the district court's

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62. See 29 U.S.C. § 626(f)(1)(A)–(H) (2012).

63. *Id.* § 626(f)(3) (“In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).”).

64. See *id.* § 626(f)(1); see also *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373–74 (11th Cir. 1995) (finding “nonstatutory circumstances, such as fraud, duress, or coercion in connection with the execution of the waiver, may render an ADEA waiver not ‘knowing and voluntary’” and remanding the case for the district court to consider these factors under the totality of the circumstances).

65. 189 F.3d 1221 (10th Cir. 1999).

66. *Id.* at 1228.

67. *Id.*

grant of summary judgment dismissing plaintiff's age discrimination claims, and remanded the case to consider whether the releases were valid in light of appellant's fraud allegation.<sup>68</sup> The court noted that fraud may render an ADEA waiver not knowing and voluntary, even though Coors met the statutory minimums outlined in the OWBPA.<sup>69</sup>

In sum, the OWBPA's strict and detailed waiver requirements provide a presumptive, but not automatic, protection for employers.<sup>70</sup> Even if the employer meets the above standards in subsections (A)–(H) in a release agreement, a court could still find that the agreement violated the OWBPA if the employee did not sign it knowingly and voluntarily through traditional contract defenses, as seen in the *Coors* case.<sup>71</sup> Still, the extensive requirements set forth in (A)–(H) do act as a floor from which employers must craft their release agreements.<sup>72</sup>

1. *A Decrease in ADEA-Related Charges Filed in Federal District Court*

This strict-compliance standard established by the OWBPA has led employers to err on the side of caution when creating release agreements to avoid what amounts to a kind of double jeopardy if the release were to be invalidated.<sup>73</sup> Since the Supreme Court decided *Oubre* in 1998 and held that an employee's release of claims under the ADEA is unenforceable if the release is not compliant with OWBPA protections, the number of EEOC enforcement suits involving ADEA claims that were filed and resolved in federal district courts has decreased, despite a spike in 2006.<sup>74</sup>

From 1999 until 2007, around forty ADEA-related cases were filed and resolved in federal district court each year.<sup>75</sup> Beginning in 2007, the rate began to gradually decline and in 2016, only two cases were

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68. *Id.* at 1239.

69. *Id.* at 1229.

70. *See id.* at 1229 (holding that “non-statutory circumstances such as fraud, duress, or mutual mistake may render an ADEA waiver not ‘knowing and voluntary’ under the OWBPA”).

71. *Id.* at 1228–29.

72. *See generally* *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1988).

73. *Id.* at 427.

74. *EEOC Litigation Statistics, FY 1997 Through FY 2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [http://perma.cc/7N8V-SDVH]. Fifty EEOC enforcement suits were filed and resolved in the federal district courts in 2006 compared to forty-four in 1998, thirty-two in 2007, and fourteen in 2015. *Id.* Statistics specifically regarding ADEA waiver litigation could not be found. I assume the decrease in the number of cases also correlates to a decrease in ADEA waiver litigation.

75. *See id.*

brought.<sup>76</sup> Without adequate research, it is difficult to determine what caused this decrease; however, an employment attorney at a prominent defense firm opined that (1) the Supreme Court's *Oubre* decision and (2) the EEOC's strategic enforcement plan changes are likely two motivating factors.<sup>77</sup> Further, the Federal Arbitration Act ("FAA") could have led many of these cases to be resolved privately in arbitration instead of in court.

*a. Oubre and Its Effect on Waiver Compliance*

One possible reason for the decline in EEOC enforcement suits brought in federal court is the *Oubre* decision.<sup>78</sup> *Oubre* helped to discipline employers into ensuring age waivers are signed knowingly and voluntarily because if not, employers are not only vulnerable to an ADEA suit, but also cannot claw back the original consideration given to the employee in exchange for his or her signature on that waiver.<sup>79</sup> The Supreme Court in *Oubre* held that if a release did not comply with the OWBPA's requirements, it could not bar an employee from keeping the benefits received from signing the release, even though the release was invalidated.<sup>80</sup> Respondent Entergy Operations, Inc. ("Entergy") argued that under general principles of contract jurisprudence, before an innocent party can elect to void the contract he entered into, he must first tender back any benefits received under that contract.<sup>81</sup> Furthermore, Entergy argued that under the doctrine of equitable estoppel, a party is barred from shirking the burdens of a voidable transaction for as long as she retains the benefits received under it.<sup>82</sup> Therefore, Entergy reasoned, an employee essentially ratifies an otherwise ineffective release agreement by retaining the consideration.<sup>83</sup>

The Court disagreed, stating that the rule proposed by Entergy would frustrate the OWBPA's practical operation.<sup>84</sup> The Court explained that it was common for a discharged employee to have already spent the consideration money and to "lack the means to

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76. *Id.*

77. Telephone Interview with Senior Counsel, Unnamed Law Firm (Oct. 4, 2016) (notes on file with author).

78. *Id.*

79. *Id.*

80. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1988).

81. *Id.* at 425.

82. *Id.* at 425–26.

83. *Id.* at 426.

84. *Id.* at 427.

tender their return.”<sup>85</sup> Additionally, “[t]hese realities might tempt employers to risk noncompliance with the OWBPA’s waiver provisions, knowing it will be difficult to repay the monies and relying on ratification. We ought not open the door to an evasion of the statute by this device.”<sup>86</sup> Because employers will not be able to reclaim consideration money given to an employee in exchange for an invalid release, employers are likely more careful about ensuring a valid release that is compliant with the OWBPA requirements since the *Oubre* decision. This added care likely has resulted in more compliant releases and thus, fewer complaints filed in federal court.

*b. The EEOC’s Strategic Enforcement Plan*

Another possible explanation for this decrease could be the EEOC’s strategic enforcement plan.<sup>87</sup> The EEOC’s Strategic Plan for Fiscal Years 2013 to 2016 had six priorities: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues (i.e. issues associated with new legislation, judicial decisions, and administrative interpretations); (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.<sup>88</sup> Notably absent from these priorities is combating age discrimination, and its absence indicates that it has not been a particular focus of the EEOC over the past five or so years. As a result, these cases are not as attractive to the EEOC for litigation.

*c. The FAA’s Effect on EEOC Enforcement Actions*

Lastly, the decrease could also be due to the United States Arbitration Act, more commonly referred to as the FAA.<sup>89</sup> The FAA provides for contractually-based compulsory and binding arbitration, setting out the legislative framework for the enforcement of arbitration agreements and awards in the United States.<sup>90</sup> The FAA provides that if a party to a contract containing an arbitration clause initiates contract-related litigation, either party can compel the

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85. *Id.*

86. *Id.*

87. See *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Sept. 4, 2012), <https://www.eeoc.gov/eeoc/plan/sep.cfm> [http://perma.cc/ZH9Z-K2UZ].

88. *Id.*

89. See 9 U.S.C. § 1 (2012).

90. *Id.*

moving party to resolve the dispute through arbitration.<sup>91</sup> Supreme Court decisions over the last several decades have reinforced the FAA's pro-arbitration mandate and ensured that it is universally applied by both state and federal courts.<sup>92</sup> As a result of cases like *Gilmer v. Interstate/Johnson Lane Corp.*<sup>93</sup> and *Circuit City Stores, Inc. v. Adams*<sup>94</sup> many ADEA claims are resolved in arbitration rather than in court.<sup>95</sup>

## 2. *An Increase in ADEA-Related Charges Filed with the EEOC*

Although there has been a decrease in the number of ADEA-related EEOC enforcement actions brought and resolved in federal district court over the past ten years, there has been an increase in the total number of ADEA-related charges filed with the EEOC.<sup>96</sup> These statistics indicate that older workers are exercising their rights under the ADEA and remain targets of discrimination.

In 2005, there were 16,585 charges filed with the EEOC alleging ADEA violations—including those filed concurrently under Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act of 1990 (“ADA”), and/or the Equal Pay Act of 1963 (“EPA”)—and in 2015, there were 20,144.<sup>97</sup>

According to a Pew Research Center analysis of employment data from the Bureau of Labor Statistics from 2016, Americans ages sixty-five and older are working more than at any time since the beginning of the twenty-first century.<sup>98</sup> This suggests that the increase in charges filed under the ADEA with the EEOC is likely due, in part, to older Americans working longer than they have in recent history. In May 2016, 18.8% of Americans ages sixty-five and older reported

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91. 9 U.S.C. § 4.

92. Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool for Enforcing Arbitration Agreements and Arbitral Awards*, LEXISNEXIS (Apr. 17, 2014), <https://m.lw.com/thoughtLeadership/the-us-federal-arbitration-act> [http://perma.cc/46XF-4773].

93. 500 U.S. 20 (1991).

94. 532 U.S. 105 (2001).

95. See generally *Circuit City*, 532 U.S. 105; *Gilmer*, 500 U.S. 20. See also discussion *infra* Section II.A.3.

96. See *Age Discrimination in Employment Act (Charges Filed with EEOC) FY 1997–FY 2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> [http://perma.cc/ZN2V-5H29].

97. *Id.*

98. Drew DeSilver, *More Older Americans Are Working, and Working More, than They Used to*, PEW RES. CTR. (June 20, 2016), <http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/> [http://perma.cc/7XKQ-RKHY].



being employed full or part-time as compared to 12.8% in May 2000.<sup>99</sup> These statistics indicate that with more workers still vulnerable to age discrimination, it is even more important to clarify laws governing their treatment in the workplace.

## II. EMPLOYERS PUT IN A CHALLENGING POSITION WHEN CONDUCTING RIFs

Enacting RIF programs can present difficulties for employers, particularly regarding the creation of OWBPA-mandated age disclosures needed for exit incentive or other termination programs.<sup>100</sup> The purpose of age disclosures is to inform the selected employee of how many other employees, ages forty or older, were selected for termination. Despite the statutory requirements, the disclosure included in a release agreement can be ambiguous or even misleading.<sup>101</sup>

This Part outlines the effect of disclosures on the knowing and voluntary nature of a terminated employee's age waiver. It also highlights the issues courts have struggled with when attempting to clarify ambiguities of the OWBPA requirements. The diverging processes taken by courts when evaluating this standard can lead to differing outcomes, leaving both employees and employers vulnerable.

Section II.A delves into three principal ambiguities in the OWBPA: how to define job classification or organizational units, the substance of disclosure requirements, and which courts qualify as courts of competent jurisdiction. Section II.B discusses the influence the OWBPA has had over the various ways courts determine whether waivers of analogous anti-discrimination protections, such as those under Title VII or the ADA, are made knowingly and voluntarily. These sections intend to demonstrate how employers are given ambiguous guidance regarding a compliant RIF, placing them in a precarious position.

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99. *Id.*

100. *See* 29 U.S.C. § 626(f)(1)(H) (2012).

101. *See generally* Raczak v. Ameritech Corp., 103 F.3d 1257, 1263 (6th Cir. 1997); Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368, 371 (11th Cir. 1995); Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847 (D. Minn. 2007).

### A. Less-than-Clear Requirements Under the OWBPA

Though the OWBPA was passed about twenty-six years ago, courts are still construing the most detailed subpart of the waiver section, which regulates information disclosures in group terminations.<sup>102</sup>

#### 1. Job Classification or Organizational Units

In particular, the language in the waiver provision of § 626(f)(1)(H) tends to generate a considerable amount of confusion among both employers and employees.<sup>103</sup> This section specifies that when an employer requests a waiver as part of an exit incentive program or other employment termination program, the employer must inform the individual in writing of:

- (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.<sup>104</sup>

The exact scope and manner in which an employer defines the class or unit is unclear, as are specific disclosure requirements.

#### a. Defining “Job Classification or Organizational Unit”

To aid in defining the unit of individuals covered by a reduction program, the EEOC issued a regulation in 1998 to clarify the OWBPA’s required disclosure of the job titles and ages of all employees eligible or selected for the program, as well as the ages of all employees in the same job classification or organizational unit who are not eligible or selected for the program.<sup>105</sup> According to the regulation, a job classification or organizational unit is determined by examining the “decisional unit” at issue.<sup>106</sup> The term “decisional unit,” a term created by the EEOC, has been developed to reflect the in-scope, broad population for an exercise in which an employer selects and rules out individuals for participation.<sup>107</sup>

The EEOC regulation gives examples of decisional units ranging from an entire facility to a group of employees who report to the

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102. See, e.g., *Raczak*, 103 F.3d at 1259; *Griffin*, 62 F.3d at 371.

103. See *Raczak*, 103 F.3d at 1268.

104. 29 U.S.C. § 626(f)(1)(H)(i)–(ii).

105. *Id.* § 626(f)(1)(H)(ii).

106. 29 C.F.R. § 1625.22(f)(1)(iii)(C) (2017).

107. See 29 C.F.R. § 1625.22(f)(3).

same person.<sup>108</sup> It is clear from both the text of the statute and the EEOC regulation that employers have significant discretion to determine an organizational unit under § 626(f)(1)(H)(ii).<sup>109</sup> Commentators have emphasized that too much employer discretion to define the organizational unit could lead to inaccurate disclosure.<sup>110</sup> Likewise, concerns remain that ambiguous disclosure requirements make it difficult for terminated older workers to understand what information the disclosure is revealing. Often employees do not know, either in technical or in precise terms, whether they belong to a certain “class,” “unit,” or a “group” of employees.<sup>111</sup> Without this knowledge, it can be challenging for a terminated older worker to make sense of a disclosure, let alone to recognize if he or she has a valid ADEA claim.

*b. Conflicting Court Approaches*

Despite somewhat sparse case law on this issue, there are a few federal and state cases that illustrate the conflict among courts as to how to interpret § 626(f)(1)(H)(ii). This legal uncertainty has potentially serious consequences for employers: disclosing too much or too little job classification or organizational unit data in a release could lead to the release being invalidated under the OWBPA. Since there is little case law regarding how to define a decisional unit—and so few cases are brought by the EEOC to federal court relating to ADEA claims—employers are stuck operating in the dark.<sup>112</sup>

Prior to the EEOC’s 1998 regulation, the Eleventh Circuit adopted a broad conception of a “job classification or organizational unit” in *Griffin v. Kraft General Foods, Inc.*<sup>113</sup> by relying on the spirit of the ADEA, generally. In *Griffin*, the court addressed whether employees

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108. Compare 29 C.F.R. § 1625.22(f)(3)(iii)(A), (iv)(A) (providing an example of an entire facility being a decisional unit), with 29 C.F.R. § 1625.22(f)(3)(iii)(D), (iv)(D) (providing an example of decisional unit being employees reporting to a singular manager).

109. See Jon Hyman, *Defining the Proper Decisional Unit Is Key in Legitimacy of RIFs*, OHIO EMPLOYER’S L. BLOG (June 12, 2008), <http://www.ohioemployerlawblog.com/2008/06/defining-proper-decisional-unit-is-key.html> [<http://perma.cc/SC2G-9MY3>].

110. *Id.*; see also *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1263 (1997) (regarding organizational units, as this case was decided pre-1998 EEOC guidance, “. . . it is certainly possible that an employer will want to fiddle with the definition to mask the possible evidence for age discrimination”).

111. See generally *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 371 (11th Cir. 1995).

112. See *EEOC Litigation Statistics*, *supra* note 74.

113. 62 F.3d at 368.

in the same job classification or organizational unit could include employees outside a single facility.<sup>114</sup> A group of terminated employees from a closed Kraft Food plant sued under the ADEA on a theory that Kraft improperly defined the job classification or organizational unit as including the plant that remained open, leaving selected employees with little understanding of the waiver to which they were asked to consent.<sup>115</sup> In denying the defendant's motion for summary judgment, the Eleventh Circuit stated that an issue of fact existed as to whether Kraft under-disclosed the organizational unit by not including all individuals considered, including those at separate plants.<sup>116</sup> The court observed that neither job classification nor organizational unit was clearly defined in the OWBPA, and instead relied upon the broad remedial purpose of the ADEA to require the disclosure of the names of individuals considered in each of its plants.<sup>117</sup>

The 1998 EEOC guidance on the subject informed employers that regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue.<sup>118</sup> This guidance still generated confusion, as different courts have relied on various aspects of the EEOC guidance and the plain text of the ADEA when attempting to define a "decisional unit." For example, in *Pagliolo v. Guidant Corp.*,<sup>119</sup> the District Court of Minnesota relied on the requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant" when determining the proper decisional unit, and the court held that the resulting release was invalid because it was objectively confusing to the average employee eligible for the plan.<sup>120</sup> In this case, the Guidant Corporation, which at one time operated eighty-five different facilities throughout the United States, conducted a RIF as a result of a shortfall in revenues.<sup>121</sup> Guidant considered more than 8,700 employees to be part of the RIF and selection, itself, impacted around 700.<sup>122</sup> The company considered its "decisional unit" to be

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114. *Id.* at 372.

115. *Id.* at 371–72.

116. *Id.* at 373.

117. *Id.* at 372.

118. 29 C.F.R. § 1625.22(f)(1)(iii)(C) (2017).

119. 483 F. Supp. 2d 847 (D. Minn. 2007).

120. *Id.* at 858 (citing 29 U.S.C. § 626(f)(1)(H)(i) (2012)).

121. *Id.* at 851.

122. *Id.* at 852.

nearly all U.S.-based employees because “these employees were covered by the program and thus considered for termination in the RIF and for eligibility in the Severance Plan.”<sup>123</sup> The court held that by listing nearly all U.S.-based employees, the employer did not properly disclose the decisional unit because conveying the names of so many individuals likely confused the average individual eligible for such a program.<sup>124</sup> As a result, the release was invalid.<sup>125</sup>

The Northern District Court of Iowa took a different approach in *Behr v. AADG, Inc.*<sup>126</sup> and held that the defendant-employer’s classification of “decisional unit” was proper because it accurately reflected the group from which the employer selected employees to terminate.<sup>127</sup> The plaintiff argued that the defendant-employer improperly labeled its RIF decisional unit as the “indirect labor group” when in reality the decisional unit was much smaller.<sup>128</sup> The defendant contended that the decisional unit was indeed all 175 employees in the “indirect labor group,” because plan management was instructed to reduce headcount of only employees in that specific group, and the employees in the direct production group were ineligible.<sup>129</sup> The defendant identified fourteen employees to terminate, thirteen of whom were over forty.<sup>130</sup> Defendant mailed each terminated employee an Exhibit A, which listed the fourteen selected employees by age and title, and an Exhibit B, consisting of a list of the ages of the 161 employees not selected.<sup>131</sup> The court held that since the defendant only considered the indirect production employees, and that the plant employees clearly understood the terms of the “indirect labor group” to mean *not* the direct production employees, the decisional unit was proper.<sup>132</sup>

All three of these cases rely on different aspects of the OWBPA and the ADEA when determining job classification or organizational unit. The appropriateness of a job classification or organizational unit can vary based on the rationale on which a court relies: whether it is in the spirit of the ADEA, if a decisional unit is conveyed in a manner

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123. *Id.* at 857–58.

124. *Id.* at 858.

125. *Id.*

126. No. 14-CV-3075-CJW, 2016 WL 4119692 (N.D. Iowa July 29, 2016).

127. *Id.* at \*15.

128. *Id.* at \*2.

129. *Id.* at \*14.

130. *Id.* at \*2.

131. *Id.*

132. *Id.* at \*14.

understood by the average participant, or how RIF selections were made. Consistency in this area would provide clarity.

## 2. Disclosure Requirements

The substantive elements required in an age disclosure are similarly unclear, despite EEOC regulations interpreting the text of the OWBPA. The EEOC regulations include the following salient provisions:

Information regarding ages should be broken down by age of those eligible and selected as well as ages of those not eligible or selected. Age bands broader than 1 year are not appropriate.

If the RIF includes employees terminated over various levels within the organization or with varying job titles, that information must be broken down by grade level or some other type of subcategory.

If the disclosures combine information regarding voluntary and involuntary terminations, the employer must make clear which employees were part of which program.

If selected employees are from a subset of a decisional unit, the employer still must disclose the entire decisional unit (i.e. if a 10% RIF is done in the Accounting Department under the direction that the bottom 1/3 will be terminated, the employer must still disclose information for all of the employees within that department).<sup>133</sup>

In *Behr*, the plaintiffs contended that the Separation Agreement did not contain the eligibility factors that the employer considered when making RIF selections, in violation of § 626(f)(1)(A) and § 626(f)(1)(H)(i), which requires disclosure of “eligibility factors for such program.”<sup>134</sup> Defendant’s director of human resources testified that those selected in the RIF were selected for “many different reasons,” none of which were listed in the waiver.<sup>135</sup> The district court held that it is sufficient for an employer to identify the group eligible for termination and that the employer is not required to identify the specific factors guiding which eligible employees to terminate based on the model waiver included in the regulation.<sup>136</sup> According to the regulation, an employer fulfills the eligibility factor by simply stating that “[a]ll persons in the [decisional unit] are eligible

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133. See 29 C.F.R. § 1625.22(f)(4)(i)–(vii) (2017).

134. *Behr*, 2016 WL 4119692, at \*4 (stating that if a waiver is in connection with an exit incentive program, the employer must disclose “any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program,” respectively).

135. *Id.* at \*12.

136. *Id.* at \*14.

for the program.”<sup>137</sup> The regulation seems to directly contradict a requirement of the statutory text, which understandably leads to disclosure requirement confusion.

The *Behr* decision held that a disclosure must be meaningful to be valid, and that merely adhering to the actual text of the OWBPA will not protect an employer from a lawsuit.<sup>138</sup> Further, in *Behr*, the defendant-employer believed that it was not required to disclose information related to employees not selected for the RIF because “job titles” is missing from the second part of the following OWBPA provision: “(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same classification or organizational unit who are not eligible or selected for the program.”<sup>139</sup> The court held that although an employer did not have to provide the job titles of every employee not selected, it had to provide enough data to inform the employee of comparative information in an understandable manner.<sup>140</sup> The court went on to explain that the primary purpose of a disclosure was to inform the terminated employee of possible age discrimination claims, and the data provided by the employer in this case was not meaningful.<sup>141</sup>

As evidenced, regulations that contradict statutory text create judicial uncertainty in whether to adhere to statutory text, leaving employers vulnerable to ADEA suits based on this confusion.

### 3. “Court of Competent Jurisdiction”

Courts disagree as to which forums constitute a “court of competent jurisdiction” in which an ADEA case may be heard. The text of the OWBPA requires that an employer prove the validity of a waiver in a “court of competent jurisdiction,” but provides no definition for this crucial term.<sup>142</sup> Further complicating the issue, a provision passed as part of the 1978 amendment to the ADEA states that “any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act . . . .”<sup>143</sup> Without a clear definition of a “court of competent jurisdiction,” employers and employees alike face considerable confusion as, oftentimes, forum can affect the

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137. 29 C.F.R. § 1625.22(f)(4)(vii)(B).

138. See generally *Behr*, 2016 WL 4119692, at \*16.

139. See *id.* at \*9–10 (quoting 29 U.S.C. § 626(f)(1)(H)(ii) (2012)).

140. *Id.* at \*16.

141. *Id.*

142. 29 U.S.C. § 626(f)(3).

143. *Id.* § 626(c)(1).

outcome of a case.<sup>144</sup> The Supreme Court addressed this confusion in *Gilmer* and found that Congress did not intend to preclude a waiver of judicial access based on the language of the 1978 amendment of § 626(c)(1).<sup>145</sup> As a result, an ADEA claim can be subject to compulsory arbitration and heard by an arbitrator rather than in court or by a judge. Despite this ruling, lower courts have found some exceptions to this general rule.<sup>146</sup>

When presented with a similar issue, the United States District Court for the District of Minnesota in *McLeod v. General Mills, Inc.*<sup>147</sup> ascertained congressional intent based on the language of another provision of the OWBPA, § 626(f)(3), which states that “the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary.”<sup>148</sup> The *McLeod* court held that the plain language of the OWBPA requires ADEA waiver cases to be tried in court, not through arbitration, reasoning that because *Gilmer* rested on § 626(c)(1), there was room within § 626(f)(3) to hold otherwise.<sup>149</sup> First, the plain language of § 626(f)(3)—by using the term “shall” in particular—was very different from § 626(c)(1) (which uses the word “may”), and a court must presume that Congress deliberately chose to include “shall” in some provisions and not others.<sup>150</sup> Second, under the plain language of the statute, a “court of competent jurisdiction” must refer to a court, not—as General Mills tried to argue—an arbitral forum.<sup>151</sup>

Thus, *McLeod* indicates that what constitutes a “court of competent jurisdiction” is unresolved, especially where a case involves multiple ADEA claims—waiver and non-waiver. The *McLeod* court held, however, that its conclusion was limited by the “narrow circumstances presented in this case: a dispute over the validity of a waiver of substantive claims under the OWBPA’s waiver requirements found in [§] 626(f)(1).”<sup>152</sup> This ambiguity creates confusion for both employers and employees regarding where an ADEA case can be heard and should be resolved.

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144. See *infra* Section III.B.3.

145. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1990).

146. Compare *Gilmer*, 500 U.S. at 26, with *McLeod v. Gen. Mills, Inc.*, 140 F. Supp. 3d 843, 855 (D. Minn. 2015).

147. 140 F. Supp. 3d 843.

148. *Id.* at 851.

149. *Id.* at 853–54.

150. *Id.* at 855.

151. *Id.*

152. *Id.* at 855–56.



### B. Furthering the Confusion: The Knowing and Voluntary Standard for Other Anti-Discrimination Statutes

While the pre-OWBPA approaches to determining the knowing and voluntary standard informed the statutory floor of the OWBPA requirements, these approaches nevertheless remain in use by some courts across the country when determining whether other anti-discrimination protections are knowingly and voluntarily waived by terminated employees. Without a clear knowing and voluntary standard, employees may not be as aware of the rights they are waiving when signing a release agreement as they are when waiving age-related claims. Further, employers are left guessing as to how they will effectuate a compliant RIF program. With clearer standards comes increased predictability for both employees and employers.

Generally, a waiver of discrimination claims is valid when the employee knowingly and voluntarily consents to the waiver.<sup>153</sup> For waivers under the ADEA, as has been described at length above, courts look to the statutory provisions outlined in the OWBPA.<sup>154</sup> Under Title VII and other anti-discrimination statutes, however, the validity of a knowing and voluntary waiver is governed solely by case law.<sup>155</sup> When evaluating a waiver of claims arising under Title VII or the ADA, for example, some courts rely on traditional contract principles to determine whether a waiver is knowing and voluntary, but most look to the totality of the circumstances.<sup>156</sup> The issue of not having a clearly articulated knowing and voluntary standard for the waiver of non-age-related claims is well described by Professor Daniel P. O’Gorman:

Not only are the circuits in disarray, each of the tests applied by them is in disarray. Courts applying the totality of the circumstances test, a test that focuses more on the releasing person’s state of mind than a strict contract law test, often apply contract rules, which are

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153. See UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47, at pt. III.

154. See, e.g., *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) (stating “the [OWBPA] creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods”); *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 117 (1st Cir. 1998) (noting that Congress enacted the OWBPA to resolve whether the “totality of the circumstances” or “ordinary contract principles” was proper to determine “knowing and voluntary” by amending the ADEA to mandate that an ADEA waiver contain certain minimum information).

155. See UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47, at pt. III.

156. See *id.*

generally objective rules focusing on what a person says and does, not what he or she thinks. Courts applying the contract law test often look at factors used under the totality of the circumstances test, despite such factors usually being irrelevant under contract law principles.<sup>157</sup>

The OWBPA has had a substantial impact on how waivers of Title VII, the ADA, and other non-age discrimination claims are being analyzed by courts,<sup>158</sup> though there is currently no official rule regarding whether courts should apply the “totality of the circumstances” approach or the general contract law approach when determining their validity.<sup>159</sup> In July of 2009, the EEOC released a guidance document summarizing case law in this area, concluding that courts determine whether a waiver of rights under Title VII or the ADA was knowing and voluntary by looking to factors nearly identical to those in the OWBPA.<sup>160</sup> This document is indicative of the OWBPA’s reach beyond age-related protections and perhaps foreshadows the future of waiver provision law for other anti-discrimination statutes.<sup>161</sup> This influence only reinforces the need for clarity and predictability.

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157. Daniel P. O’Gorman, *A State of Disarray: The “Knowing and Voluntary” Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 78 (2005). O’Gorman further explained that in the context of a Title VII waiver, the central issue is whether a Title VII release should be viewed as a waiver of a fundamental or contractual right. *Id.* If Title VII is determined to be a fundamental right, a more subjective test should be applied, such as the “actual intent” theory that focuses on whether the parties had a subjective meeting of the minds to determine whether a contract was formed. *Id.* If Title VII is determined to be a contractual right, a more contractual or objective test would be applied, focusing on what the parties said and did, not what they thought. *Id.* The objective theory has prevailed. *Id.*

158. See generally UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47.

159. See O’Gorman, *supra* note 157, at 74–75.

160. UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47, at pt. III.1 (“These courts consider the following circumstances and conditions under which the waiver was signed: whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience; whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer; whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it; whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so; whether the employee had any input in negotiating the terms of the agreement; and whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.”).

161. See *infra* Section III.B.2.

### III. PROPOSING A NEW KNOWING AND VOLUNTARY STANDARD

This Part both recognizes the successes of the OWBPA and proposes new EEOC regulations to bring further clarity to the OWBPA. Additionally, it proposes that the formal structure of the OWBPA be extended to other anti-discrimination statutes to ensure that employees receive all material information possible before waiving any discrimination claim in the case of a layoff or incentivized termination.

The OWBPA has not only had a powerful impact on older workers, attributable in part to its relatively straightforward structure and clarity, but it also has improved protections for any employee subject to RIFs or other similar programs.<sup>162</sup> According to a partner at a prominent plaintiffs' law firm, the OWBPA has even had a positive ripple effect on those under age forty due to its transformation of the consideration periods and revocation rights for all employees signing these agreements, regardless of age.<sup>163</sup> The partner explained that because employers must abide by the waiver requirements in the OWBPA during a group termination, some tend to follow the same OWBPA standard for all employees involved in that particular termination for simplicity's sake.<sup>164</sup> For example, employees receive the same time period in which to return their waiver and are encouraged to speak to an attorney before signing. Therefore, those under age forty receive some of the benefits of OWBPA in the group layoff context as well but rarely, if ever, receive specific disclosures.<sup>165</sup>

#### A. Making the OWBPA Even More Effective: Clarifying Salient Waiver Provisions

The OWBPA's relative clarity is one of the reasons for its success.<sup>166</sup> By providing employers with disclosure responsibilities, compliance appears to be within arm's reach. However, this is rarely the case, and further clarity in a number of salient waiver provisions could make this statute even more effective, an important goal given its ever-growing importance and influence.

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162. See Telephone Interview with Partner, Unnamed Plaintiffs' Law Firm (Oct. 25, 2016) (notes on file with author).

163. *Id.*

164. *Id.*

165. *Id.*

166. See generally UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47.

1. *Increasing Mandated Disclosure in RIF Exhibits*

The below proposal is intended to remove the secrecy of the RIF selection process, keep employees informed regarding the program, and, as a result, encourage reduction of discrimination suits.

Defining “decisional unit” in a RIF exercise within a large corporation has proven challenging, and, as a result, further EEOC regulations should be issued to alleviate the confusion.<sup>167</sup> Currently, the EEOC mandates disclosure of the job titles and ages of those in the “decisional unit.”<sup>168</sup> This instruction provides room for employers to manipulate who makes up a “decisional unit,” which could lead to inaccurate disclosure and the ability to lawfully conceal potential age discrimination.<sup>169</sup> The EEOC should issue guidance aimed at tying the definition of “job classification and organizational unit” directly to management structure by mandating disclosure of not just job title and age, but also of corporate organizational data.

First, the issue of defining “job classification and organizational unit” is an understandably difficult one because RIF selections can occur in a number of ways: employees can be compared against each other on a subunit level or on a larger, departmental level. For example, fictional Company X, as outlined in Figure 1, contains the Legal and Compliance Super Department, which can be further broken down into the Legal Department and the Compliance Department. There are several subunits within the Legal Department, such as the employment law group, the tax group, and the litigation group.

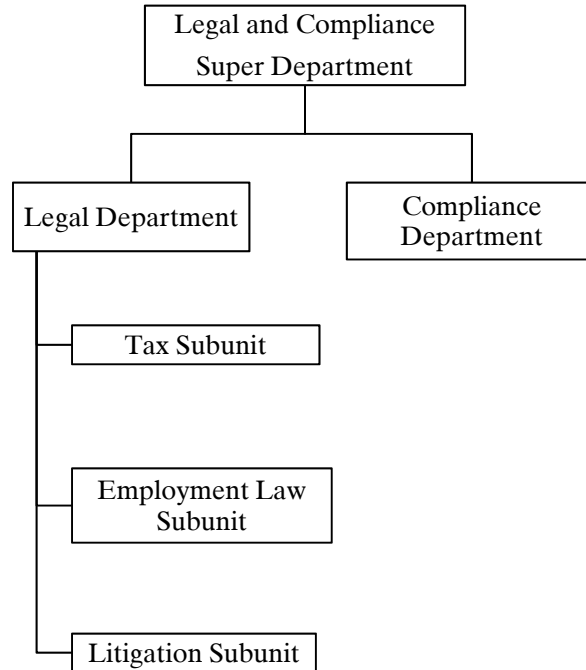
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167. *See generally id.* at pt. IV.

168. 29 C.F.R. § 1625.22(f)(4)(iii) (2017) (“In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.”).

169. *See* Raczak v. Ameritech Corp., 103 F.3d 1257, 1263 (6th Cir. 1997); Hyman, *supra* note 109.

Figure 1. Fictional Company *X* Organizational Chart Broken down by Super Department, Department, and Subunit



If a ten-percent RIF was mandated on Company *X*, which has over 50,000 employees in the United States, determining the decisional unit to be all 50,000 employees could seem preposterous. However, that massive disclosure could technically be considered a decisional unit because it is the portion of the employer’s organizational structure considered as part of the RIF.<sup>170</sup> Employers are unlikely to disclose that much information and courts have ruled that doing so might actually invalidate the release entirely.<sup>171</sup> The ambiguity of the “decisional unit” definition under current regulations allows

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170. 29 C.F.R. § 1625.22(f)(1)(iv)(3)(i)(B) (“A ‘decisional unit’ is that portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term ‘decisional unit’ has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.”); *see also* *Behr v. AADG, Inc.*, No. 14-CV-3075-CJW, 2016 WL 4119692, at \*15 (N.D. Iowa July 29, 2016) (holding that regardless of size, the EEOC regulation that defined decisional unit as the group from which the employer chose the persons affected was proper).

171. *See Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847, 859 (D. Minn. 2007).

companies to disclose a decisional unit that selectively reveals the most favorable statistical data for the employer, possibly hiding disparate impact red flags.<sup>172</sup>

A clearer way to define “decisional unit” would be to uncover the exact senior management directive for the RIF, and to tie managerial structure to the definition of “decisional unit.” This proposal is exactly in line with the 1998 EEOC Regulation on the issue,<sup>173</sup> but specifically emphasizes the decision-making process in determining the appropriate unit. The purpose of such an emphasis is to provide consistency. Anchoring all organizational unit composition to management decision-making is the most clear, common indicator of working groups across workplaces.

To illustrate, consider a common RIF scenario in which the head of the Legal and Compliance Super Department within fictional Company *X* assigned his direct reports (the heads of the Legal Department and the Compliance Department) the responsibility of determining who to select as part of the ten-percent RIF. Further suppose that the head of the Legal Department then delegated that responsibility to the heads of the Tax, Employment Law, and Litigation subunits and asked that they recommend specific individuals to be terminated, subject to his oversight and ultimate sign-off. The individuals within the Legal Department should be considered the “decisional unit” because the head of the Legal Department ultimately signed off on his direct report’s selections.

Defining “decisional unit” based on which manager ultimately signed-off on the selected individuals would create a more clear-cut rule. Functionally speaking, a manager who has ultimate authority needs to have a working knowledge of who is selected and why, which in large companies simply could not be a CEO or Super Department head. This would help preclude problematic over-disclosures because a company could not persuasively argue that one individual was responsible for determining all of the terminations in a large-scale RIF program. This would also avoid under-disclosure issues, because ultimate sign-off would not be done at a highly localized level as lower-level employees are generally not entrusted with that authority.

Guidance that mandates disclosure of not just job title and age, but also organizational-related data, would further help clarify “decisional unit” for the selected employees. Selected employees

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172. *See generally Raczak*, 103 F.3d at 1263.

173. 29 C.F.R. § 1625.22(f)(1)(iv)(3)(i)(B) (1998) (“When identifying the scope of the ‘class, unit, or group,’ and ‘job classification or organizational unit,’ an employer should consider its organizational structure and decision-making process.”).

would receive enough information to be able to essentially re-create the organizational structure of which they were members. This re-creation allows the average employee to understand the applicable “decisional unit” without confusion. If an employee in the Employment Law subunit of Company *X* was selected, for example, the disclosure would contain not only job title and age of those in the “decisional unit,” but also subunit data and department data. A plaintiff’s attorney could then evaluate if there was age discrimination at the subunit or department level, which is impossible to determine in a disclosure issued pursuant to current EEOC guidance.

### 2. Clarifying “Eligibility Factors”

EEOC regulations should be issued to refine the definition of “eligibility factors” to include what criteria, such as job performance, experience, or seniority, an employer relied on in determining RIF selection.<sup>174</sup> The EEOC regulations currently only include the generic statement, “[a]ll persons in the Construction Division are eligible for the program” as an example of an acceptable eligibility factor disclosure, which gives employees little actual knowledge about selection criteria and could enable employers to easily disguise discriminatory motives.<sup>175</sup> Employers may be concealing important information from those who are receiving these waivers. By redefining “eligibility factors” to include the factors that the employer considered when selecting RIF participants, employees selected would get important information that would inform their knowledge of the validity of an age discrimination claim under the ADEA.

### 3. Keeping Age Claims in a Court of Law

Lastly, an ADEA waiver case should be handled in a court of law, not by an arbitrator. Thus, this Note proposes that a court should focus on the plain language of § 626(f)(3) and not look to the language of § 626(c)(1) as the *Gilmer* Court did.<sup>176</sup> This proposal is consistent with literature that suggests that employees have fared much worse in arbitration of statutory employment claims than in judicially-managed claims.<sup>177</sup> It is also consistent with the passage of

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174. See *Pagliolo*, 483 F. Supp. 2d at 860–61.

175. See generally *Behr v. AADG, Inc.*, No. 14-CV-3075-CJW, 2016 WL 4119692, at \*14 (N.D. Iowa July 29, 2016).

176. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23–24 (1990).

177. See Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL’Y J. 405, 412–13 (2007).

the ADEA, generally, as Congress has made clear through that statute that age waivers deserve enhanced protection;<sup>178</sup> thus, it follows that such litigation should be handled in this manner as a result of many policy considerations, elaborated on below.

In addition to its role in reducing valuable case law that could clarify the OWBPA, arbitration of ADEA claims can be problematic for three additional policy reasons, all of which harm employee protections. The issues of the repeat player bias, employee win rates, and employee recovery figures all point in the direction of arbitration not being a “court of competent jurisdiction” for purposes of litigating age-related claims.<sup>179</sup> The repeat player bias is based on the concept that a party that participates in a conflict resolution process multiple times will have an advantage over a party that participates only once.<sup>180</sup> With regard to employment arbitration, there is concern that employers will have an advantage as repeat players because they will likely participate in multiple arbitration cases, whereas the employees will likely participate in only one.<sup>181</sup> “Given that employment arbitrators rely on being selected to decide cases for their livelihood, the danger is that arbitrators will have a bias in favor of the repeat player employer in hope of being selected by the employer to hear future cases.”<sup>182</sup> In a study conducted by Lisa Bingham in the 1990s, “employers who participated in multiple arbitration cases were significantly more likely to win their case than employers who only participated in a single case.”<sup>183</sup> For the repeat players, the employee win rate was 23.3% and for the non-repeat players, the employee win rate was 67%.<sup>184</sup> Though evidence indicating that such a bias exists is limited, it does suggest that further investigation into these discrepancies is warranted.<sup>185</sup>

In a 2011 study comparing overall trial outcomes in mandatory arbitration and litigation conducted by Professor Alexander Colvin, from the Industrial and Labor Relations School at Cornell University, and Professor Katherine Stone, from the UCLA School of Law, employee win rates are much lower in mandatory arbitration than

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178. *See* S. REP. NO. 101-79 at 968 (1989).

179. *See generally* Colvin, *supra* note 177, at 406.

180. *See id.* at 427.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.* at 428–29.



they are in either federal or state court.<sup>186</sup> The study found that employees in mandatory arbitration win 21.4% of the time, compared to 36.4% in federal court and 57% in state courts.<sup>187</sup> This conclusion is particularly problematic in the face of the Supreme Court's rationale for the holding in *Gilmer*, that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>188</sup> That sentiment seems to not necessarily be true given that the outcome of a litigated right will likely be different if argued in one forum over the other.<sup>189</sup> The purpose of the ADEA, after all, is to prohibit age discrimination in employment by protecting the rights of older workers.<sup>190</sup> Without consistency in outcome, the purpose of the Act is thwarted.

Lastly, the issue of damages favors keeping ADEA claims out of arbitration.<sup>191</sup> According to Colvin and Stone's study, the differences in damages awarded in arbitration versus federal or state courts are significant.<sup>192</sup> A typical mandatory arbitration award is only twenty-one percent of the median award in the federal courts and forty-three percent of the median award in the state courts.<sup>193</sup> In order to ensure that the ADEA is fulfilling its purpose, employers must be faced with some degree of discipline should they not comply with the statute. Bringing ADEA claims to arbitration weakens the deterrent effect of the Act because employee awards are significantly lower than they would have been if brought to court.

Genuine concern exists around the neutrality of the arbitration forum. As a result, such claims should be litigated in the most neutral legal forum. This is consistent with Congress' desire to hold age-related waiver claims to the higher knowing and voluntary standard.<sup>194</sup>

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186. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS*, ECON. POL'Y INST. 3 (2015).

187. *Id.* at 20.

188. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1990).

189. *See Colvin*, *supra* note 177, at 420–21.

190. 29 U.S.C. § 621(b) (2012) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

191. *See generally Colvin*, *supra* note 177, at 420–24.

192. *See Stone & Colvin*, *supra* note 186, at 21.

193. *See id.* at 20.

194. *See S. REP. NO. 101-79*, at 968 (1989).

## B. The Future of the Knowing and Voluntary Standard

This Note proposes that Congress adopt an OWBPA-like waiver rule for other anti-discrimination statutes, such as Title VII and the ADA, to resolve the issue of how the knowing and voluntary standard should be interpreted when waiving these rights.<sup>195</sup> The following section will specifically address only Title VII and the ADA; this Note, however, does not propose that the change stops there. Instead, this Note uses these two statutes as a starting point for what could be an evolution in how courts evaluate the knowing and voluntary standard for waivers. This Note highlights Title VII and the ADA due to the volume of individuals that the statutes protect and the likely probability that employers will have this information available about their workforces to include in a disclosure.

Because it would be preposterous for an employer to offer a race or sex-based exit incentive program, this Note proposes that in the context of large-scale RIF programs, § 626(f)(1) should become standard text required in all anti-discrimination statutes.<sup>196</sup> Professor Cynthia Estlund, from New York University School of Law, introduced a similar theory that the OWBPA should serve as a “useful legal template for regulating the waiver of other existing employment claims,” but stated so merely in passing.<sup>197</sup>

As mentioned in Part II, “totality of the circumstances” factors were the basis of the disclosure factors enumerated under the OWBPA.<sup>198</sup> Both age and non-age discrimination claims were evaluated under similar factors prior to the passage of the OWBPA, such as whether the employee who released his claims was represented by an attorney, whether the settlement was in writing, and whether the language in the settlement was clear to the employee.<sup>199</sup> Recognizing that the origin of many of the OWBPA

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195. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 442 (2006) (“[I]n practice, the OWBPA is serving as a broader template: because ADEA claims may be included in the single broad waiver that employers often seek from employees at the time of severance, employers are well advised to, and often do, follow the relatively stringent standard of the OWBPA.”).

196. Under this proposal, 29 U.S.C. § 626(f)(1)(H) would read: “if a waiver is requested in connection with *an employment termination program* offered . . .” [emphasis added].

197. See Estlund, *supra* note 195, at 442.

198. See UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47, at pt. III-IV.

199. See *DiMartino v. City of Hartford*, 636 F. Supp. 1241, 1247 (D. Conn. 1986).

factors came from the “totality of the circumstances” test suggests that enumerating the waiver requirements of other anti-discrimination statutes that also rely on the “totality of circumstances” test for enforcement would be logical.<sup>200</sup>

One critical aspect of the OWBPA that deviates from the typical “totality of the circumstances” analysis is the use of disclosures.<sup>201</sup> Age disclosures under the ADEA should be modified to fit waivers covering other claims of discrimination to ensure that terminated employees have enough information to adequately determine if they would like to waive those rights. For example, under Title VII, a requirement mandating the disclosure of gender, race, and ethnicity of those terminated would be useful. The definition of “decisional unit” would remain the same as the one this Note proposes above, but instead of simply disclosing the ages and groups within which the employee was selected, other demographic information would be included. This would extend to the ADA as well. If an employer would like a terminated employee to waive any ADA claim, the employer would be required to include a disclosure of those who fall under the ADA’s protection within the “decisional unit” from which the terminated employee was selected. The knowing and voluntary standard would, therefore, be elevated under this proposed disclosure system, just like it has under the OWBPA. This proposal places a higher burden on employers to strongly consider and monitor the make-up of their workforces, because such information will be disclosed in a layoff.

To put this portion of the proposal in context with the proposal for a more robust disclosure, Figure 2 outlines a sample excerpt of an ideal release agreement disclosure based on the Company X example. Not only is age disclosed in the release exhibit, but sex, race, and ethnicity are as well.

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200. *See generally id.*

201. *See generally* UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS, *supra* note 47.

Figure 2. Fictional Company X Release Agreement Disclosure

<b>Release Agreement Disclosure</b> <i>Company X</i>							
Scope of RIF: <i>10 firm-wide reduction</i> Selection criteria: <i>low-performers</i> Decisional unit: <i>department-level</i>							
<b>Selected/ Not Selected</b>	<b>Job Title</b>	<b>Age</b>	<b>Sex</b>	<b>Race/ethnicity</b>	<b>Disability</b>	<b>Department</b>	<b>Subunit</b>
Selected	Attorney	44	Female	Puerto Rican	No	Legal	Tax
Not Selected	Attorney	48	Female	Asian	Yes	Legal	Tax
Not Selected	Paralegal	26	Male	White	No	Legal	Tax
Selected	Attorney	50	Male	African American	Yes	Legal	Employment
Selected	Paralegal	35	Female	Native Hawaiian	Yes	Legal	Litigation
Not Selected	Attorney	42	Female	White	Yes	Legal	Litigation
...	...	...	...	...	...	...	...

\*... signifies that there would be further disclosures (the above is just a snapshot of a few of the individuals in the decisional unit)

Under this proposal, Title VII disclosure would be limited to organizations required by the EEOC to file EEO-1 reports since it would be difficult, from an information-gathering perspective, for smaller organizations to mandate disclosure of race, ethnicity, and gender of its employees.<sup>202</sup> All companies that meet the following criteria are required to file the EEO-1 report annually: (1) subject to Title VII with 100 or more employees; (2) subject to Title VII with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; or (3) federal government prime contracts or first-tier subcontractors with fifty or more employees and a prime contractor or first-tier subcontract amount to \$50,000 or more.<sup>203</sup> Under this proposal, organizations already required to produce EEO-1 reports would be obligated, in the context of a RIF,

202. See *EEO-1 Frequently Asked Questions and Answers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eeo1survey/faq.cfm#About> [<http://perma.cc/V2L5-2GWV>] ("The EEO-1 Report is a compliance survey mandated by federal statute and regulations requiring company employment data to be categorized by race/ethnicity, gender and job category.")

203. *Id.*

to disclose gender, race, and ethnicity information in a release agreement exhibit.

Regarding ADA disclosures, instead of sharing details about an employee's specific disability, this Note proposes including whether or not one exists. This Note recognizes the importance of anonymity, especially when it comes to disability information. However, a simple *yes* or *no* in the "Disability" column of the example disclosure above will continue to protect employee privacy.

One can argue that this proposal seems lofty, especially from a monetary perspective because employers would have to bear the cost of running robust data analytics on RIF decisional units as well as bear the risk of having to disclose such information. Though this may be the case, this deeper analysis will force employers to choose who they select for termination more carefully, and perhaps who they hire into their organizations as well. Moreover, this proposal may also save employers time and money in the long run by eliminating frivolous discrimination suits. With the data required to be disclosed under this proposal, both the employer and employee would better know where they stood regarding the merits of any lawsuit. Employers and terminated employees would spend less time in discovery and more time evaluating the merits of a case. Thus, this proposal could be effective on multiple fronts.

### CONCLUSION

The OWBPA has been successful because it has disciplined employers to operate under a system of waiver disclosures with harsh consequences of non-compliance while also providing employees with information they need to determine whether an age waiver was made knowingly and voluntarily. Nevertheless, there is still room for clarity that could make the OWBPA even more effective. With an increasing number of older employees in the workforce, the time to act is now. The most pressing issues involve the currently malleable definition of "decisional unit," ambiguous disclosure requirements, and whether to allow ADEA claims to be arbitrated. Furthermore, the OWBPA's codification of knowing and voluntary should be extended to other anti-discrimination laws such as Title VII and the ADA. The OWBPA could and should serve as a model for what it means for an employee to waive his rights knowingly and voluntarily.