Webcast: Practical and Legal Guidance for Drafting Enforceable Release Agreements
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Presented by ACC's Employment & Labor Law Committee and Jackson Lewis LLP
Presenters: Richard I. Greenberg, Partner, Jackson Lewis LLP ; Matthew A. Aufman, Senior Counsel, Welch Foods Inc

Moderator: David A. Hitchens, Vice President—Human Resources Counsel, LandAmerica Financial Group, Inc.

ASSOCIATION OF CORPORATION COUNSEL

Moderator: David A. Hitchens
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12:00 p.m. CT

Operator: Just a reminder - today's conference is being recorded.

Please go ahead, David.

(David Hitchens): Good afternoon, everyone, or good morning, depending on where you are today. My name is (David Hitchens), and I am a Subcommittee Chairman on the ACC's Employment Labor Law committee. I am the Vice President and Human Resources Counsel at LandAmerica Financial Group in Richmond Virginia. And I am delighted to be the moderator for today's Webcast.

A couple of items relating to logistics, and then I'll have the pleasure of introducing today's speakers. The title for today's Webcast is "Practical and Legal Guidance for Drafting Enforceable Release

Agreements". It's a very timely topic in an ever-changing area of law, and one that touches all in-house counsel, not just labor and employment practitioners.

You are able to ask your questions online. If you have your screen open, you should have, at the bottom left-hand corner, a box that says, "Questions". Please type your questions in there and quick send. You can enlarge that box if you need to. I'll see your questions as they are submitted, and I'll try to get them to the speakers during the presentation today. However, I know there is quite a bit to cover today. So please understand that, depending on the number of questions submitted, we may not have time to get to all of them today. However, the presenters have agreed to provide answers to your questions, which will be posted after the Webcast with the archived Webcast on the committee Web site.

Another matter, which is very important to the speakers, and to the ACC and the Employment Labor Law Committee, is the evaluation form, which you are asked to complete. In the middle of the left-hand side of your screen you should see a link to Webcast evaluation. We'd very much appreciate your taking a few moments to complete that evaluation form at the end of today's presentation. They are reviewed and used to continually improve these Webcasts so they can remain a superior resource available from the ACC.

Please note that this Webcast is being recorded, and will be made available on the ACC Web site. If you have technical difficulties during the session, please e-mail accwebcast@commpartners.com. Please note that there are two m's in commpartners.

That being said, allow me to introduce our two presenters and we'll go from there. I'm delighted to have both of them speak on today's topic, and I'm sure you'll agree as we proceed.

(Matt Hoffman) is Senior Counsel at Welch's, where he has a general practice including employment and employee benefits, international supply chain and sales and marketing matters. Prior to joining Welch's, Matt was an Associate in the Employee Benefit's group of a major law firm.

Additionally, we have Rich Greenberg, Partner at Jackson Lewis's office in New York. Rich regularly advises clients on compliance with the myriad federal and state employment laws, including the SMLA, the FLSA, ADA, ATEA and Warn, as well as new legal developments impacting labor employment policies and practices.

We're delighted to have both Matt and Rich here today. And again, I recommend that you take a listen and hear what both of them have to say. And with that, I will turn it over to Matt.

(Matt Hoffman): Hello everyone. I'm going to start by talking about the statutory framework for these releases, particularly under the age discrimination laws. The OWVPA amended the Age Discrimination and Employment Act to require certain minimum standards for releases of liability in connection with severance agreements by employees who are age 40 or over. And if you don't comply with these, then you don't have a valid waver of age discrimination claims that the employee might have.

Now the first is group termination language and exhibits. Let me back up for a moment. Really, the ADA separates terminations into two universes, group terminations and individual terminations. And there are different requirements for the two different sets.

And for group terminations the requirements are here. Let's go through them. First you need to provide specific language and you need to give exhibits showing these are the people who were let go. This is how old they were. And I believe there's titles and some other requirements there. You have to expressly - and this is going to be true for both group and individual terminations - you need to expressly list ADEA as one of the clause under which the employee is waiving claims. You need to give the employee 45 days to consider whether or not to sign the release. And once you receive the signed release, there has to be a seven-day revocation period. And you must advise the employee to seek counsel prior to signing the agreement.

For an individual, the requirements are a little bit less onerous. Again you have to expressly list the Age Discrimination Employment Act as one of the laws under which the employee is awaiting potential claims. The consideration period, instead of 45 days, may be as short as 21 days. You still have to have the seven-day revocation period. And you still need to advise the employee to consult with counsel.

If you're terminating an employee who is under 40, then the Age Discrimination and Employment Act isn't relevant, because that only protects employees who are age 40 and over. And BOWBPA amendments, by extension, don't apply either.

So what does this mean? It means that you don't need your group termination language and the related exhibits even if it's part of a larger reduction in force. You just don't have to provide that information. There's not particular reason to list the Age Discrimination and Employment Act among the statutes that you're waving rights under. Although, I mean if you use a form agreement, as we often do, it probably ends up in there.

There's no reason to provide that seven-day revocation period. And you don't have to give them 21 days or 45 days to think about it. And you're not specifically required to tell them to consult an attorney. But that's a good idea in any event. And one of the reasons that's a good idea is that any release has to be knowing and voluntary. That's a specific requirement under the ADEA. But I think that's true for any release in the employment context and otherwise. And so, advising the employee to consult with an attorney always is helpful in establishing that the release was given knowingly and voluntarily. And giving them some time to consider it, I think further supports the idea that you have a knowing and voluntary release and not something that someone is going to be able to weasel out of later.

Second, and this is a tricky one - the waiver has to be written so it is understandable to the reader. And you're expected to take into account the education and professional background of the employee. And so that can be rather challenging with an employee who's not educated, who doesn't speak English as a first language, et cetera. And as I said before, I think it's always prudent to suggest that the employee consult with an attorney before signing the release, and to give them some time to do that.

Now moving on from the legal requirements to what you ought to be thinking about when you draft an agreement. Who are the parties to the agreement? This is probably

straightforward in most cases, but you can have some situations where someone might be providing services to two or more affiliate companies. You'd want them both to be covered. You want to make sure that your relief language covers not only the company itself, but its employees. I think Rich is going speak about that a little bit later.

The fine terms - you've got to be careful with the fine terms, again going back to the idea that it needs to be understandable to the employee. You probably need to be conservative in the way you use define terms. And the way that they are defined, if you do use them at all, would have to be very intuitive.

Date of execution - the date of execution - I think that you want to make sure that you're probably tracking that revocation period where that applies. And so that's something that you need to keep track of. I know that we routinely do agreements that are as of a certain date. And here the execution date is itself relevant, even if the agreement is retroactive.

You have to be thinking about consideration, which I think we always think about in the employment context. And I think the biggest trap for the unwary here is you can't - you have to make sure that there's something being given in support of the - in exchange for the release, that goes above and beyond what the employee's otherwise entitled to.

So for example, here in Massachusetts where you're required to cash out an employee for non-used vacation pay, that wouldn't be an acceptable - that wouldn't be adequate consideration, and the release wouldn't be enforceable.

As it mentioned here, it's a severance plan. Severance plans, depending on their terms, may or may not be subject to ERISA. If you refer to the severance plan and it's consistent with the severance plan, ERISA might apply, might provide you with some added protection. In general, ERISA claims are easier to defend against than non-ERISA claims, forces them to go through a claims review procedure, forces them to - you know but that would really only affect the amount of the severance, and not necessarily the validity of the release. But I mean it's something to think about.

Also you want to think about if you are adopting a pattern or practice of giving out severance according to an informal formula. You want to think about whether you've established an ERISA plan, than whether maybe you ought to memorialize that plan in writing, obviously giving yourself discretion to depart from it, for (bread) cases.

You know when you're letting someone go, it's not usually an amicable situation, so you want to spell out the payment details as well as you can. But that's a challenge because, particularly where you have the seven-day revocation period, you're not going to want to let the money go until that seven-day revocation period is expired. So while you do want to be as precise as you can about the payments, you don't want to go to the point of saying that the payment will be made on this or that date, because often times you either won't have a signed release in hand, or the revocation period won't have expired.

On the benefits front, you want to make sure that, if the employee is electing COBRA, if they need to fill out some forms to make that happen, you want to make sure that the agreement makes it clear that it's their responsibility. You want to set the date for when coverage goes from being employer paid or mostly employer paid to being entirely employee

paid. And you want to provide some language in there that says that Management has some discretion to implement whatever is agreed to in the benefits front. In a reasonable way you want to make sure that it's subject to the (employee) documents and subject to the claims review procedures under the plan.

And you want to lastly - and this really is a point, kind of a broader point - you want to have a clause in the agreement - and I think (Richard) will show one of these - that consideration is provided solely because of the execution of the agreement. And obviously reciting it in the agreement doesn't make it so, but it certainly strengthens the case. And it means that you're not going to be looking like you're making a case after the fact that someone challenges you and says they'd (allowed) themselves all this up front.

At this point, I'd like to turn this over to Rich Greenberg, and he's going to talk about some sample clauses.

Rich Greenberg: Thank you very much, Matt.

What I'd like to do now is build on Matt's discussion, focus first on some other vital clauses in release agreements, and the relevance of them. The clauses I'm going to focus on are going to be the actual release provision, the affirmation provision, which deals with protection from certain claims which are not subject to release, certain necessary group termination language, which as Matt said is required if you are age 40 or over and you're being let go as part of a group termination program. Certain issues relevant to a confidentiality provision, and then certain miscellaneous issues that come up regularly in release drafting and execution.

Thereafter what we're going to do is engage in a discussion of some recent case law, both in general as to the enforceability of release, and as to some of the specific OWBPA issues. At the outset I want to point out that, even though the OWBPA has now been around for many years, there is still an incredibly staunch number of cases that it all interprets how an employer is to comply with the regulations. And the regulations are often vague and subject to various interpretations. And as we'll see when we go over some of these cases, the case war has not resolved some of these issues. So a lot of these decisions need to be made based on sound business practices and business judgment.

But hopping right back on the theme that we were just talking about, the next clause we'd like to talk about is the general release of claims. And first we have a sample provision, which we're going to talk about. And the sample provision just basically is the first paragraph - first subparagraph of the release provision, talking about the party is being released and this would be followed by the list of statutes as noted by three dots at the bottom of the page.

There are numerous considerations that need to be considered in drafting such a provision. The first one is the scope of the release claims. We need to ensure that if there are any claims that are waivable, that we list them to the extent possible. And that if there are claims that are not waivable, that we do not list them so there can't be any public-policy arguments that we've created in an unenforceable document. And we'll touch on that a bit more later.

Second, we need to address the scope of the released parties. As you see on the previous slide, while the agreement is between the employee and the company, we use the release paragraph to make the releases a broader group. The releasees include the company, parent

corporation, individual employees, directors et cetera. And there's not reason that the scope of the released parties needs co-existent with the parties to the agreement itself.

Third, we need to recognize that a release only covers claims up to the date of execution. So if someone signs the release, and then they're employed for another months, while you may have covered their upcoming termination, if that was expressly addressed in the release, if someone alleged harassment during that two-month period, you do not have a release covering that period. And that's something that needs to be considered in the development of the strategy for letting someone go.

I do note that there's a fury for those age 40 and over with the no-revocation letter. If you say in the no-revocation letter, "I am not revoking, and I hereby affirm my release of claims", there can be an argument that then the release extend through that date. And at least I'm not aware of any case law.

And then when we move to the case law, we're going to touch on some recent cases that dealt with the distinction between scopes of releases and scopes of covenants not to sue, which some employers put in their documents. And as we'll point out, that raises a concern that is building on what Matt said, that under all principles the release must be knowing, and voluntary and understandable to the employee. The more legalese that gets involved, the more likely it is that an employee or plaintiff lawyer can argue, "Well the employee didn't understand this", and potentially gain some muster before a court.

A couple more comments as to the release provision itself - in general, except for the ADEA, as Matt noted, which must be expressed and listed in the release in order for a federal age-

discrimination claim to be waived by someone aged 40 or over, there is generally no per se need to list the statute in order to obtain a waiver. However, we always recommend that we list all statutes possible just to avoid any arguments that someone can say, "Well you listed these five, and didn't list this one, so there must have been an intent to exclude this". Relevant jurisdictional law needs to be addressed, though, to see whether or not such case law exists in that jurisdiction, or whether or not a jurisdiction specifically requires a listing of a statute.

The next concept I wanted to touch on was the mutual release. Oftentimes, negotiating a settlement agreement oftentimes with a higher-level employee, the employee asks for a mutual release of claim. We need to be very, very careful when agreeing to such a mutual release, because depending on the language that we use, we have to watch our defining terms.

So for example, if we had a very, very broad defining terms of releasees that includes all employees, et cetera, we don't have the ability to enter into a mutual release as to all employees. We only have the ability to enter into a mutual release on behalf of the company. We cannot be responsible; we cannot attempt to waive any individual claims an employee may have against that separating employee.

Further, we need to ensure that the employee understands that and that the agreement is drafted in a clear and understandable manner. And finally as to this point, we need to be careful of any necessary (cause out). So for example, I've had situations where high-level accounting personnel, or finance personnel went, and it was before the year-end audit. So

while we agreed to a mutual release, we inserted a (cause-out) that excluded any wrong doing found related to the preparation of the financial documents for fiscal year blank.

Now moving into and acknowledgements and affirmations provision - and as I mentioned a few moments back, this provision is intended to address those claims which cannot lawfully be waived in a release. And as of the date of this conversation, this Webcast, those claims include SLSA claims, FMLA claims and other attendant issues.

So for example going through this cause piece by piece, the first provision says, "Employee affirms that employee is not caused to filed, or presently the party to any claim against company name except". While this doesn't directly address the unwaivable claims issue, the purpose of this is that if an employer is going to be giving someone consideration, the employer has the right to know what is out there, what is the legal landscape. So this will give the employer and opportunity for him to require the employee to assert whether or not there are any other outstanding claims out there. And if the employee does not do so, the employee potentially is in breach of the agreement.

Employee also affirms that an employee has reported all hours worked as of the date employee signs this release, and has received all compensation, wages, bonuses, commissions and benefits to which employee may be entitled. This provision is key because federal wage and hour claims cannot be released absent judicial supervision, or the United States Department of Labor supervision.

However, we feel by putting in a clause such as this, if an employee comes forward and asserts a wage and hour action, we have some impeachable evidence that we can use against

the employee to state that, "You signed an agreement in which you stated that nothing was owed to you. How can you now allege that monies are owed to you?"

In the same vein is the following sentence, "Employee affirms, and employee has been granted any leaves to which employee was entitled under the Family Medical Leave Act, or related state or local leave or disability accommodation laws". Currently while they're - currently the FMLA regulations provide that FMLA claims can't be waived. And to date, the courts that have ruled on the issue have generally ruled in accord with the regulations. We don note that a case, "Taylor versus Progress Energy:" is currently - I believe argument was held a couple weeks back. I believe in the fourth circuit is subject to re-hearing on this issue, and may be an employer will be provided with some more rights based on that decision. But as of the date of this conference, FMLA claims are unwaivable. So if we put them in the release paragraph, the release paragraph doesn't add much value to us. So putting this affirmation in provides us with the same protection that I mentioned for the FLSA claim.

Similarly, in the next sentence the employee further affirms that employee has no known workplace injuries or occupational diseases. Worker's Comp claims aren't waivable. However, this is language that could be used if someone subsequently asserts a Worker's Comp claim to impeach them, to state, "You acknowledged that you had no workplace injuries".

And then we have some language regarding confidential information, where the individual affirms that they haven't divulged any proprietary or confidential information, and will continue to maintain the confidentiality of such.

Then we move forward into a Sarbanes-like protection where someone is stating, affirming that they have not been subject to any retaliation. "Employee further affirms that employee has not been retaliated against for reporting any allegations of wrong doing by company name or its officers including any allocations of corporate (forgue)".

Then these final two sentences are one of the toughest areas for in-house counsel to deal with. The EOC, as we'll mention in a few more moments, and now the NROB have taken the position that an individual has an unwaivable right to file a charge of discrimination with the EOC or the NORB.

Many employers obviously do not want to specifically remind employees of this concept. However as we'll point out in a couple minutes, there's been at least one case that's held as a facial - excuse me - it's a violation of the OWBPA to imply to employees that they are waiving such a right. So what we generally recommend is that we put a clause in an agreement that to the effect of both parties acknowledge that this agreement does not limit either party's right, where applicable, to file or participate in invest proceeding of any federal, state or local government agency. But then follow that up with a sentence that makes it clear that to the extent permitted by law, employee agrees that if such an administrative claim is made, employee shall not be entitled to recover any individual monetary relief or other individual remedies.

We believe by doing this that there is extra protection from an employee alleging that the release was over broad. And we're building in protection that, even if that claim is made, that the individual is not going to be entitled to receive any remedy, individual remedy from

that claim. Obviously that comes down to a business decision, and we'll talk about some case law in that issue in a couple of moments.

Most of the issues on this slide, we've already covered. The fact that the affirmations were relevant to the protection from FLSA and all the FMLA claims, which are waivable as well as I did not note, however, that there is a potential distinction as to FMLA retaliation claims. However, we still recommend the use of the broad affirmation.

There was a recent case, which we'll mention a little bit later, that held that requiring an individual to withdraw a charge of discrimination as a condition of receiving consideration, is improper, that someone has an unwaivable right to file a charge of discrimination. How can you condition someone's withdrawal of that charge on receiving the consideration? So that's something that we need to keep in mind when drafting a document.

To the extent that there are specific agreements to reference, or specific provisions to mention and other agreements regarding the promise of keeping information confidential, obviously the affirmation should be modified. And we mentioned the pros and cons of the right-to file-charge language.

(David Hitchens): Rich, before you on, we do have a question. And I think this is probably the best time to bring it up. The question is, "How do you recommend handling a settlement where the allocations included kitchen-sink allocations, including SMLA claims"?

And I think there are really two parts to that question. One is, is there a distinction, and if so what is it, between a release in connection with the separation agreement versus the

settlement agreement? And then specifically, you know, what kinds of things, you know; do we deal with when we have all of those various kinds of claims involved?

Rich Greenberg: I mean, I think you David.

I think if we're dealing in terms of a settlement agreement with something that is before the court, I think that we have a little bit more protection there if there's going to be a stipulation, because there's an argument that the judge is signing off and approving the settlement. And similar to FOSA claims, FMLA claims can be waived if the judge approves the settlement.

However in that situation, I still would ensure that we had some broad affirmation language, as well as including the FMLA in the list of statutes just to enhance the protection. If we're in an individual separation issue where there's no judicial involvement I would just go with a very, very strong affirmations clause, where the person is clearly stating that they've not been subject to any violation of the FMLA, or that they've received any remedy for violation of the FMLA, and ensuring that if someone made a subsequent claim, that we passed the straight-face test that it was clear that the money that was being provided was in resolution of the issues.

So in summary, if we're before the court I'd list the FMLA, I'd list the affirmation and I'd get the judge to sign off on the settlement. If we're not before the court, it becomes a business judgment whether or not you list the FMLA. But at the least I would have a very broad affirmation built into the agreement.

(David Hitchens): All right, Rich, one follow-up question - and again I think this is the best time to raise it - deals with the issue of the waiver of a right to individual monetary recovery. And the question is that, "An employees agreement to waive an individual monetary recovery looks a lot like a waiver of the right to seek release from the agency. Why is their authority permitting the waiver of individual recovery"?

Rich Greenberg: The EOC regulations specifically contain language that states that the EOC will respect release agreements, and will not seek individuals, and an individual will not be able to recover individual specific remedies if they've already signed a release.

However, since the EOC has the right on behalf of the greater good to investigate and remedy discrimination, the EOC still has the right to look into the issue. And through the filing of the chart the EOC obtains that right. And the EOC can seek injunctive relief. The EOC can seek remedies on behalf of other individuals based on its investigation. But in the regulations that the EOC issued after the (ASTRID) decision, which reiterated the EOC regulation as to the right to file a charge, the EOC specifically stated that it will respect release agreements.

I'm now going to move on to certain specific issues relevant to a group termination provision that's in a release. And as Matt mentioned, this is a paragraph and exhibits that are only relevant if the individual is age 40 or over and being let go as part of a group program.

The first think I want to point out - and this is one of the most frustrating items for in-house counsel - is the fact that the definition of group means two or more people being let

go for the same reason. So it could be a reduction of force of only two people, and these group termination requirements still apply.

What these OWBPA requirements require is as follows - first the program needs to be named. Second, there needs to be the eligibility criteria, basically noting something to the effect that, "In order to be eligible, you must have been employed by the company as of X date".

Next what we recommend, and we'll talk in a few moments when we talk about the cases, that this is somewhat vacuous. We recommend that there be a selection criteria, "All eligible employees were selected for separation based on the following factors". And we need to be very, very careful as how we phrase that language, because that language could be used in litigations, potentially by other individuals who don't sign their releases, as to why to support their claims that they were chosen for discriminatory reasons, if we don't then set forth the reasons for discharge to include the reasons that we set forth in the release.

A vital issue to remember here is that there is a distinction between being selected for separation and eligibility to severance. So for example, if in order to be eligible for severance you need to be there for a year, that does not mean if you're separated after six months that you're not relevant to be a selected or unselected employee for these lists, because you are still someone who is being let go as part of this program.

Another difficult list that - difficult issue that arises - if it's a rolling reduction in force. A reduction in force where a few people go in January, then a few more people go in February. And the regulations indicate that in such instances, unless the new reduction is for a separate

and distinct reason, is that the list should constantly be aggregated. For the newer people, the exhibit A of the selected individual should list both the people who went formerly and the people who are going now.

In terms of the unselected employees, the regulations specifically state that there should be a list of each individual and the employee's job classification, or in a department who were not selected for separation, the age of such individuals.

You know, we generally recommend putting in both job titles and ages. And we generally recommend not limiting ourselves to just the express department or job classification, but looking at who the comparators are. So for example, if there's a reduction in the electrical engineering department, but in deciding who was going to go we looked in the mechanical engineering department, then some of the mechanical engineers can now take over the electrical engineers' roles, I would be very nervous of only listing the unselected employees as the electrical engineers, if the mechanical engineers were part of that decisional unit. And because the case law is so sparse here, and the regulations are a bit uncertain, there always needs to be a balancing of the considerations of whether or not to provide more versus less information.

Confidentiality clauses, just two quick comments - one, in general there should be a confidentiality clause that - in most agreements, there should be a confidentiality clause that notes that, you know, the terms and provisions of this agreement, and the existence of this agreement are confidential. Further, there may wish to be language that talks about, you know, you can't talk about the underlying circumstances surrounding this agreement.

However in group-termination situations, or in other open and notorious situations, such language may potentially should be modified. With a reduction in force for example, where everyone knows there was a reduction in force and people were getting agreements, there may not be a need to say that you can never disclose the existence of this agreement. It's just recognizing that different situations may require different approaches.

And separate and apart from the confidentiality of agreement provision is a provision regarding confidential information. To some extent, that could have been reiterated in affirmations. It could be reiterated by a reference to an existing confidentiality agreement. But in one way, shape or form, a company should ensure that it's agreement reiterates to individuals that their obligation is to keep truly confidential information and trade secrets confidential within the barriers of the law remain in full force and effect.

Next I want to touch on some miscellaneous issues. First issue I want to touch on is tender back. Tender back is the concept that if someone is going to sue alleging the release is invalid, that they need to return all the consideration in order to do so.

While that is not per se unlawful for individuals under age 40, or even individuals age 40 and over, it is unlawful as it pertains to OWBPA claims. There was a specific Supreme Court case, a Mr. (Ubre) case, that was then followed up by specific - by specific EOC regulations. And any requirement that an individual return consideration to challenge the validity of their waiver of an age claim is invalid and potentially a violation on its face of the OWBPA.

Next provision we see all the time, a non-disparagement provision. And it's generally fine to have an employee agree that they're not going to disparage the company. But oftentimes, you know, someone will ask mutuality. And the company will simply say, you know the company agrees not to disparage the employee.

However if that company definition is very broad and includes all individuals, then we're making promises on behalf of employees that we cannot monitor, because we can't control every employee in the company. So we generally recommend that if there's going to be a mutual non-disparagement, that it be limited to certain senior executives or alleged wrong doers to provide the individual being separated with the necessary protection that they feel they need.

Next clause that we regularly think should be vitally included is a non-admission clause. We generally recommend that there be a clause that states, "By providing this consideration, the employer is not admitting to any wrongdoing".

The next clause that we see, sometimes employers try and build in non-solicitation clauses, be it non-solicitation of employees, non-solicitation of clients, et cetera into releases. And obviously, the enforceability of such clauses is going to depend on the situation.

Along the same vein, are non-assistance clauses. And based on the same logic that you can't prevent someone from filing a charge of discrimination, you cannot prevent someone from providing assistance to the EOC with an investigation of a discrimination complaint. So if there's going to be a non-assistance clause that needs to exclude voluntary assistance in regard to EOC or agency charges.

And then moving into some legalese issues, we want to define the applicable law. To the extent possible, we like to define the forum. We like to note that the agreement can only be amended in certain manners by certain people. To the extent possible, we want to note that the agreement represents the entire agreement between the parties, and simply reference any other documents that are included by reference. But we would like to make sure that this agreement could be as stand-alone as possible and doesn't leave open for interpretation what other potentially governing documents are out there.

And one clause I see clients like to put in is a clause requiring arbitration of disputes over terms of the agreement. That is generally enforceable. In general an employment arbitration agreement would not cover arbitration over terms of the agreement, because it's a post separation issue. But an argument could be made that we recommend boot strapping if we have that concern, and putting in an arbitration of disputes provision directly into the agreement.

Final specific release language I want to touch on is closing language as it reiterates certain consideration and revocation periods. And the language that we use here as a sample is from a group termination release.

So the first thing that we note is that the consideration period is up to 45 days, because as Matt eloquently noted before, if you're age 40 or over and being let go as part of a group, the consideration period used to 45s not 21 days.

We insert the language, "up to" for two reasons. One, we don't like the issue of someone being able to come back six months later and saying that the agreement is still valid. We want to be able to note that the agreement has a drop-dead date by which someone must agree to it, or it's null and void.

Second, we believe that the "up to" reinforces to employees the concept that that 45-day period can be waived. Someone could choose to sign the agreement after one day. And that's totally lawful, unlike the revocation period, which someone cannot waive. Someone has that statutory seven-day revocation period no matter what if they're age 40 or over.

Next we note the OWBP requirement that the employee has the right to consult with an attorney prior to signing. Next we note the specific revocation language. And in this sample we require a revocation letter signed and dated at least seven days after execution, saying that the individual is not revoking the agreement.

You know, the no-revocation letter is not per se required. Oftentimes in writ situations, as a matter of operational ease, it's not something that you'd want to use, but it is a great boots, and belt and suspender thing for the file.

Then we put in language noting that if there are any modifications to the agreement, that it doesn't continue to extend this period. So for example if someone gets a lawyer involved, or they just directly engage in discussions with in-house consul or human resources, we want to make it clear that that 45-day clock, or 21-day if it's an individual, under age 40 in individual termination, that that clock is ticking.

And then we just have some closing language, "Employee freely and knowingly, and after due consideration, enters into this agreement in general release, intending to waive settle and release all claims employee has or might have against releases". It's somewhat gilding the lily. But we think it's vital to have at least an addition to the release paragraph, to have at least one other place, preferably above the signature line, where the employee is acknowledging what their signature means. And we found from experience that that helps defeat claims, when individuals may say that they didn't know what they were signing.

Certain considerations, many of which I've touched on already, we noted the purpose of the "up to" language with the consideration periods. One point that I want to touch on is, while that sample closing language was for an individual age 40 in a group, and while technically individuals under age 40 do not need to be required to be given a specific consideration period, we recommend that such a period be provided, (1) to avoid the issue that someone just having the agreement hang out for a long period of time. And number two, to make it clear to people that there is a firm deadline on which this issue needs to get resolved.

We touched on the necessity of the language regarding consulting the consul. Another issue that we're seeing more and more of is, that while this revocation period applies, it applies solely to ADEA claims. So technically an employer has the right to apportion consideration, and to state that you have a right to revoke the waiver of your ADEA claim for a seven-day period and if so, the consideration will be reduced by blank. So at least, by doing so, while the employer may not have a full and complete release, the employer can insure that all other claims are waived and for a lesser amount of consideration. And my experience is some employers like that concept; some employers don't because they want to have the pure

certainty. And the last issue, something that we mention in regard to the list, if it's a rolling riff is that we need to consider aggregation.

Now I'd like to turn to some relevant recent decisions that address some of these OWBPA concepts in our last 16 minutes or so of the program. The first issue is a concept that applies to all individuals. It's not an OWBPA issue. It's a general release issue that would apply whether an individual is age 18, whether an individual is age 40, whether an individual is age 92, whether it's an individual termination, whether it's a group termination. And that's the importance of insuring that release language is knowing and voluntary. As we mentioned before, some individuals – some employers have separate language in their agreement regarding releases and covenants not to sue. In two cases dealing with IBM, one from the Ninth Circuit in 2006 and one from the Eighth Circuit in 2005, courts invalidated agreements that individuals signed; basically held that the waiver was unenforceable because a normal reader could not understand what they were waiving. The release talked about some claims, the covenant not to sue talked about other claims, et cetera, and the court said a reasonable individual in the, in the realm of the employee who signed this agreement did not understand what they were waiving and the court basically, when the individual filed an action despite signing the release and the employer moved to dismiss or moved to summary judgment to, for a motion to summary judgment based on the release, the court said no. The release was not clear and knowing and voluntary. So to me, this reiterates the need of making sure that every release agreement that we give to every individual is written in a manner where we feel that if we needed to make a five-minute presentation to a judge or we need to write a short brief to a judge that we could clearly and unequivocally, with a straight face, in good faith assert that that release was understandable to the individual who signed it.

The next concept is the scope of enforce for releases and I touched on this and, but I'm going to go into it a little bit more in details. There was at least one case this year that held that a release could be facially retaliatory under the OWBPA, depending on its language. And there are two cases that I'd like to talk about in this regard. The first one is an NLRB decision and this NLRB decision is in a case called U-Haul, the company, versus California. Basically, this was on a facially retaliatory case but dealt with the scope of a release, and the release included NLRA claims.

And basically, while this was dealing with a arbitration cause, we believe all concepts are applicable to releases and that the NLRB, the Labor Board reiterated is that all individuals who are covered by the National Labor Relations Act have the unwaiverable right to file a charge with the board and any release agreement that indicates that NLRB claims are waived is one, unenforceable and potentially could be deemed a violation of Section 8A1 of the National Labor Relations Act, which prohibits any interference with protected rights.

So we strongly recommend that in-house council scrutinize this decision and if your releases specifically include NLRA claims, that you recognize the potential concerns that could arise with that with rank and file employees, and potentially either include it, recognizing the risk or recognizing that it's not a relevant concern, or potentially build in an affirmation addressing the issue.

Now, as I mentioned before, that decision was consistent with these OWBPA regulations, which specifically provide as to Title VII claims are that no waiver agreement may include any provision prohibiting any individual from filing a charge or complaint, including a challenge to the validity of the waiver agreement with the EOC. No waiver agreement may

include any provision imposing any condition precedent, any penalty or any other limitation adversely affecting an individual's right to file a charge or complaint, including a challenge to the validity of the waiver agreement. And building on that facially retaliatory point is a case in the Federal District Court of Maryland earlier this year, in a case brought by the EEOC to no one's surprise, against Lockheed Martin.

In this case, the court said that the course of the agreement in the release provision said that the employee had released all claims and did not indicate to the employer that they still retain the right to file a charge, that the release was retaliatory on its face and constituted unlawful interference of protected activity.

So basically, the court said that, regardless of whether or not that provision is enforceable, regardless of whether or not someone has the right to file a charge, just the fact that the employer in the agreement indicated to someone that they had waived all rights, the employer committed a violation of the OWBPA and the, and the, and the agreement was facially retaliatory.

Thankfully, in a later case, and this is a different circuit, the Sixth Circuit, once again, brought by the EEOC, the court held that's a ridiculous assertion here to say that the release itself, that the language of the release is facially retaliatory. That doesn't make any sense. However, the court went on to indicate that such a provision is not enforceable. So based on that concept, until there's a determinative Supreme Court decision on this issue, at least in my opinion, it's better to be safe than sorry. It's better to note that the agreement does not have the, that the agreement does not limit someone's right to file a charge or build such similar type language into the release paragraph, but note that someone doesn't have

the right to recover any remedy, so at the least, you're gaining the protection of ensuring that there's not going to be a potential finding the release is facially retaliatory. Of course I recognize that that addresses, that raises a business decision as to whether or not you want to point that issue out to an individual, however, my belief is that why put something in an agreement that one, we know is enforceable and two, we know on its face could lead to litigation or the EEOC, itself, looking at our practices, cause no one enjoys the EEOC knocking at their door.

(David Hitchens): Yes, I'm completely in agreement with Rich on that, but I can tell you that it's an uphill battle with the HR folks. I mean, they really don't like this language and feel that, you know, the business incentive the release is at least partly deterrent and having language in there that, as Rich said earlier, seems to invite this kind of complaint kind of sticks in their craw and so, you know, I'm sure that there's probably some diversity of practice out there in this area. I mean, I agree with Rich's point of view, but I suspect that at other companies, the balance is being struck differently.

Rich Greenberg: Yes, and I think the most important thing for an in-house council is to just make sure that, with the management team, that they advise them of the concerns and that everyone understands what's on the table before they make their final decision. You know, I personally have worked with clients and expressed my beliefs and listened to the client. If the client wanted to have the deterrent affect and understood the risk involved, you know, we work with them to effectuate that concern, however, I think the most important thing for in-house council is making sure that upper management, co-upper management is aware of the issue.

(David Hitchens): Absolutely.

Rich Greenberg: The next, the next final topic I'd like to talk about are some recent decisions involving group terminations. Despite the fact that these OWBPA regulations have now been around for over 10 years, I believe, there are literally under 20 cases that all address what some of this language means. One would think that there would be more cases involved and more plaintiff lawyers that would jump on this cause if they can invalidate one release invol – in a reduction when there are hundreds of people let go, that they could be sitting on a gold mine. In my experiences, however, when such a claim has been made, the employer has always settled that claim very difficult, very quickly due to the concern of retaliation, else could be due to the concern of the ball of wax that could be opened up if everything was invalidated and potentially overpaid one individual. But however, this year we finally did get some clarity as to some decisions, however, as we'll talk about in a minute, certain clarity we received was then reversed, so in many ways, it was almost a back-to-the-future year where we felt that we had some clarity on these issues, but still a lot of this is uncertain.

So the first sub-topic I want to talk about is who to include in the job list, cause as I mentioned, the OWBPA regulations provide, as the OWBPA and supporting regulations provide that two lists need to be given to individuals age 40 or over being let go as part of a group termination program. Number one was the job titles and ages of those selected and B is the job titles that ((inaudible)) in the regs, specifically the ages of those in the individual's department or job classification.

What does that mean, exactly? You know, if there's a reduction in one facility, but it was – excuse me, if there's a reduction in two facilities, does information need to be aggregated, and all of these questions are unanswered by the regulation. As to the first issue, who to include in list one, there was a decision by the Northern District of Georgia in 2005 that provided some guidance, but then was reversed in 2006. Basically, the situation that we were dealing with in this case was that McDonald's Corporation had a reduction and the reduction affected a couple of different regions. In the in, in the initial release, the list of selected employees, those who were being let go as riff, only included employees in one region.

The court said, that doesn't make sense, the initial court, because the purpose of these regulations is to give someone an idea whether or not they're being discriminated against based on age. And someone needs to see systemically what has happened if this reduction is all emanating from the same financial or other reasons, so someone should have the right to see if in region D all the older people are being let go also, so that they could validly determine whether or not their wage claim is being, is being properly – whether or not they're knowingly and voluntarily waiving their age claim.

So this court, the lower court invalidated the release and held, no, you need to include everyone who is being let go in that – in the whole decisional unit, all those being affected by this. However, earlier this year, on appeal, the 11th Circuit came to the opposite conclusion. Without real detail or explanation, the 11th Circuit held that, no, you need to look at it solely at the decisional unit level.

Someone who worked in region A only should be concerned with those in region A to determine whether or not they want to sign a release or feel that they're being discriminated against. And the court, but then the court pointed out that their informational requirements are designed to ensure that older employees are given the information they need to evaluate to evaluate any potential claims before deciding to release them.

So based on these decisions today, if there's a multi-regional, a multi-facility reduction and the decisional units are really separate and distinct, where you're not looking about moving from one region to another, there's a strong argument that you can limit that list A to only those being let go in that region, that facility. However, that goes back to one of the points that I made earlier where sometimes, in my opinion, it is best to give more information to be safe rather than less information and have a concern because whenever I get a call from a plaintiff's attorney trying to challenge the way that we provided exhibits in one of these situations, I love to be able to say back that plaintiff's attorney, we provided more information than we feel that we needed to. How can you dare say that we didn't give enough information for your client to validly decide whether or not they wished to sign the agreement?

Another tricky issue is the OWBPA talks about defining the eligibility crit – the eligibility or selection criteria. What does that mean? Because that could be different if it's a voluntary program, if it's an involuntary program, et cetera. There is, to my knowledge, only been two decisions that have addressed this issue. One of them was a decision by the U.S. District Court in Massachusetts v. Bull HN Information Systems in 2001, and the other one was a decision in the Weyerhaeuser case in first by the, in 2006. Basically, in the fir – in the Massachusetts decision and then the initial decision from the 10th Circuit, the court

basically said that while the regulations used this term, eligibility or selection criteria, an employer can't just say, in order to be eligible you needed to be employed on X date and then just have the exhibits.

What the regulation – what the initial case said is, you need to explain to individuals why they were selected. So, for example, you would need to say, in order to be eligible, you had to be an employee as of X date, and eligible employees were selected based on numerous factors. And the court even went on to state that the response, the language that should be used would be akin to how you would answer an interrogatory if someone sued and in the interrogatory said, what was my basis of termination. That finally provided some guidance, albeit not the most helpful guidance for employers or favorable guidance, but some guidance.

Fortunately or unfortunately, however, the 10th Circuit in May, invalid, withdrew withholding on this issue because it found the release invalid on other grounds. So basically, the 10th Circuit was able to withdraw its holding without affecting the actual, without affecting the employees involved, so once again, employers remain in a, in a, in a, in an, in a crux. Do you provide this more info, more information or do you provide less information? I, once again, am a believer of putting in at least some protection; a sentence such as, individuals were selected based on numerous business factors, including but not limited to, so that you still have some wiggle room, but at least that, but at least you have some protection, because what these couple of initial decisions demonstrate is that a court could be amenable to such an argument and while we could eventually prevail at the end, if we don't have such language, do we want to spend hundreds of thousands of dollars and hours of time to get to that point?

The final OWBPA issue I want to mention is an issue involving time limits. The regulations also talk about setting forth the time limits applicable to the program and there was one case, and that's always been something that's been ignored in certain issues that could be covered by the severance plan, especially if it's a voluntary program, or by other documents, but in this, but in this decision, the court said that the claim was invalid because it did not list a time limit applicable to such a program.

Because of that, what we generally recommend is we think this is a wild card decision, is that if it's not addressed in a related severance plan that we define something such as the March 2006 separation program, and potentially on the exhibits, note the dates of separation so that there's no question that someone understood the dates on which this occurred.

But the conjunction of these three issues, how to define the exhibits; how to, what language is required in order to define eligibility and selection criteria and the time limits applicable to this program create a real burden for in-house council and outside council because we're providing advice in an area where there is no certainty, and where we have to engage in a risk/reward analysis to determine what do we want to do to protect the company, and in my opinion, as I said earlier, to consider providing more information, even though these decisions are not full – are not currently on the books, but – as imposing obligations on employers, but to consider insuring we comply with all of these arguments that courts have in some way accepted in one shape or form to insure that our interests are protected in our, and our internal and external clients are protected. David?

(David Hitchens): Thanks, Rich. I don't believe that we have any further questions from our attendees, so that will conclude today's webcast. On behalf of the Employment and Labor Law Committee, let me thank our two superb speakers, (Matt Offman) and (Rich Greenberg). And I'd like to remind you to please complete the webcast evaluation form provided in your materials. Thank you again for your participation today, and thank you for your continued support of ACC programs.

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