



## LABOR AND EMPLOYMENT

### Release and Waiver Agreements: Complying with the ADEA in Group Terminations or Layoffs

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Individuals aged 40 or older are protected from discrimination in employment by the Age Discrimination in Employment Act [29 U.S.C. §§ 621 et seq. (“ADEA”)] as well as the California Fair Employment and Housing Act [Government Code §§ 12940 et seq.].

If an employer seeks to obtain a release or waiver from an employee upon ending the employment relationship, and the employee is age 40 or more, the ADEA, as supplemented by the Older Workers Benefit Protection Act, provides special protections needed for the release or waiver to be valid.

#### “KNOWING AND VOLUNTARY” RELEASE OR WAIVER

To be enforceable, a release or waiver under the ADEA must be “knowing and voluntary.” As a result, when terminating an employee who is 40 years old or older, the employer must comply with special notice and review procedures if the employer seeks to end the employment relationship by use of a severance or other agreement that includes a release of claims or waiver of rights by the terminated employee. These include written disclosure of the employee’s rights under the ADEA, affording the employee 21 days to review the proposed terms and conditions of separation, and a seven-day revocation period even after the agreement is signed, among other requirements (not discussed in this article).

But what if the employer plans to terminate multiple employees, as in a group layoff, or to encourage early separation through use of an incentive program? Are the ADEA requirements the same as in the case of terminating a single employee aged 40 or over? The answer is emphatically no. This article discusses the special steps the employer must take to obtain a valid waiver or release under the ADEA when ending the employment of a group or class of employees.

#### BASIC REQUIREMENTS FOR GROUP SEPARATIONS

A release or waiver obtained in connection with an “exit incentive or other employment termination program offered to a group or class of employees” is not considered “knowing and voluntary” unless it meets the following minimum requirements:

- Employee is given 45 days to consider it.
- Employee is given 7 days following execution to revoke it.
- At the beginning of the 45-day period, employee is advised of:
  - Any class, unit or group of individuals covered by the program.
  - Any eligibility factors for such program.
  - Any time limits applicable to such program.
  - The ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.
- The waiver is part of an agreement that is written so that the average person eligible to participate can understand it.
- The waiver specifically refers to rights or claims arising under the ADEA.
- The waiver does not apply to rights or claims that arise after its execution.





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- The waiver is made in exchange for consideration over and above anything to which the employee is already entitled.
- Employee is advised in writing to seek consultation with an attorney before executing the agreement.

A release may not interfere with the employee's right to file a charge or participate in an investigation by the EEOC. A release also will not affect the EEOC's rights and responsibilities to enforce the ADEA.

### DEFINING THE TERMS:

#### “EXIT INCENTIVE PROGRAM”

This typically refers to a voluntary program offered to a group or class of employees where the employees are offered consideration in addition to anything of value to which they are already entitled, in exchange for a voluntary resignation and a waiver. Most commonly, this would include so-called “golden handshake” or “golden parachute” programs or other incentive programs encouraging early retirement.

#### “OTHER EMPLOYMENT TERMINATION PROGRAM”

This refers to a program offered to a group or class of employees who are involuntarily terminated and offered additional consideration in exchange for a waiver and release of claims. Most commonly, this would include a severance program to a group or class of employees, offering additional compensation (e.g. a cash payment or number of months salary) in addition to accrued vacation or other leave balances, in exchange for “voluntary” resignation and a release and waiver by the employees of claims arising out

of the termination or the employment relationship.

#### “PROGRAM”

This exists where the employer offers additional consideration for the signing of a waiver and release in accordance with an exit incentive or other employment termination, such as a reduction in force, to two or more employees. It typically involves a standardized formula or package of benefits and the program is not subject to negotiation.

#### SAMPLE NOTICE

The following is a sample notice that should be included in the written proposed separation or severance agreement or other document containing a proposed waiver or release that is given to the employee in cases of separation of employment of two or more employees, whether voluntarily or involuntarily. It includes hypothetical and fictitious employee data. This sample notice is not intended to be the exclusive document or text provided to the employee(s), but rather is provided as a helpful guide to employers and HR staff facing such situations. It is recommended that employers consult with legal counsel prior to and in connection with such separations. The sample notice follows:

In compliance with the Age Discrimination in Employment Act (ADEA), 29 USC §§621-634, including the amendments made by the Older Workers Benefit Protection Act (OWBPA), Pub. L 101-433, 104 Stat 978, we are providing you with the following additional information:

- A. The decisional unit is the programming section of the Information Technology Department.





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B. All persons in the programming section are eligible for the program. All persons who are being laid-off are selected for the program.

C. All persons who are being offered consideration under the “Agreement—General Release” must sign the agreement and return it to the Director of Human Services within 45 (forty-five) days after receiving the agreement. Once the signed agreement is returned to the Director of Human Services, the employee has seven (7) days to revoke the agreement. The revocation will not be effective unless it is actually communicated to Director of Human Services prior to the expiration of seven (7) calendar days after execution of this agreement.

D. Following is a listing of the ages and job titles of persons in the programming section who were considered and who were and were not selected for lay-off and the offer of consideration for signing a waiver:

JOB TITLE	AGE	NUMBER SELECTED	NUMBER NOT SELECTED
Systems Analyst	38	0	1
Systems Analyst	41	1	0
Sr. Program Analyst	47	1	0
Programmer Analyst II	34	1	0
Programmer Analyst II	51	1	0
Programmer Analyst II	47	1	0
Programmer Analyst I	39	1	0
Programmer Analyst I	26	1	0

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