

New EEOC Regulations Regarding ADEA Waivers

by Patrick W. Shea & Adam S. Bozek

The EEOC has issued new regulations that employers will have to take into account every time they ask an employee to release a claim under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. The regulations purport merely to codify the Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), but are far more expansive. This alert summarizes the five most important things that you should know about the regulations.

First, the regulations will be codified at 29 CFR § 1625.23 and will go into effect on January 10, 2001. Presumably, they will apply to all releases executed on or after that date, although we expect some plaintiffs to argue that the regulations are retroactive.

Second, the regulations are so-called "legislative regulations" under the ADEA, which means that they are not limited to interpreting the statute, and can be used to fill gaps in the statutory framework. The regulations are, however, subject to judicial review, and we believe that employers will challenge those portions of the regulations that go beyond the mere codification of the *Oubre* decision. Previous challenges to some EEOC regulations have been successful.

Third, the regulations purport to invalidate all "tender back" provisions in ADEA releases. Thus, an employee who challenges a release under the ADEA will be able to keep the consideration that he/she received for signing the release and sue the employer for the very claims that he/she released. A provision in the release requiring the employee to tender back the consideration as a precondition to challenging the release under the ADEA will be unenforceable - even if the release is eventually determined to be valid.

Fourth, the regulations will invalidate all provisions in ADEA releases that require the employee to pay costs, attorneys' fees and/or damages resulting from the breach of a covenant not to sue. Under the new regulations, the only permissible use of a covenant not to sue will be as an affirmative defense to a lawsuit that was filed in violation of such a covenant. Thus, while the regulations allow employers to continue to use covenants not to sue, they ensure that employees who violate such covenants will be immune from financial penalties that might deter them from filing an improper lawsuit in the first place.

Fifth, it is not clear whether a tender back provision or a covenant not to

sue with a costs, fees or damages provision will invalidate the entire release. The regulations are silent on that issue, but the EEOC's commentary on the regulations states that "there is a strong argument that inclusion of an invalid provision in an ADEA waiver agreement ... should invalidate the entire waiver." Thus, the EEOC has identified two options for employers. The first option requires employers to eliminate tender back provisions and covenants not to sue with financial penalties from their standard release agreements (at least to the extent that they apply to claims under the ADEA), thereby extending a "free ride" to employees who wish to sue them under the ADEA after signing valid releases. Alternatively, employers can continue to use such provisions with the hope that the courts will reject the new regulations. An employer choosing the latter option will assume the risk that a court may uphold the regulations and invalidate the entire release. We have identified a third option, which we believe will allow employers to comply with the new regulations without completely foregoing tender back provisions and covenants not to sue. Our approach involves utilizing a number of techniques, such as structuring the release so that the tender back provision and covenant not to

sue apply to all released claims other than the employee's ADEA claims, that will allow employers to continue to realize the benefits associated with tender back provisions and covenants not to sue to the greatest extent permitted by the new regulations.

This alert provides an overview of the most important aspects of the EEOC's new regulations. If you have

any questions about the issues examined herein, or would like us to review your standard release agreement and advise you on the manner in which your company should proceed in light of the new regulations, we encourage you to contact the Paul, Hastings' attorney with whom you normally work or any of the following attorneys:

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