11th Circuit Limits ADEA Release Disclosures to Decisional Unit

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Last August, a federal district court issued a widely publicized but unpublished decision that held that the special disclosures that the ADEA requires when releases are sought in connection with an employment termination program had to include company-wide, not just decisional unit, data on the employees selected for termination. This holding would have invalidated the ADEA releases many employers have obtained because many employers, particularly large employers, have been providing data on a decisional unit basis. Fortunately, the 11th Circuit has just reversed the district court and held that the required data may be provided just on a decisional unit basis. *Burlison v. McDonald’s Corp.*, No. 05-13991 (11th Cir. July 11, 2006).

**Background**

The Older Workers Benefit Protection Act (OWBPA) amended the ADEA to permit an unsupervised release of ADEA claims, but only if a litany of special requirements are met. If any of these requirements are not met, the ADEA release is void. Bar none, the most troublesome of these requirements is that census data be provided to persons asked to sign ADEA releases in connection with an “employment termination program” (generally speaking, any 2-person or larger layoff or exit incentive program). This requirement is troublesome because the statute and the regulations are far from clear as to exactly what is required, and compiling the required census data in complex employment termination programs is challenging.

To be specific, the ADEA requires that persons being asked to sign employment termination program ADEA releases be:

- inform[ed] . . . in writing in a manner calculated to be understood by the average individual eligible to participate as to . . . the job titles and ages of all individuals eligible or selected for the program [(Eligible List)],
- and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program [(Ineligible List)].


Although the purpose of the census data requirement is to permit individuals being asked to sign ADEA releases to determine whether eligibility or selection for the employment termination program discriminates against older workers, providing information in literal compliance with the statute would render that information less than entirely useful. To cite just two issues, the Ineligible List need not include job titles, and the population the Ineligible List must show can be more limited than that which the Eligible List must show. This makes apples-to-apples comparisons between the two lists difficult if they are compiled strictly in accordance with the ADEA’s minimum requirements, yet it is only by making such a comparison that one normally would be able to determine if a pattern of age discrimination seemed evident.

The EEOC has issued a regulation explaining the ADEA release requirements. It uses the “Decisional Unit” concept to describe each group as to which separate census data information is to be given. Generally speaking, a Decisional Unit is the organizational unit in which eligibility or selection decisions were made by a given decision-maker. For example, if the heads of the accounting and purchasing departments each make separate layoff decisions for their respective departments, each of those departments likely would be a separate Decisional Unit; if one of them makes layoff decisions for both departments, both departments might constitute a single Decisional Unit.

The EEOC regulation does not specifically state whether an individual need only be given Eligible and Ineligible List for just his or her own Decisional Unit, but it suggests that this is the case, and that is how many employers had interpreted the regulation prior to the district court decision in *Burlison*. This makes sense for several reasons. First, a comparison of those two lists would permit a rational disparate impact analysis to be conducted, especially if job titles were included in the Ineligible List. This analysis likely would be impossible or difficult if the Eligible List included persons from other Decisional Units. Second, in large reduction in force situations, providing an Eligible List of all persons selected or eligible for an employment termination program without regard to Decisional Units would make that list extremely cumber-
some, indeed phone-book-like. For example, such an Eligible List might include 10,000 job titles and ages, whereas the Ineligible List an individual receives might have just a few entries if he or she is in a small Decisional Unit.

Until Burlison, no case of which we are aware had ever considered whether the ADEA’s employment termination release requirements require the provision of Eligible List data for individuals outside the recipient’s Decisional Unit.

The Circuit Court Burlison Decision

“The only fair conclusion, then, is that the OWBPA is ambiguous,” noted the 11th Circuit after looking at the statutory Eligible/Ineligible List requirements. No kidding. For that reason, the 11th Circuit said it could look to the EEOC regulation for guidance. Although the regulation is not a model of clarity with respect to whether Eligible List data need only be provided on a Decisional Unit basis, the court read the EEOC regulation as authorizing that.

After correctly noting that its statute and regulation parsing had been “exceedingly technical,” the court then analyzed whether limiting disclosure to the Decisional Unit would give affected employees the information Congress intended that they have, which the court characterized as information that would allow them (in the layoff context) to “make meaningful comparisons to determine whether an employer engaged in age discrimination . . . to consider whether anything suggests that older employees in their unit were unjustifiably terminated in favor of younger ones.” The court concluded that presenting Eligible List data on a company-wide basis, as opposed to on a Decisional Unit basis, “will in reality only obfuscate the data and make patterns harder to detect.” The court said that this conclusion buttressed its interpretation of the statute and regulations as only requiring Decisional Unit data. The court rejected plaintiffs’ claim that company-wide Eligible List data would be useful because it would permit them to determine the average age of individuals selected for layoff, holding that that information would be a flawed statistic that would not be probative of age discrimination.

Recommendations for Employers

We generally have counseled employers to present ADEA release census data in the manner that would be most informative on the issue of potential age discrimination, and that remains our advice because it is the best explanation an employer could proffer if its manner of presenting ADEA census data were challenged.

Because we have always been concerned that ADEA releases might be challenged on the grounds that Decisional Unit delineations were erroneous, we have generally recommended, where practical, that employers give all Decisional Unit census data lists to each Decisional Unit member, or at least offer to do so, and we still recommend this.

If Decisional Unit census data lists are properly compiled and if all lists are distributed to the members of each Decisional Unit, the employer will be exceeding the ADEA census data requirements. If the Burlison district court’s interpretation of the ADEA were adopted outside of the 11th Circuit or by
the Supreme Court, merely offering in writing to provide members of a Decisional Unit with ADEA census data about all other Decisional Units may not be sufficient. Even so, employees who did not request other Decisional Unit information they are offered in writing might be estopped from asserting that the failure to deliver it violated the ADEA census data requirements.

Here is how we generally recommend employers compile and present required ADEA census data:

1. Identify the employment termination program, which likely should be all layoffs and exit incentives that are part of an integrated RIF effort.

2. If in doubt, err on the side of having a single employment termination program. If so, explain in the cover memo (that sets forth the required eligibility criteria and time limit information) that the census data is for, e.g., a layoff and an exit incentive program that commenced on [date], and use some system, e.g., asterisks, to permit a person to determine who was eligible or selected for each arguably separate employment termination program.

3. Present completely up-to-date and accurate data when the data is delivered.

4. Provide data on a cumulative program-inception-to-date basis using the frozen initial population as the baseline, noting in a cover memo that fact and also the date as of which the data was current, and offering to consider providing updated data (including updated baseline data) to persons who request it before signing releases, to the extent convenient to do so.

5. Except as requested in response to this offer, do not update data for persons who received data in the past that was correct when it was delivered.

6. Use the smallest rational unit as the Decisional Unit, most likely the group as to which a primary decision-maker made either/or choices. For example, if Mary heads accounting in Dubuque and also heads accounting in Oakland, and Mary makes independent decisions to lay off persons in each location (i.e., the decisions as to one location do not have an impact on decisions as to the other), treat the two accounting units as separate Decisional Units.

7. In each Decisional Unit’s census data, identify the Decisional Unit precisely (e.g., accounting department in the Dubuque plant).

8. Give each person census data for all Decisional Units or at least offer to provide all other Decisional Unit data on request. In either case, also consider listing all Decisional Units that are not affected (i.e., those for which statistics have not been complied), and offer to consider providing those other Decisional Unit numbers to persons who request them before signing releases, to the extent convenient to do so.

If you have any questions regarding ADEA releases or employment law matters in general, please contact:

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