SEYFARTH SHAW
MANAGEMENT ALERT

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Tenth Circuit Requires Disclosure of RIF Selection Criteria for Valid Release

In a decision significant for downsizing employers, the U.S. Court of Appeals for the Tenth Circuit earlier this month invalidated a release signed by employees terminated in a reduction-in-force because the employer failed to inform the employees of the reasons they were selected for termination. The case marks the first time a federal appellate court has required employers to disclose RIF selection criteria in order to obtain a valid release of ADEA claims.

The District Court and Appellate Court Decisions

Kruchowski v. Weyerhaeuser Co. (10th Cir. Sept. 13, 2005) grew out of a reduction-in-force at Weyerhaeuser's containerboard mill in Valliant, Oklahoma. In all, 31 salaried employees were terminated in the RIF. Each was notified by letter of termination and was provided a list of employees, by age and job title, who were selected for termination and therefore eligible for separation pay. Each terminee was also given a list of ages and job titles of employees who were not being terminated and who were therefore *ineligible* for separation pay.

Kruchowski and 15 other terminated employees signed the release and obtained separation pay, but then sued Weyerhaeuser for age discrimination. The plaintiffs argued that the releases were invalid because Weyerhaeuser had failed to comply with the notice requirements of the Older Workers Benefit Protection Act (OWBPA), which amended the ADEA by imposing eight statutory requirements for a knowing and voluntary release in the group termination or exit incentive context: (1) the release must be written in a manner calculated to be understood by the average employee; (2) the release must specifically reference claims under the ADEA; (3) the release cannot cover claims arising after the release is signed; (4) the release must be in exchange for consideration to which the employee is not otherwise entitled; (5) the employee must be advised in writing to consult with an attorney before signing; (6) the employee must be given at least 45 days to consider the agreement before signing; (7) the employee must have the right to revoke the agreement within seven days after having signed; and (8) the employee must be given information about the class of employees covered by the program, plus any *eligibility factors* and time limits applicable to the program, along with a list of the job titles and ages of those eligible or selected and those not eligible or not selected.

The *Kruchowski* plaintiffs argued that Weyerhaeuser had failed to comply with OWBPA's group termination disclosure requirements in two ways. First, they contended that Weyerhaeuser had told them that all salaried employees in the Valliant mill were in the affected group, when in fact the reduction and severance offer affected only salaried employees reporting to the mill manager. Second, they argued that Weyerhaeuser had failed to disclose the requisite "eligibility factors" by failing to advise them of the factors it relied upon in selecting employees for termination in the RIF.

The district court rejected both arguments and entered summary judgment for Weyerhaeuser, ruling that the plaintiffs had released their ADEA claims. On appeal, the Tenth Circuit reversed on both points and held that the release failed to comply with the OWBPA. The appellate court's decision on the first point is not surprising.

But the Tenth Circuit's selection criteria ruling is significant. Weyerhaeuser argued that it had disclosed the requisite eligibility factors by explaining which employees were eligible to receive separation pay in connection with the RIF. The Tenth Circuit disagreed, ruling that the information which must be provided is not the criteria for receiving separation pay, but rather the selection criteria for termination. Relying on a 2001 district court decision from Massachusetts, *Massachusetts v. Bull HN info. Sys., Inc.*, 143 F. Supp. 2d 134, 147n. 29 (D. Mass. 2001), the Tenth Circuit held that, in the context of a group termination program:

> The intent of the statute's information requirement is to alert employees to potential age-discrimination claims . . . The term "eligibility factors" must refer to the factors used to determine who is subject to a termination program, not the factors used to determine who is eligible for severance pay after termination.

The Tenth Circuit then looked to Weyerhaeuser's interrogatory responses, wherein the company explained how it had chosen employees for RIF. Weyerhaeuser specifically identified "leadership, abilities, technical skills, and behavior of each employee and whether each employee's skills matched defendant's business needs." The appeals court held that because the same information was not provided to the terminated employees before they were asked to sign a release, the releases were invalid under OWBPA and the employees could proceed with their ADEA suit.

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The *Kruchowski* Case in Context

As noted, the Tenth Circuit is the first federal court of appeals to have addressed the eligibility factors/selection criteria question. Accordingly, *Kruchowski* is binding only in that circuit, which covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. However, there are no federal court decisions clearly to the contrary. Other courts have arguably accepted Weyerhaeuser's severance eligibility argument in passing, but they were not squarely confronted with the *Kruchowski* plaintiffs' argument that, in the RIF context, the relevant "eligibility factors" are the RIF selection criteria, rather than the severance eligibility factors.

EEOC's regulations under the OWBPA, which are quite detailed regarding what constitutes the appropriate "group" or "class" covered by an employment termination program, are silent on the subject of eligibility factors. One might infer from this that EEOC rejected the Tenth Circuit's view. However, the Commission's original OWBPA regulations were the product of negotiated rulemaking, meaning a consensus of Rulemaking Committee members was needed in order for the regulations to address a particular issue. When the proposed regulations issued in 1996, "EEOC emphasize[d] that no inference should be drawn on any issue by reason for [sic] the proposed regulation's silence with respect to that issue."

Significance of *Kruchowski* for Employers Nationally

*Kruchowsk*i is the law in states encompassed by the Tenth Circuit, so employers in those states need to comply with it. Exactly what that entails—what information must be disclosed about a RIF selection system in order to obtain a valid release of ADEA claims—will depend on the particular selection criteria and a company's reduction process. The Weyerhaeuser interrogatory answers cited by the Tenth Circuit identified "leadership," "abilities," "technical skills," "behavior," and "skills matched [with] defendant's business needs." This apparently is the type of descriptive information the Tenth Circuit believes the OWBPA requires.

The question, then, is what should employers outside the Tenth Circuit do. There is an argument that the Tenth Circuit got it wrong, either on the arguments before it or because the better arguments were not presented. That said, the court's ruling is not arbitrary or nonsensical, and seems consistent with the spirit of the OWBPA's informational scheme. Perhaps most importantly, *Kruchowski* (plus the U.S. district court's decision in *Bull HN*) are the only authority thus far on this subject. While the subject is somewhat arcane, it is of considerable importance to any employer providing severance to a group of employees in exchange for their signing a release: without the correct information required by the OWBPA, any ADEA waiver will be invalid. And because age discrimination claims are oftentimes the legal subject of greatest concern to downsizing employers, *Kruchowski* is all the more significant.

Compliance with the Tenth Circuit's view, however, requires the employer to identify and disclose its RIF selection criteria well in advance of possible litigation. Those criteria, once disclosed, will be an indelible statement of the reasons for termination. Should the selection criteria be inaccurate or incomplete in the OWBPA materials, the ADEA release be unenforceable. Moreover, questions of fact may arise regarding the employer's real reasons for having selected individuals for RIF. All of which means that having defensible, documented, and consistently applied RIF selection criteria is now more important than ever. Obtaining sound legal advice *before* a reduction-in-force is essential. So are best practices in communicating with employees and otherwise implementing any reduction.

Please contact your Seyfarth Shaw LLP Labor & Employment or Employee Benefits attorney with questions regarding the above.

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