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One Minute Memo™

Tenth Circuit Withdraws Decision Requiring Disclosure of Selection Criteria Under OWBPA

The Older Workers Benefit Protection Act (OWBPA), which amended the federal Age Discrimination in Employment Act (ADEA), requires that employers seeking a release of age discrimination claims disclose job titles and ages of employees separated as part of a voluntary or involuntary reduction. In *Kruchowski v. Weyerhaueuser Co.*, 423 F.3d 1139 (10th Cir. 2005), the Tenth Circuit became the first U.S. Court of Appeals to hold that the OWBPA also requires employers to disclose the *selection criteria* used to choose employees for separation in the involuntary reduction (RIF) context. *See* Seyfarth Shaw's September 2005 *Management Alert* (www.seyfarth.com/OMM092605). On May 2, 2006, the Tenth Circuit withdrew its 2005 decision and issued a new one. The new decision still holds that Weyerhaeuser violated the OWBPA, and thus failed to obtain valid ADEA waivers, because it provided job titles and ages for the wrong "decisional unit." However, because the court withdrew its earlier decision, no federal appellate authority requires disclosure of RIF selection criteria.

This development has several implications for downsizing employers seeking a release of ADEA claims (usually as part of a general release). First, employers within the Tenth Circuit - which covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming - are no longer clearly required to include selection criteria in their OWBPA disclosure. Second, employers in any jurisdiction whose selection criteria are easily identifiable and defensible may still want to disclose them. The Tenth Circuit's original decision cited *Massachusetts v. Bull HN Info Sys., Inc.*, 143 F. Supp. 2d 134, 147 n.29 (D. Mass. 2001) (holding ADEA release invalid in RIF context, among other reasons because selection criteria were not disclosed). No federal court has expressly held contrary to *Bull HN*. Moreover, the Equal Employment Opportunity Commission joined the Commonwealth of Massachusetts as a plaintiff in *Bull HN*. Thus, the EEOC may view ADEA waivers in the RIF context as invalid if selection criteria were not disclosed. That said, disclosing selection criteria up front - when the release and other required information are tendered to employees - may be risky if the criteria are unclear or their application was inconsistent. In either event, information regarding selection criteria could raise questions regarding the release's validity, and might also provide evidence of pretext should an employee succeed in invalidating the release.

Lastly, the new Tenth Circuit opinion emphasizes the need for an employer to define the "decisional unit" as such in its OWBPA disclosure. This means employers must continue to work hard to identify the proper decisional unit, since the validity of age waivers appears to turn on strict compliance with OWBPA's mandates.

If you have any questions on this decision, please contact the Seyfarth Shaw LLP attorney with whom you work or any Labor & Employment attorney on our website at www.seyfarth.com.