
FOR YOUR INFORMATION

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News For School Clients

Voluntary Early Retirement Plans, Severance Agreements, and Employee Waivers

Voluntary early retirement plans and severance plans (“retirement plans”) are now commonly found in collective bargaining agreements, individual employment contracts and policies governing the wages, hours and conditions of employment for school district employees and administrators. Some retirement plans offer paid health insurance; others offer cash benefits; and still others offer additional contributions to the Wisconsin Retirement System. Most retirement plans include eligibility requirements such as a minimum number of years of service or a minimum age. Additionally, some plans terminate benefits at a certain age or because of a particular event. With all such retirement plans, the *original* goal was to entice higher paid employees to retire and to replace them with employees at lower salaries, i.e., to save school districts money. However, because of the increasing cost of health insurance, often that goal is no longer being achieved.

During the 1990’s, the United States Equal Employment Opportunity Commission (EEOC) mounted a campaign against employers who

administered retirement plans that, arguably, used age as the basis for discontinuing benefits, e.g., stipends or health insurance paid until the retiree reached age 65 or Medicare eligibility. The EEOC concluded that such retirement plans violated the Age Discrimination in Employment Act (ADEA) by using an age-based distinction in an employee benefit. The EEOC filed charges against numerous school districts on that basis. At the same time, individual employees and retirees across the country were filing lawsuits against school districts and other employers on the same basis.

On April 22, 2004, the EEOC changed course regarding alleged age discrimination in retirement plans when the EEOC learned that its position was having the unintended consequence of discouraging employers from providing any retiree health benefits (which employers are not required by law to provide) so as not to run afoul of the ADEA. Accordingly, the EEOC issued a rule, known as the *coordination rule*, that would allow employers to offer retiree health benefits that are coordinated with Medicare eligibility

without violating the ADEA. The rule was to take effect upon publication in the Federal Register.

On February 4, 2005, the American Association of Retired Persons (AARP) filed a complaint against the EEOC in the U.S. District Court for the Eastern District of Pennsylvania challenging the *coordination rule*. On September 27, 2005, the District Court granted summary judgment to the EEOC and dismissed AARP's claims. AARP appealed the case to the Third Circuit Court of Appeals. While we wait for a decision from the Third Circuit Court of Appeals, an injunction prevents the EEOC from implementing its *coordination rule*.

Regardless of the outcome of the litigation in the Third Circuit Court of Appeals, it is clear that retirement plans offering health benefits that end at age 65 will be found to violate the ADEA. However, the validity of retirement plans that offer health benefits coordinated with Medicare is not yet settled due to the litigation in the Third Circuit Court of Appeals and, perhaps, future litigation. Because of the uncertainty caused by this litigation, many school districts that offer retiree health benefits coordinated with Medicare have considered changing the benefits in order to eliminate the bridge to Medicare. If you are considering doing the same, you should be aware of the potential for increased costs associated with modifying a retirement plan in order to eliminate the bridge to Medicare. For example, many school districts have been persuaded to simply eliminate the contract language

providing for the bridge to Medicare, leaving the school district with an obligation to provide paid health insurance to retirees for more years than the parties originally intended, which increases the cost of the retirement plan to the school district.

An alternative (and potentially less costly option) for employers to consider is to insist that each retiring employee waive his or her right to file an age discrimination claim against the employer as a precondition to receiving benefits under a retirement plan. The Older Workers Benefit Protection Act (OWBPA) allows for such a waiver to be secured from an employee as long as the waiver satisfies the following requirements:

1. The waiver must be in writing and be understandable;
2. The waiver must specifically refer to ADEA rights or claims;
3. The waiver may not waive rights or claims that may arise in the future;
4. The waiver must be in exchange for valuable consideration;
5. The waiver must advise the individual in writing to consult an attorney before signing the waiver; and
6. The waiver must provide the individual at least 21 days to consider the agreement and at least 7 days to revoke the agreement after signing it.

If the waiver is required as part of a group retirement benefit, (i.e., offered to a specific class of employees within a collective bargaining agreement, employment contract, or policy), the minimum time to consider the waiver is increased to **45** days. In addition, the employer must make the following disclosures to the retiring employee regarding the benefit:

1. A copy of the bargaining unit's recognition clause may be used to satisfy the requirement to provide an explanation of the class, unit or group of employees covered by this benefit.
2. A copy of the retirement benefit provision may be used to satisfy the requirement to provide the eligibility factors for such benefit and time limits for participating in this benefit.
3. A list of employees, which includes their job titles and which identifies the employees eligible for the retirement benefits and the employees who are ineligible, may be used to satisfy the requirement to provide the job titles and ages of all eligible individuals and the job titles and ages of all ineligible individuals.

If the retirement plan is part of a collective bargaining agreement and the school district requires employees to sign waivers as a precondition to receiving retirement plan benefits, the union may challenge the school district's ability to unilaterally require such a waiver from employees. In such a case, it is advisable for the district to propose language for inclusion in the collective bargaining agreement that explicitly

requires employees to sign the waiver as a condition of retiring under the retirement plan.

Not all retirement plans providing retiree health benefits include a bridge to Medicare. For example, some retirement plans simply provide health insurance to retirees for a particular number of years; others provide for a particular amount of money to be used toward health insurance premiums. If a school district has a retirement plan that does *not* provide employees with retiree health benefits until Medicare eligibility (or until a certain age), the EEOC's *coordination rule* and the court's decision in *AARP v. EEOC* will have no effect. Therefore, it is not necessary to modify the language; nor is it necessary to require for employees to sign age discrimination waivers.

In addition to the litigation concerning the *coordination rule*, described above, the EEOC has recently filed a number of lawsuits against employers alleging that it is unlawful for an employer to require an employee, in an agreement providing for severance or retirement benefits, to waive his or her right (a) to file claims under Title VII of the Civil Rights Act of 1964, and other laws enforced by the EEOC, and/or (b) to cooperate with EEOC investigations regarding such claims. Similarly, the United States Department of Labor (DOL) has asserted that it is unlawful to require an employee, in an agreement providing for severance or retirement benefits, to waive his or her rights to (a) file claims under the Family and Medical Leave Act, and other laws enforced by the DOL, and/or (b) cooperate with DOL investigations regarding such claims.

That said, the DOL and the EEOC opinions, as well as a few court decisions, have concluded that it is *not* a violation for an employer to require that an employee, in an agreement providing for severance or retirement benefits, waive his or her right to any damages or other relief resulting from any claims of discrimination filed by third parties, e.g., the EEOC, the DOL or other aggrieved employees filing a class action suit. Thus, an agreement that requires an employee to waive his or her right to pursue an age discrimination claim and/or claims of discrimination on the basis of other protected classes must be drafted carefully so as to avoid violating these rules.

Your school district may be using a sample agreement for purposes of an

individual employee retirement or resignation that includes a waiver (with a 21-day review/7-day revocation period), which may have been drafted by Lathrop & Clark LLP. Your school district may also be using a sample agreement for purposes of a voluntary early retirement and/or severance plan within a collective bargaining agreement provision, employment contract, or policy, that includes a waiver (with a 45-day review/7-day revocation period), which may have been drafted by Lathrop & Clark LLP. The developments identified in this publication demonstrate that this area of law is always changing and developing. Therefore, it is advisable to have any sample agreements you are using reviewed periodically to determine whether any revisions are necessary to update the agreements.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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