EEOC Opinion Letter: Older Workers Benefit Protection Act (OWBPA)

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On January 14, 2021, the Equal Employment Opportunity Commission (EEOC) finally issued an opinion letter addressing the long standing issue of whether information about non-U.S. citizen employees working outside of the United States must be included in the information disclosure to a covered individual as otherwise required by the Older Workers Benefit Protection Act (OWBPA). The EEOC concluded that non-citizen information is not required to be included in the disclosures.

What is the ADEA and OWBPA?

The Age Discrimination in Employment Act of 1967 (ADEA) makes it "unlawful for an employer … [to] discriminate against any individual [at least 40 years of age] with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §§ 623(a), 631(a). The OWBPA, which imposed specific requirements for releases of ADEA claims, states that any waiver under the ADEA must be "knowing and voluntary." If a waiver is part of a group termination or exit incentive program, the employer must provide employees with a description of the "decisional unit" and the eligibility factors for inclusion in the program, the job titles and ages of all individuals within the decisional unit who were eligible for the program, and those within the decisional unit who were not selected.

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The EEOC's Opinion Letter

The Commission concluded that employers subject to the requirements of the ADEA are not required to include employees working outside the United States who are not U.S. citizens in OWBPA disclosures because such individuals are not "employees" for purposes of the ADEA.

According to 29 U.S.C. § 626(f)(1)(H), only covered employees within the applicable "decisional unit" must be included in an OWBPA disclosure. The ADEA does not protect non-U.S. citizens working for companies outside of the United States.

The EEOC further explained one of the main purposes of the OWBPA is to ensure covered employees are provided sufficient information to evaluate exit incentive or termination programs before waiving their rights under the ADEA. If employers were to include non-covered employees in these OWBPA disclosures, it would likely mislead employees or "mask potentially unlawful discrimination".

Further, employers may apply different selection criteria or eligibility requirements when administering the domestic and international components of a separation program. The regulations provide that "[w]hen identifying the scope of the 'class, unit, or group,' and 'job classification or organizational unit,' an employer should consider its organizational structure *and decision-making process*." An employer may be required to offer different separation benefits to employees working in countries outside the United States to comply with the foreign country's requirements governing separations.

The Commission Opinion Letter clarifies that employers are not *required* to include non-U.S. citizen international employees in the OWBPA disclosure, but if employers choose to *voluntarily* include non-U.S. citizen employees in the disclosures, they must make sure they do so without misleading other covered employees.

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