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# LITIGATION WAIVERS AND AGE DISCRIMINATION

**ROBERT D. LEE, JR.**
*The Pennsylvania State University*

**ABSTRACT**

In response to perceived abuse by employers in demanding employees sign waivers from litigation under the Age Discrimination in Employment Act, Congress in 1990 passed the Older Workers Benefit Protection Act. The law's numerous provisions specify under what conditions waivers are valid. In 1998, the Supreme Court ruled in *Oubre v. Entergy Operations, Inc.* that employees, after signing waivers and deciding they had been victims of age discrimination, may file suits against their former employers without having to tender back benefits received at the time their employment ended. Also in 1998, the Equal Employment Opportunity Commission issued regulations intended to clarify the application of OWBPA's requirements. Numerous legal issues remain despite the Court's decision and the EEOC's regulations.

In this era of corporate and government restructuring, downsizing, or rightsizing, older workers often find themselves unemployed. These turbulent times create concerns for employers as well as troubles for employees. Fearing employees will claim age discrimination, employers have asked employees to sign blanket waivers relinquishing their rights to file suits, including suits under the Age Discrimination in Employment Act (ADEA) of 1967 [1]. In response to a deluge of complaints from workers about the waiver process, Congress passed the Older Workers Benefit Protection Act (OWBPA) of 1990.

This article considers the characteristics of waivers and the waiver process required by OWBPA. The discussion then turns to a 1998 Supreme Court decision that dealt with whether a person who signed such a waiver and received money in return could later litigate without returning the money. Next, the regulations promulgated in 1998 by the Equal Employment Opportunity Commission (EEOC) are considered, followed by an analysis of selected court decisions



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issued subsequent to the Supreme Court's 1998 ruling. The discussion concludes with a critique of age-related legal issues concerning waivers faced by employers, employees, and the courts.

## BACKGROUND

The Age Discrimination in Employment Act protects workers age forty and over from discrimination in employment. The act covers private corporations, labor unions, and the federal, state, and local governments. An employer must have at least twenty employees to be covered under the law. The Equal Employment Opportunity Commission administers the law.

Cases involving age constituted 20 percent of the EEOC's caseload in 1997 [2]. That figure is expected to climb in coming years as the World War II baby boomers move into their fifties. For many states human rights commissions, which also administer antidiscrimination laws, age cases are among the most common bases for employment discrimination complaints [3].

The writers of the 1967 ADEA did not anticipate the widespread use of waivers that occurred in the 1980s and continued in the 1990s. What the framers expected was that the EEOC or a state commission would typically act on behalf of someone protected by the law. In a waiver context, then, one of these commissions would supervise a case to be sure the rights of an employee were protected. What emerged, however, were unsupervised waivers in which employers presented such documents to their workers and expected them to sign on the dotted line. The EEOC estimates that in any one year nearly 14,000 employers reduce their workforce and in the process ask employees to sign waivers [4].

Court cases developed in which workers challenged these waivers on the grounds that they did not understand the meaning of various provisions and had been coerced into signing the waivers [5]. The courts developed a "knowing and voluntary" standard in response to these cases, and EEOC adopted a rule in 1987 that incorporated this standard. Congress, being less than fully satisfied with the EEOC rule, denied funding for its enforcement, and in response passed the Older Workers Benefit Protection Act (OWBPA) of 1990 [6]. Title I of the law provides guidance on employment practices concerning benefit plans; this section, as is indicated in the findings section of the law, was passed to overturn a Supreme Court decision that restricted judicial review of benefit plans [7]. Title II is of interest here in that it instructs how waivers may be used.

## TITLE II OF OWBPA

Title II of the 1990 legislation adopted the "knowing and voluntary" standard: "An individual may not waive any right or claim under this act unless the waiver is *knowing and voluntary*" (emphasis added). The law then lists five conditions for what constitutes "knowing and voluntary."

1. the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
2. the waiver specifically refers to rights or claims arising under this act;
3. the individual does not waive rights or claims that may arise after the date the waiver is executed;
4. the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
5. the individual is advised in writing to consult with an attorney prior to executing the agreement [8].

Having time to consider an employer's offer is another aspect of "knowing and voluntary." The law was aimed at eliminating stressful situations in which employees were threatened by their employers to sign waivers immediately or risk losing whatever was being offered. The time requirements vary according to three different situations. First, when an individual is offered an incentive package to resign or retire, s/he must have at least twenty-one days to consider the offer.

Second, when an employer's offer affects two or more employees, each individual must have a minimum of forty-five days to consider the offer. The forty-five day time period is particularly important in situations involving hundreds or even thousands of workers being laid off due to reductions in force.

The law covers two types of "programs" within this category of two or more workers being affected. One type is the "exit incentive program," in which workers are encouraged to retire or resign on a voluntary basis. The other program is for involuntary terminations, in which the employer asks for a waiver. In this latter category, a unit might be phased out and all workers terminated. In another situation, workers with low performance ratings might be involuntarily terminated.

Third, when the EEOC or a court handles an age-discrimination complaint, a different time standard applies. In such a situation, only a "reasonable period of time" is required rather than the twenty-one or forty-five days. The presumption is that a person acting in such a situation is likely to be better informed than in the other two situations and therefore may not need forty-five or even twenty-one days to consider the offer.

In all three of these types of situations, workers have another protection involving time. After signing a waiver, a worker has seven days to revoke the agreement. The law does not permit any shortening of this period, such as when a worker wants to proceed immediately rather than wait for the seven days to expire.

With regard to unsupervised exit incentives for groups of two or more workers, the Older Workers Benefit Protection Act requires employers to supply the affected workers with pertinent information. They must be informed about which workers are affected, how eligibility was determined, and what time limits exist.

Information is to be supplied about the job titles and ages of affected and not-affected workers. This information is meant to help workers decide whether they are the victims of age discrimination and therefore should not waive their rights to bring suit.

The framers of the law anticipated the possibility of one side in such agreements wishing to back out. The law provides that whichever party claims the waiver is valid has the burden of proving its validity. In virtually all instances, employees are the ones who wish to negate the agreement, and employers then have the burden of proving the waivers' validity.

The bases for challenging the waivers are each of the law's provisions. The waiver must make reference to consulting an attorney; referencing a financial advisor is inadequate [9]. The waiver must include an incentive above what the employee would normally receive in benefits [10]. Failure to provide adequate information is grounds for challenging the waiver [11]. Waivers that contain language above the reading level of the average worker may be challenged [12]. The waiver must have been signed [13]. Any breach of the timing requirements is grounds for challenging the waiver's validity [10]. A person cannot seek protection under OWBPA if a waiver was proffered by an employer but was never signed by the employee, since in such a circumstance an injury would not have occurred [14]. ADEA and OWBPA can be used in conjunction with other civil rights legislation, such as the Americans with Disabilities Act, which protects disabled people from discrimination in the workplace [14].

## COMMON LAW AND OWBPA

Contract law is, of course, a major component of common law. With each state having its own body of common law, the prospect arises that contracts applied to employment can vary somewhat from state to state. Federal courts, as a result, have tended to rely on the *Restatement (Second) of Contracts*, which is a synthesis of the field [15]. The American Law Institute, a prestigious body of judges, attorneys, and law professors, compiled the *Restatement*.

Prior to passage of the Older Workers Benefit Protection Act, the courts turned to the *Restatement* for guidance in determining when a waiver met the "knowing and voluntary" standard. The courts were divided in their application of the *Restatement*. Some focused on "ordinary contract principles." For example, a waiver would not be "knowing and voluntary" if an employer engaged in fraudulent deception about a waiver's features or engaged in duress. The other approach was to use the "totality of circumstances" test, which as its name suggests takes a holistic approach to determining a waiver's validity [9, at 117]. This latter test was more stringent than the "ordinary contract principles" test.

The OWBPA would seem to have supplanted these common-law doctrines, since as explained above, the statute lists what is required for a waiver to be valid. According to one district court, "The statute, by creating its own set of criteria for

valid waivers which must be met, took these waivers out of the regime of common law contract and put them squarely under the purview of the statutory provisions of the OWBPA" [16, at 184]. Some courts, nevertheless, have continued to apply the "totality of circumstances" test enunciated by the Second Circuit Court of Appeals in its 1989 decision of *Bormann v. AT&T Communications*. Factors to be considered in the "totality of circumstances" test are:

1. the plaintiff's education and business experience;
2. the amount of time plaintiff had possession of or access to the agreement before signing it;
3. the role of the plaintiff in deciding the terms of the agreement;
4. the clarity of the agreement;
5. whether the plaintiff was represented by or consulted with an attorney; and
6. whether the consideration given, in exchange for the waiver of claims, exceeds employee benefits to which the employee was already entitled by law [17, 18, 19].

Another body of common law used in some OWBPA cases is equitable estoppel. Either the employer or employee may claim the other party is estopped or barred from acting. The elements of equitable estoppel are that 1) one party represents something, 2) the second party reasonably relies on the representation, and 3) the second party suffers an injury because of the reliance. In OWBPA cases, employees may claim equitable estoppel from the standpoint that employers allegedly misrepresented the contents of waivers to obtain employees' signatures [9]. Employers may claim injury and ask that employees be estopped or barred from filing ADEA suits contrary to their waiver agreements [20].

## THE 1998 *OUBRE* DECISION

The Supreme Court dealt with a complex set of waiver problems in its 1998 case, *Oubre v. Entergy Operations, Inc.* [21]. Dolores Oubre received a poor performance rating from her employer and was told she could either work to improve her rating or accept a voluntary severance. Staying on to improve her performance would not guarantee she would be retained. Therefore, she decided to leave the company in exchange for more than $6,000 paid over a four-month period. After receiving the money, Oubre filed a claim stating that the company had in effect fired her (constructive discharge) in violation of the ADEA [21].

According to the Supreme Court, the waiver barring her from suing had at least three flaws: "(1) Entergy did not give Oubre enough time to consider her options. (2) Entergy did not give Oubre seven days after she signed the release to change her mind. And (3) the release made no specific reference to claims under the ADEA" [21, at 840]. At issue was whether Oubre was required to return the $6,000 as a condition for filing suit.

Entergy Operations used the *Restatement* as its defense, specifically § 7, comments d and e. According to the *Restatement*, a flawed contract becomes voidable, but it can be made binding. This is accomplished when the party that has the right to void the contract decides to retain the benefits received or delays in returning the benefits. By retaining the benefits, the employee ratifies the voidable waiver. The company also claimed equitable estoppel blocked Oubre. Since the company had relied on Oubre's waiver by paying her more than $6,000, she should not be allowed to revoke the waiver and file suit unless she tendered back the money [21]. Corporations in such positions contend that without the tender back, former employees in effect use corporate monies to sue the corporations.

It was important for the Court to hear the *Oubre* case in that the circuit courts were split on the ratification and tender-back issues. The Fourth and Fifth Circuits had held that ratification occurs unless the employee tenders back the benefits received [22, 23]. In contrast, the First, Third, and Sixth Circuits had ruled that tender back was not required [9, 12, 24, 25]. The Third Circuit relied on the Supreme Court's 1968 ruling in *Hogue v. Southern Railway Company* [26]. In that case a worker who had signed a release under the Federal Employers' Liability Act could still bring suit without returning the funds received in exchange for the release [27].

The *Oubre* opinion, written by Justice Kennedy and signed by five other justices, while recognizing Entergy Operations' common-law argument, focused on the wording in OWBPA. The Court said that taking Congress "at its word," the law says an employee "may not waive" ADEA rights when the waiver fails to meet the conditions in OWBPA. As a consequence, retention of the money cannot serve as ratification of the faulty waiver. Retention fails to block a party from filing an age discrimination suit, since the waiver has no effect in the situation [21].

The Court's ruling relied partially on the reality of situations in which employees wish to file suits after having signed waivers and having received benefits. A requirement that workers tender back the monies they received, said the Court, would frustrate Congress' clear intention to protect workers. Many workers might eventually realize their waivers were inconsistent with OWBPA but would be unable to file suit, having spent the monies that were expected to be tendered back. Such a practice might encourage employers to dupe their employees. "These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification" [21, at 842].

The majority opinion in *Oubre* skirted any discussion of voidability, but that topic was taken up in an important concurring opinion written by Justice Breyer. One reading of the majority opinion is that since a waiver to be valid must meet all of OWBPA's provisions, any waiver that fails to do so is by definition void. A void contract is a contradiction in terms, since something that is void is by

definition not a contract [15, § 7, comment a]. If a contract is void, both parties may walk away from the agreement. In the employment situation, the employer might halt all payments, such as health care and other benefits. In contrast, a voidable contract gives the injured party the choice of avoiding his/her responsibilities or at some time ratifying the contract. For example, a contract is voidable as long as duress exists, but once that is removed, the party might choose to ratify the contract. According to Justice Breyer, waivers under OWBPA should be considered voidable so as to prevent an employer from threatening to terminate all employee benefits if a former employee challenges the waiver. While only Justice O'Connor joined Breyer, the opinion asserts that "apparently, five or more justices take this view" [21, at 844].

The two dissenting opinions supported the principle of voidability and employee ratification of a waiver through retaining the funds provided by an employer. Justice Scalia wrote a short dissent in which he contended that ratification occurs when tender back does not occur. Justice Thomas, joined by Chief Justice Rehnquist, provided a more explanatory dissent. According to the dissent, when Congress passes a statute, it is understood that this is done within the context of common-law principles. Thomas and Rehnquist agreed with the majority that OWBPA replaced the common-law approach to "knowing and voluntary," but disagreed that Congress also abrogated the common-law doctrines of ratification and tender back. According to the dissent, since OWBPA does not state it is rejecting these doctrines, the assumption should be made that they exist in this context. It follows, then, that Oubre by retaining the $6,000 her employer provided had ratified the waiver and that Oubre to void the contract must tender back the $6,000 [21].

## EEOC REGULATIONS

1998 was an important year in age discrimination law not only because of the *Oubre* decision, but also because the Equal Employment Opportunity Commission issued regulations intended to provide greater specificity to the use of waivers. These regulations were the product of a process begun in 1992 when the EEOC announced its intention to issue OWBPA regulations [28]. At that time, the commission invited suggestions about what to include in any such regulation.

### Adoption Process

The process used in adopting these regulations is noteworthy. Under the Negotiated Rulemaking Act of 1990, federal agencies may form committees of interested parties or stakeholders that have the task of building a consensus as to what to include in a proposed regulation [29]. Use of this process is strictly at the option of the federal agency and only when it considers that the process will have

a positive outcome. Forming such a committee when at the outset it is clear the interested parties have widely divergent views would be foolhardy.

The EEOC announced in August 1995 its intention to use the negotiated procedure [30], and a committee was formed that December. The committee consisted of twenty attorneys, including two from the EEOC, as well as representatives from small and large employers, labor unions, groups that assist older persons, bar organizations, and the like. According to the Negotiated Rulemaking Act, a committee is not chaired by an agency representative but by a neutral party. EEOC obtained the assistance of "facilitators" through the Federal Mediation and Conciliation Service.

The committee held several meetings between December 1995 and August 1996 and in September 1996 forwarded a proposed rule to the EEOC. Several months later—in March 1997—the commission put forward the committee's recommendations in a proposed rule and invited public comment [31]. More than one year later—in June 1998—the EEOC announced final regulations that were identical to the draft [32]. These regulations went into effect in July 1998, a little over five months after the *Oubre* decision. The regulations were silent in regard to the tender-back issue the Court had addressed. According to EEOC, the regulations did not include topics on which the rulemaking committee was unable to reach consensus [31, pp. 10787, 10788].

Although the 1998 regulations consist of numerous provisions, four general topics stand out as most important. They are 1) the wording of waivers, 2) timing requirements, 3) how information is to be provided to employees regarding the decisional units of their employers, and 4) the specific information to be supplied about employees affected and not affected.

## Waiver Language

The regulations, which apply to all employers—public and private with twenty or more employees—require that an entire waiver agreement be in writing. This provision is important in heading off future allegations by either the employer or employees that there was some general "understanding" that had not been included in the waiver. This is nothing more than the application of the parole-evidence rule of contract law.

The Older Workers Benefit Protection Act states the language of the waiver is to be written to be understandable by the employee affected or by the average person when a group of employees is affected. The regulations explain that employers when drafting waivers should consider "the level of comprehension and education of typical participants." "Technical jargon" and "long, complex sentences" are to be limited or not used at all [33].

The regulations not only require the language to be understandable, but also proscribe waiver provisions that "have the effect of misleading, misinforming, or failing to inform" the affected employees. If a waiver explains its advantages and

disadvantages, this must be done "without either exaggerating the benefits or minimizing the limitations [33, § 1625.22(b)(4)].

## Timing Requirements

The 1998 regulations included several important points of clarification regarding timing. The twenty-one-day and forty-five-day period in which employee(s) may consider signing a waiver starts when the employer makes a "final offer." If later a "material change" is made in the offer, the running time restarts [33, § 1625.22(e)(4)]. For example, an employer might be seeking voluntary retirements and if few employees did such, the employer might increase incentives such as increasing the size of severance bonuses. The regulations further state that if a material or immaterial change is made in the offer, the twenty-one-day or forty-five-day running time does not need to be restarted if all parties agree to the original starting date. What the regulations do not accomplish, however, is to provide guidance on what is a material change. Neither a definition nor examples are offered.

As will be recalled, the law guarantees an employee seven days to reconsider a waiver after signing it. The regulations state this period cannot be waived or even shortened. What is permissible is for an employee to sign a waiver in advance of the twenty-one or forty-five-day running time so that the seven-day reconsideration period runs concurrently. The regulations allow an employer to begin processing the waiver "consideration" when an employee signs a waiver, even though the running time has not been completed [33, § 1625.22(e)(6)]. This provision has the advantage of putting the changes into action, including the employer's desire to get the employee off the payroll and the employee's desire to receive payment as soon as possible.

## Information and Decisional Units

One of the most troubling parts of OWBPA has been the requirement that information be supplied to individuals based on "any class, unit, or group of individuals covered" [6]. The problem stems in part from the fact that nomenclature varies among public, nonprofit, and for-profit employers and varies within each of these. Another part of the problem is that employers may reduce their employment using a variety of methods, thereby making impossible any simple prescription for what information is to be provided.

The 1998 regulations give examples of several types of reductions in force [33, § 1625.22(f)(3)]. An employer that operates several facilities might decide to reduce employment at one or to eliminate one altogether. An employer might decide to shut down a department that could have employees at several of the company's facilities. An employer might decide to cut back on an occupation or job category, such as sales personnel or accountants.

A key concern, according to the regulations, is what was the decisional unit used by the employer. If an employer simply decided to close a facility, perhaps because it was physically obsolete, that might well be the decisional unit. However, if in this process the employer considered several of its facilities, then those are part of the decisional unit. Accordingly, employees being encouraged to resign/retire or being terminated would be entitled to information about employees not only at their facility but at the other facilities as well.

### Information about Age

When two or more people are being asked to sign waivers, these individuals as prescribed by OWBPA are entitled to job title and age information of the people affected and *not* affected. This information has the obvious importance of possibly revealing that an employer is systematically removing older workers. One important feature of the 1998 regulations is that they prohibit the use of age bands, such as human resource (H.R.) analysts aged twenty to twenty-nine [33, § 1625.22(f)(4)]. Instead, an employer is expected to supply information for each job title and the number of employees at each age, such as H.R. analyst I, age 25, 26, 27, etc. This information must show the number of employees at each age and job level who were and were not selected to be removed or offered incentives to retire.

Sometimes employers offer incentives for employees to leave using performance evaluation criteria. The regulations specify that if an employer is separating those employees within a job category who have received the lowest performance ratings, the employer must supply information about all of the other employees being retained. Data of this sort might reveal a systematic attack on older workers by rating all as poor performers.

One piece of good news for employers contained in the regulations involves situations where an employer may need to undertake a series of cuts in its workforce. For example, a large employer might need to reduce its staffing by 4,000 workers, and as soon as that is accomplished, the company may decide it needs to terminate an additional 1,200 workers. The workers in the second round are entitled to information about affected and nonaffected workers in both rounds. The regulations, however, exempt the employer from having to provide information about the second round to employees terminated in the first round.

## CASE LAW SINCE *OUBRE*

As would be expected, the *Oubre* decision failed to resolve all legal issues pertaining to waivers and age discrimination. Indeed, the decision was only a narrow one, namely that a person need not tender back any severance pay or other consideration before filing an age discrimination suit. As noted above, the decision skirted whether a waiver was void or voidable.

## Tender Back Revisited

An unresolved issue is whether at some point a former employee must tender back the consideration, even though that is not required when an age discrimination complaint is filed. The Supreme Court said, ". . . Courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee . . ." [21, at 842].

The Second Circuit Court of Appeals noted this admonition in a case of a Texaco employee who had received $46,500 in severance pay and then filed suit [19]. Were the individual successful in a suit against the oil company, the $46,500 could be deduced from any settlement.

Another issue is whether a waiver can have severability and tender-back clauses. A severability clause in a waiver is much like one Congress typically includes in statutes, namely that if one part of a waiver or, in the case of Congress, one part of a statute, is determined to be invalid or illegal, the rest of the document remains in effect.

Gerber Products Company used such a clause: "The invalidity or unenforceability of any provision of this agreement shall not affect the validity or enforceability of any other provision of this agreement, which shall remain in full force and effect" [34, at 8]. Gerber also included in its waiver a tender-back requirement. If the employee ever breaches any term of the waiver, then "all monies received . . . will become immediately due and payable" [34, at 8]. Not only was tender back required, but the waiver stated that if the employee sued the company, the person would pay "for all costs and expenses incurred by the company, including reasonable attorney's fees, in defending such suit" [34, at 8]. These provisions were struck down by a district court, which based its opinion on the Supreme Court's *Oubre* opinion and Justice Breyer's concurring opinion. If Gerber's waiver is invalid, said the district court, the company cannot demand a payback. In effect, the company would be saying the waiver was void, whereas the seemingly prevailing view is that it is voidable. The district court held that Gerber had committed "an act of retaliation solely because Velkovich [the employee] engaged in the protected activity of commencing this ADEA action against Gerber" [35, at 25].

## Consideration and Signing Waivers

OWBPA provides that when an employer wants an employee to sign a waiver, the employer must offer something "for consideration in addition to anything of value to which the individual already is entitled" [8, § 626(f)(1)(D)]. The law also uses the term "exit incentive or other employment termination program" in reference to groups of employees being terminated. None of these terms is defined in the law, and the 1998 EEOC regulations offer little guidance. The regulations do state that the employer may not eliminate a "benefit or thing of value" to which

the employee is entitled by "laws or contract" and then offer this to the employee as if it were a "consideration" or "exit incentive."

The issue is one of deciding when an incentive is an incentive. Offering a small sum of money clearly would not be an incentive, and offering a large sum and/or a generous benefits package would be. The problem is compounded by the fact that there may be different incentives at play over resigning, on the one hand, and signing a waiver, on the other. An employer could give an employee a chance to quit within a few hours or be dismissed. In that situation, there may be a strong incentive to quit regardless of any offer that may be forthcoming that would require signing a waiver [36]. An employee may feel that as long as s/he is losing her/his job s/he may as well accept the consideration and sign the waiver.

Another harsh reality of many situations is that employees may feel they have little choice about signing a waiver in terms of possible future employment. Employers simultaneously may be hiring people to fill several new positions and phasing out many other positions and the employees who occupy them. If an employee suspects s/he is being dismissed contrary to ADEA policy, s/he may be willing to sign a waiver to avoid revealing his/her views and to remain eligible for bidding on one of the new positions. Certainly an employer would be unlikely to hire a worker in a new position who refused to sign a waiver when being terminated in an old position [19, at 5]. If an employee signs a waiver in such a situation, is it not "knowing and voluntary"? Can an employee subsequently disregard the waiver and file suit? There has been no resolution of this issue to date.

## Consideration and Standing

The Older Workers Benefit Protection Act does not require employers to offer any consideration, but it does require that when an employer asks an employee to sign a waiver, then consideration is required. The new EEOC regulations state an employer need not offer more to someone aged forty and over than to younger workers.

Issues can arise after the offer period has elapsed, during which some workers and not others may have signed the waiver. Those who did not sign, of course, are free to file complaints of age discrimination. Those who did sign fall within the context of *Oubre* and the other legal issues discussed here. However, what exists are two classes of former employees, and the class of workers who refused to sign the waiver may lack standing in terms of any suit pertaining to the waiver [37].

## Arbitration

Employers sometimes require new employees to sign agreements to arbitrate any employment issues that may arise in the future. The advantage to perhaps both parties is that arbitration often is a less expensive process than one in a courtroom. The potential disadvantage to an employee is that an arbitrator may be

less sympathetic to claims than would be a jury in a court trial. The securities industry has required such preemployment agreements—the Uniform Application for Securities Industry Registration or Transfer.

The Supreme Court dealt with arbitration and age discrimination in *Gilmer v. Interstate/Johnson Lane Corporation* [38]. Robert Gilmer had signed an arbitration agreement in 1981 at the time he was hired and was terminated in 1987 at the age of 62. The timing of the *Gilmer* case is important. While the case was on appeal to the Supreme Court, OWBPA was passed. The *Gilmer* decision was announced only seven months after enactment of OWBPA. The Court did not carefully review the waiver requirements contained in the new law, but the Court did hold that arbitration was an acceptable procedure. "Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to ADEA [i.e., OWBPA]" [38, at 29].

Cases subsequent to the *Oubre* decision have upheld the use of arbitration agreements [39]. Plaintiffs have attacked arbitration agreements as violating OWBPA's provision that a person may "not waive rights or claims that may arise after the date the waiver is executed" [8, § 626(f)(1)(e)]. Since the arbitration agreement is signed at the outset of employment, any discrimination claim by definition occurs at a later time. The Third Circuit Court of Appeals rejected this argument on the ground that the OWBPA is intended to protect substantive rights and not procedural ones [40].

A double standard may be developing concerning arbitration in civil rights employment law. On the one hand, arbitration may be acceptable in age discrimination cases, as suggested by the *Gilmer* decision. On the other hand, the Ninth Circuit Court of Appeals has ruled against arbitration in sex discrimination cases, based on an interpretation of the Civil Rights Act of 1991 [41]. Analysis of that court's position and the 1991 legislation is beyond the scope of this article, but the case raises the important question of whether there is merit in allowing for age discrimination arbitration but not sex discrimination arbitration or presumably arbitration of rights based on race, religion, and national origin.

## EEOC Litigation

The Older Workers Benefit Protection Act simply states, "No waiver agreement may affect the commission's [EEOC's] rights and responsibilities to enforce this act" [8, § 626(f)(4)]. In other words, the EEOC has powers independent of individuals under OWBPA. Issues arise, then, over when EEOC may and may not be part of the legal proceedings of a case.

In *EEOC v. Johnson and Higgins*, a district court case decided five months after *Oubre*, the employer challenged the EEOC's role due to an allegedly valid waiver agreement [16]. Earlier, the commission had successfully prosecuted the company for arbitrarily forcing the retirement of a group of executives at the age of sixty-two. The company quickly responded by drafting a waiver and obtaining

signatures from the retirees, with the consideration for signing being $1,000. What the executives did not know was that each could be eligible for $3 million rather than the mere $1,000. The company contended, then, that EEOC was barred from any further litigation due to the waiver. EEOC in contrast contended that once it filed suit, "private parties lose any right to control the litigation" [16, at 182]. Moreover, the commission insisted that since it had been responsible for successfully litigating the discrimination charge, the commission should be part of any subsequent action, such as preparing a waiver. The district court agreed with the commission that it was a "necessary party" and that the waivers appeared not to be "knowing and voluntary" [16].

While EEOC was successful in that case, it was unsuccessful in the Second Circuit Court of Appeals case of *EEOC v. Kidder, Peabody, and Company* [42]. As mentioned above, arbitration agreements are used in the securities industry and were used by now-defunct Kidder, Peabody. The Second Circuit Court did not accept the commission's contention that the *Johnson and Higgins* case set a precedent allowing the commission's involvement even though a waiver existed; that case simply did not address the issue. Instead, said the Second Circuit, *Gilmer* [38], which permits arbitration agreements, is the governing case. The court said EEOC could proceed were it pursuing injunctive relief against the company, but that avenue had been abandoned by EEOC when Kidder, Peabody ceased operations as an investment banking firm [42].

## State Commission Litigation

State human relations commissions also can play a role. The ADEA provides that "any person aggrieved may bring a civil action" [8, § 626(c)]. The Commonwealth of Massachusetts has been granted standing in a complex case involving Bull HN Information Systems, which reduced its workforce from 4,500 to 3,000 between 1988 and 1998 [43]. Massachusetts, acting like a private citizen, went through the EEOC, which granted a letter-to-sue. Both Massachusetts and EEOC filed separate but virtually identical suits against Bull. The district court ruled both cases could proceed [43].

The *Bull* case, which is still in litigation, illustrates an unsettled issue about OWBPA: does the 1990 law in itself create an independent cause of action? Some courts have answered negatively. In a 1995 district court case involving Sears, Roebuck (known as *Sears II*), the court ruled an employer cannot be sued for using an invalid waiver; in such an instance, all that happens is that the waiver cannot protect the employer from ADEA claims [44]. The 1998 *Bull* decision took the opposing view, namely a cause of action can arise under OWBPA [43]. This is an unsettled area sure to produce continuing litigation given its potential ramifications. If an employer is not open to action on a wrongfully constructed waiver, disreputable employers could craft harmful and illegal waivers in the hope that employees would never discover the flaws of the waivers. Such

employers would be assured that the worst that could happen from the employers' standpoint would be that the waivers would be declared invalid.

### Expansion of the *Oubre* Doctrine

One other emerging development is that the courts may extend the tender-back ruling of *Oubre* to non-age discrimination cases. In one instance, a district court applied *Oubre* in a case alleging discrimination against a Hispanic employee [45]. On the other hand, differences exist between the "knowing and voluntary" standard used in OWBPA and the standards provided in other employment discrimination legislation, most notably Title VII of the Civil Rights Act of 1964. Using the "totality of the circumstances" approach, a waiver might be valid under Title VII but invalid under OWBPA, due to the waiver not complying fully with one of the numerous requirements of that law [19].

## CONCLUSION

As has been seen, Congress passed the Older Workers Benefit Protection Act of 1990 in response to the needs of older workers who were being either encouraged to resign or retire or were being terminated. In 1998, the Supreme Court provided an important decision in the case of *Oubre v. Entergy Operations, Inc.* The Court held that workers who signed waivers promising not to sue under the Age Discrimination in Employment Act of 1967 were not required at the time of filing suit to tender back the severance benefits received at the time of their retirement, resignation, or termination. The Equal Employment Opportunity Commission also took important action in 1998 by issuing the long-anticipated regulations that implement OWBPA.

Despite these major landmarks in the law of age discrimination, numerous legal issues remain. These issues have major bearing on the lives of workers age forty and over and the corporations and governments that employ them. The *Oubre* decision left unanswered the question of whether a former employee who signed a waiver and later sued must at some future date tender back the employer's payments. Also, the Court's opinion stayed clear of addressing the legal status of a challenged waiver. As was discussed, the concurring and dissenting opinions addressed whether such a waiver was void, voidable, or had been ratified.

The EEOC's regulations produced other unanswered questions. What is meant by a "material change," when an employer makes what is thought to be a final incentive offer to an employee or group of employees and then modifies the offer? The regulations leave unanswered questions about what types of language are permissible or impermissible. When does language intended to clarify matters become subject to attack as being "technical jargon"? The regulations shed some light on the information concerning "decisional units" that needs to be supplied to

employees, but any employer that feels compelled to engage in layoffs will be unsure about what specific information is required.

Court cases since the *Oubre* decision reveal other areas of legal confusion. Can a waiver include severability and tender-back provisions? What constitutes "consideration" or, in other words, is there some threshold minimum benefit that must be offered to an employee being asked to sign a waiver? What are the legal rights of employees who sign an invalid waiver and those who do not? Does OWBPA permit the securities industry to use pre-employment agreements that require employees to submit any future complaints to arbitration rather than a court? If yes, to what extent could these arbitration agreements be used by other industries? To what extent can litigation by the EEOC and state commissions be pursued? Can the EEOC supplant individually litigated cases?

Some of these matters may require in the near future the attention of the Supreme Court and possibly the Congress. Thousands of employers and thousands of employees each year must face these issues. Leaving these knotty legal problems unresolved certainly does not produce justice.

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Robert D. Lee, Jr. is professor of hotel, restaurant, and recreation management and professor of public administration at The Pennsylvania State University, University Park. He is co-author of *Public Budgeting Systems,* 6th Edition (Aspen Publishers, 1998) and author of *Public Personnel Systems,* 3rd Edition (Aspen Publishers, 1993).

## ENDNOTES

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Direct reprint requests to:

Robert D. Lee, Jr.
Pennsylvania State University
201 Mateer Building
Hotel Management
University Park, PA 16802