EMPLOYMENT LAW REPORT

Exit Frying Pan, Enter Fire: When Releases of Employment and Civil Rights Claims Make Matters Worse

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INTRODUCTION[1]

Plaintiffs and their counsel often must survive battles, large and small, before defendants will agree to a satisfactory resolution of legal claims. For the unwary, however, agreements that could resolve pending legal disputes may actually exacerbate matters by inducing further litigation. This article focuses on current and common pitfalls for litigants who seek to resolve their cases amicably: confidentiality provisions, waivers under the Family and Medical Leave Act and the Older Worker Benefit Protection Act, and terms prohibiting plaintiffs from filing subsequent civil rights charges with administrative agencies against defendants or from reapplying for employment with defendants in the future.

I. THE PROPER SCOPE OF CONFIDENTIALITY TERMS TO AVOID COSTLY POST-SETTLEMENT LITIGATION

Defendants often request confidentiality as part of the pretrial settlement of legal claims brought by plaintiffs. Depending on their scope, confidentiality provisions can be a significant obstacle to resolution of claims and, moreover, create additional litigation after resolution of those claims.

The terms that typically create problems for litigants concern the requirement that plaintiff's counsel not disclose the evidence underlying, or generated by, the litigation that is subject to the settlement. Defendants request such terms on the theory that comprehensive confidentiality is necessary to ensure actual closure of the case. Imposing confidentiality on plaintiff's counsel beyond the amount and terms of the settlement agreement, however, improperly restricts counsels' ability to practice law – including providing effective representation of future clients.

According to the American Bar Association ("ABA") Formal Opinions, Model Rules, and Model Code, such broad confidentiality terms are unethical and improper.[2] A recent ABA Formal Opinion prohibited expansive confidentiality provisions in emphatic terms: "An agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)."[3]

The Restatement follows the aforementioned ABA Formal Opinions, Model Rules, and Model Code by prohibiting settlement agreements from restricting "the right to represent or take particular action on behalf of other clients."[4] The Restatement has endorsed the ABA's long-standing position because, among other reasons, the confidentiality provisions at issue may create unnecessary conflicts of interest between plaintiff's counsel and plaintiffs:

> Proposing such an agreement would tend to create conflicts of interest between the lawyer, who would normally be expected to oppose such a limitation, and the lawyer's present client, who may wish to achieve a favorable settlement at the terms offered. The agreement would also obviously restrict the freedom of future clients to choose counsel skilled in a particular area of practice.[5]

Importantly, defense counsel may create significant legal exposure for themselves and their clients if they insist on such confidentiality provisions. The applicable ABA Model Rule states as follows: "It is professional misconduct for a lawyer to ... violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."[6] Therefore, defense counsel have been sanctioned (along with plaintiff's counsel) for executing settlement agreements that restrict plaintiff counsel's ability to represent future employees against the defendants subject to the pending litigation.[7]
In sum, counsel for parties amenable to confidentiality terms in their settlement agreements must avoid language that could be construed as limiting plaintiff counsel's subsequent use of facts learned or developed through litigation. Otherwise stated, confidentiality should be confined to the terms and amount of a settlement agreement. This approach will minimize the chance of protracted settlement negotiations and potentially costly litigation after settlement agreements have been executed.

In a similar vein, the Equal Employment Opportunity Commission ("EEOC") has argued that confidentiality provisions that purport to restrict the plaintiff from sharing information with the EEOC are retaliatory and void.[8] Moreover, the EEOC does not permit confidentiality provisions in its Consent Decrees, and it holds that "no individual can be required as a condition of obtaining relief on a Commission claim to agree . . . to keep the terms of his or her recovery confidential."[9]

II. EFFECTIVE SETTLEMENT OF CLAIMS UNDER THE FAMILY AND MEDICAL LEAVE ACT

The regulations promulgated by the United States Department of Labor ("DOL") concerning the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601, *et seq.*, declare as follows: "[e]mployees cannot waive, nor may employees induce

employees to waive, their rights under the FMLA."[10]

Although the Eighth Circuit has not directly addressed whether this regulatory language precludes private settlement of FMLA claims, the Eighth Circuit recently cited with approval the Fourth Circuit's holding that the DOL's regulatory language bars both retrospective and prospective settlement of claims.[11] In ruling that claims under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, cannot be prospectively waived, the Eighth Circuit reasoned as follows:

> "[b]ecause FMLA claims are not waivable by agreement, neither are they waivable by ratification." We apply the same reasoning. Since prospective Title VII claims are not waivable by virtue of the Supreme Court's command in *Gardner-Denver*, neither are they susceptible to ratification.[12]

In an *en banc* ruling, the Fourth Circuit reaffirmed its decision in *Taylor v. Progress Energy*, Inc., 414 F.3d 364 (4th Cir. 2005) and the applicability of the rationale therein.[13] As the leading case in the nation and having been cited with approval by the Eighth Circuit, *Taylor* is highly instructive here. Therefore, employers should not expect to settle FMLA claims without first obtaining approval of the DOL or the courts (in addition to agreement from plaintiffs).[14]

Although the Fourth Circuit is perhaps the most conservative jurisdiction in the country, its *en banc* decision emphatically rejected the arguments of *amici* United States Chamber of Commerce and the DOL as well as those of the defendant employer. The Fourth Circuit based its analysis on several considerations, most notably the plain meaning of the express statutory and regulatory language and the public policy codified by the FMLA.

A. The Statutory and Regulatory Language Governing Releases Under the FMLA

The Fourth Circuit focused its analysis on the regulatory language concerning waivers under the FMLA:

> There is nothing in the text of section 220(d) that permits a distinction between prospective and retrospective waivers. The regulation states plainly that "[e]mployees cannot waive . . . their rights under FMLA." As we pointed out in *Taylor I*, the word "waive" has both a prospective and retrospective connotation. Courts, including the Supreme Court, frequently use the word "waive" to refer to the post-dispute or retrospective release or settlement of claims.[15]

In explaining why claims under the FMLA should be treated differently than those under Title VII and similar employment statutes, the Fourth Circuit further reasoned that "neither Title VII nor [similar statutes have] an implementing regulation, like [the FMLA], that prohibits the waiver of all rights under the statute."[16] Indeed, such regulations cannot exist for Title VII and similar employment statutes because, unlike the DOL, the EEOC has no authority to issue

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binding substantive regulations.[17]

B. The Public Policy Codified By the FMLA

In analogizing claims under the FMLA to claims under the Fair Labor Standards Act ("FLSA"), the Fourth Circuit unequivocally rejected the argument that prohibiting retrospective waiver of claims would discourage the amicable resolution of litigation:

> [the argument] overlooks an important exception in employment law to the general policy favoring the post-dispute settlement of claims. The settlement or waiver of claims is not permitted when "it would thwart the legislative policy which [the employment law] was designed to effectuate." For example, under the FLSA, a labor standards law, there is a judicial prohibition against the unsupervised waiver or settlement of claims.[18]

The Fourth Circuit then explained why FLSA precedent is directly relevant to FMLA cases:

> The reasons for the prohibition on private settlement of FLSA claims apply with equal force to FMLA claims. Congress explains in the FMLA's legislative history that the Act "fits squarely within the tradition of the labor standards laws that . . . preceded it," such as the FLSA. . . . The FMLA, following the FLSA model, provides a "minimum floor of protection" for employees by guaranteeing that a minimum amount of family and medical leave will be available annually to each covered employee. As with the FLSA, ***private settlements of FMLA claims undermine Congress's objective of imposing uniform minimum standards. Because the FMLA requirements increase the cost of labor, employers would have an incentive to deny FMLA benefits if they could settle violation claims for less than the cost of complying with the statute.*** Further, employers settling claims at a discount would gain a competitive advantage over employers complying with the FMLA's minimum standards.[19]

In other words, allowing an employer to resolve FMLA claims for less than their actual value – as

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may happen via private settlements – would directly undercut the purpose of the FMLA and contravene the governing statutory and regulatory language.

Accordingly, employers must be prepared to fold in the DOL or the court into any settlement of FMLA claims to avoid unnecessary post-settlement litigation and related costs. The Fourth Circuit proclaimed that this approach is not only required by law, it also will be expeditious:

> We are confident that both the DOL and the courts will work diligently to deal with these cases in a prompt and efficient manner. ***The DOL already has a system in place for reviewing FMLA claim settlements*** in administrative cases, and it has had even broader experience in supervising FLSA settlements. The courts will only be supervising settlements in court actions brought pursuant to the FMLA, and we do not believe that this responsibility will create an undue burden.[20]

III. POTENTIAL PITFALLS IN SETTLING AGE DISCRIMINATION AND OTHER EMPLOYMENT CLAIMS IN THE WAKE OF THE OLDER WORKERS BENEFIT PROTECTION ACT

A. Older Workers Benefit Protection Act Requirements

The Older Workers Benefit Protection Act ("OWBPA") prohibits an individual from waiving any right or claim under the Age Discrimination in Employment Act ("ADEA") unless that waiver is "knowing and voluntary."[21] A waiver is not "knowing and voluntary" for purposes of the OWBPA unless it satisfies several specific requirements:

- 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";
- The waiver "specifically refers to [ADEA] rights or claims";
- The waiver does not include "rights or claims that may arise after the date the waiver is executed";
- The individual receives "consideration in addition to anything of value to which [he or she] already is entitled" in return for waiving his or her claims;
- ~~The release advises~~ the employee to consult with an attorney prior to execution;
- The release allows the employee 21 days within which to consider the agreement; and
- The release provides the employee a period of seven days following execution to revoke the agreement.[22]

The OWBPA also imposes additional requirements upon releases associated with "an exit incentive or other employment termination program offered to a group or class of employees . . ."[23] In the group context, employers must expand the consideration ~~period to 45 days and must~~ also inform the individual "in writing in a manner calculated to be understood by the average individual eligible to participate" of the eligibility factors for the program, any time limits applicable to the program, the job titles and ages of all individuals eligible for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[24]

These requirements are designed to ensure that individuals make an informed choice before releasing any age discrimination claims. The requirements are unusual, given that there is no similar requirement that individuals receive information before releasing other types of claims.

B. Expansion of OWBPA Requirements: *Pagliolo v. Guidant Corp.*

The OWBPA requirements have spawned a series of litigation battles regarding the scope of these obligations. The resulting caselaw has created additional issues for unwary parties and counsel.

A vivid example recently arose in *Pagliolo v. Guidant Corp.*[25] *Pagliolo* arose out of an August 2004 reduction in force ("RIF").[26] Guidant considered nearly 8,800 employees for termination in the RIF, and it elected to terminate over 700 such employees.[27] Guidant informed each of the 700 employees of its decision, informed the employees that they

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would remain employed for 60 days, and provided each employee with a packet of information regarding the RIF. Many of the employees selected for termination were allowed to search for other jobs at Guidant, and approximately 200 employees found such jobs.

The packet included information regarding benefits available to the employees as well as a draft severance package and release of claims.[28] Guidant's draft agreement complied with the standard OWBPA requirements (suggesting that the individuals seek legal counsel, specifically calling out age claims, and allowing the individuals time to consider the agreement and revoke it after execution).[29] Because the draft agreement was provided in connection with a group termination, Guidant expanded the consideration period to 45 days and noted that it would provide a spreadsheet listing the job titles and dates of birth of the employees considered for inclusion in the RIF.[30]

At the end of the 60 days, Guidant provided the employees with a final version of the agreement and release. The final version also contained an attachment that listed the job titles and dates of birth of all of the employees considered for inclusion in the RIF (together with a notation stating whether they were selected for termination).[31] Nearly all of the employees signed the release in return for the benefits promised in the settlement agreement.[32] Joseph Pagliolo, however, used the information contained in the attachment to conduct a statistical analysis of the RIF.[33]

Based upon the information provided by Guidant, and a basic statistical program that he found on the internet, Mr. Pagliolo concluded that older employees were disproportionately impacted by the RIF.[34] He therefore refused to sign the release and instead elected to pursue a claim against Guidant for age discrimination.[35]

Many of Mr. Pagliolo's former co workers soon decided that they also had been victims of age discrimination. Nearly 60 such co workers joined with Mr. Pagliolo to pursue a collective action against Guidant in District Court, alleging that Guidant's release documents did not comply with the OWBPA, that their releases were therefore invalid, and that they had been subjected to age based discrimination in violation of the ADEA.[36]

Guidant sought summary judgment on the claims, contending that the attachments complied with the OWBPA and the releases were valid. The District Court disagreed with Guidant and concluded that the releases were not valid. The Court based this decision on various considerations, all of which are extremely important for litigants and their counsel.

First, the Court held that the release was unenforceable because Guidant designated individuals as being selected for termination as part of the RIF even though they accepted other jobs and remained at Guidant.[37] The Court rejected Guidant's argument that these employees were actually selected for termination as part of the RIF and concluded that "it was a material misrepresentation to identify those employees as eligible for severance benefits" on the attachments.[38] The Court held that "[i]f Guidant wanted to include these employees in Exhibit B, it needed to note that although these employees were offered participation in the plan, they ultimately accepted redeployment within Guidant and therefore declined to participate in the Plan."[39]

Second, the Court held that the releases were not valid because Guidant did not properly describe the decisional unit for the RIF. Guidant contended that it effectively disclosed the decisional unit by listing the employees considered for termination.[40] The Court rejected this argument, holding that "listing nearly all United States-based employees in Exhibit B does not disclose the decisional unit in a manner calculated to be understood by the average individual to participate in the Severance Plan."[41] The Court also held that the release was invalid because Guidant combined six different subsidiary corporations into the decisional unit.[42] The Court reasoned that "nothing in the statute suggests that multiple corporations can be combined to constitute one decisional unit."[43] As a result, "the decisional unit should have been limited by facility."[44]

Third, the Court held that the releases were invalid because Guidant did not disclose the reasons employees were selected for termination.[45] Guidant argued that the OWBPA required only that it disclose the reasons employees were eligible for severance pay and claimed that it did so by stating that all employees selected for termination were eligible for severance pay.[46] The Court rejected this argument and concluded that OWBPA actually requires the employer to disclose the criteria by which employees were selected for termination.[47]

Fourth, the Court held that the releases were invalid because Guidant included employees' dates of birth instead of ages. Guidant argued that use of date of birth was more precise than rounding off to a year, and that the date of birth essentially reflects the employee's age.[48] The Court disagreed, and concluded that the use of date of birth instead of age rendered the releases invalid.[49] The Court reasoned that the disclosure of

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age information "was not presented in a manner calculated to be understood by the average employee signing the release."[50] The Court identified three specific deficiencies:

- "The use of birth dates, particularly in such a document as voluminous as Exhibit B, placed an unreasonable burden on the employee to compute each birth date to age";
- "[T]he random presentation of age" violated OWBPA; and
- The "failure to present the number of employees selected in a one-year age band added to the difficulty in drawing meaningful conclusions from Exhibit B."[51]

Finally, the Court held that Guidant failed to disclose job titles properly under OWBPA.[52] Guidant disclosed job titles and established subcategories within job titles in its employee list.[53] However, the Court nevertheless held that Guidant's employee list was inadequate because Guidant did not also include the grade level of the employees within each job title.[54]

The Court's decision in *Pagliolo* is extremely significant for employers, employees, and litigants. Several of the Court's conclusions are substantial refinements of the requirements contained in the OWBPA and the DOL's regulations regarding OWBPA. Moreover, the combination of many new requirements (any one of which is sufficient to render a release invalid) substantially increases the difficulty of executing an enforceable release and encourages employees to challenge releases after receiving severance payments.

C. The Next Shoe Drops: *Peterson v. Seagate*

The next critical battle regarding the scope of OWBPA was fought in a second District of Minnesota case, *Peterson v. Seagate U.S. LLC.*[55] Plaintiffs James Peterson and David Olson filed timely charges of age discrimination with the EEOC and MDHR alleging that they, and a class of their fellow employees, were terminated by Seagate in 2004 as part of a pattern or practice to terminate employees on the basis of age.[56] Although Peterson and Olson did not sign releases, 19 other employees sought to join the lawsuit even after signing a release of claims. Seagate brought a motion to dismiss the claims of those 19 former employees.

The plaintiffs argued that the release offered by Seagate was invalid because it failed to comply with OWBPA. In particular, the plaintiffs argued as follows:

- The releases misrepresented the number of terminated employees because the decisional unit at issue included two facilities and employees at one facility were not given information about the second facility;
- The release was defective because it only disclosed the eligibility factors for the severance program and not the eligibility factors for selection for inclusion in the RIF;
- The release required the employees to waive their right to file charges with the EEOC in violation of 29 C.F.R. § 1625.23; and
- The plaintiffs were pressured to sign the release immediately because Human Resources personnel collected the releases on the day they were provided (although the releases stated that the individuals had 45 days to consider the release and advised the employees to seek counsel before signing).[57]

Seagate argued that its releases did comply with OWBPA, that the agreement specified that they had 45 days to consider the document before signing, that the document advised them to seek counsel before signing, that the facilities were considered independently and therefore were appropriate decisional units, and that

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it need only disclose eligibility factors for the severance program, not for the reduction in force.[58]

The Court rejected Seagate's arguments and denied the motion to dismiss in its entirety. The Court did not specify the basis for its decision, other than to state that "the complaint contains sufficient allegations that the releases at issue are not valid under OWBPA and that plaintiffs signed the releases under duress."[59]

The significance of the Court's decision in *Peterson* came into sharper focus on May 28, 2008, when the Court granted the plaintiffs' motion for summary judgment and held that the releases were invalid as a matter of law. The Court's analysis turned on two undisputed flaws in the agreements: (1) the failure to list accurately the number of employees selected for termination as part of the RIF and (2) the listing of job codes without defining those codes on the OWBPA attachment. Most importantly, the Court expressly rejected the employer's argument that mistakes must be material to invalidate a release under the OWBPA. The Court's rulings in *Peterson* further dramatize the dangers inherent in executing an OWBPA compliance release.

IV. THE PROHIBITION AGAINST RESTRICTIONS ON FILING CHARGES WITH THE EEOC

The EEOC regards any provision in a release that purports to restrict a person from filing a charge of discrimination with the EEOC as unenforceable and retaliatory. The EEOC has initiated two lawsuits in Minnesota alone challenging such provisions: *EEOC v. Ventura Foods L.L.C.*, Civ. No. 05-663 RHK/JSM (D. Minn.); *EEOC v. Land O' Lakes, Inc.*, Civ. No. 06-3828 ADM/AJB (D. Minn.).

In *EEOC v. Lockheed Martin Corp.*, 444 F.Supp.2d 414, 420-22 (D. Md. 2006), the District Court held that severance agreements requiring employees to release their right to file administrative charges of discrimination with the EEOC constitute facial retaliation in violation of Title VII, the ADEA, and analogous statutes. The Court based its decision on Supreme Court and other precedent, the public policy objective served by administrative charges (to inform the EEOC of potential discrimination and trigger a government investigation), the harm to the public interest caused by severance agreements that have a chilling effect on such charge filing, and the broad standard for actionable retaliatory conduct recently expanded by the Supreme Court in *Burlington North and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006).[60]

In *EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006), two judges of the Sixth Circuit, over the dissent of a third member of that panel, reversed a District Court finding that severance agreements are facially retaliatory when they purport to prohibit charge filing. The court did indicate that such provisions may be unenforceable, but found that the provision in question was not facially retaliatory. Notably, the panel decision failed to consider the *White* decision and instead relied on pre-*White* cases applying the narrower definition of actionable retaliation that the Supreme Court rejected in *White*.

V. THE IMPROPRIETY OF "DO NOT DARKEN MY DOOR" TERMS IN SETTLEMENT AGREEMENTS

Employers often seek to include provisions barring former employees from reapplying or "darkening their door" as a condition of the release.[61] These provisions can be challenged as retaliatory in some circumstances. While such "no reapplication" clauses are not uncommon, the EEOC has opposed provisions that bar an employee from reapplying for positions with a defendant as a condition of settling a discrimination claim.[62] Indeed, in its Settlement Guidelines to its attorneys, the EEOC's Regional Attorney's Manual explicitly states that no such provision can be included in an EEOC settlement.[63]

CONCLUSION

To avoid unnecessary and costly post-litigation litigation, plaintiff counsel should make sure that settlement agreements either have no confidentiality provisions or, if so, those provisions are limited to the terms and amount of the settlement. Plaintiff counsel also would do well to remind defense counsel of the rigid requirements under the FMLA and OWBPA so that settlements can be drafted, reviewed, and approved with a minimum of delay and cost. Plaintiff counsel should resist settlement terms that prohibit plaintiffs from filing future charges with civil rights agencies or from submitting applications to defendants in the future. If defendants insist on such terms, plaintiff counsel may consider involving the EEO

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[1] An earlier version of this article appeared in the 2008 Employment Law Institute manual. All views expressed herein are those of the authors and not their agency or firm.

[2] AM. B. ASS'N. FORMAL OP. 00-417 (April 7, 2000); AM. B. ASS'N. MODEL RULE 5.6(B); AM. B. ASS'N. MODEL CODE, DISCIPLINARY RULE 2-108.

[3] AM. B. ASS'N. FORMAL OP. 00-417 (April 7, 2000); *see also* AM. B. ASS'N. MODEL RULE 5.6(B) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.");
AM. B. ASS'N. MODEL CODE, DISCIPLINARY RULE 2-108 ("In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice

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law.").

[4] RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 13(2).

[5] Restatement of the Law Governing Lawyers, § 13(2), Comment c.

[6] AM. B. ASS'N. MODEL RULE 8.4(A).

[7] *Adams v. BellSouth Telecomm., Inc.*, 2001 WL 34032759, *2 (S.D. Fla. 2001) (sanctioning all counsel); *see also Hu-Friedy Mfg. Co. v. Gen'l Elec. Co.*, 1999 WL 528545, *2-*3 (N.D. Ill. 1999) (rejecting the effort to limit plaintiff counsel's ability to represent future parties against the defendant).

[8] *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744-45 (1st Cir. 1996); *see also United States v. City of Milwaukee*, 390 F.Supp. 1126 (E.D. Wis. 1975) (holding that it was unlawful retaliation for the employer to impose a confidentiality policy that required employees to obtain the employer's permission before speaking to representatives of the Department of Justice, which was pursuing a Title VII claim against the employer).

[9] EEOC Regional Attorney's Manual, Settlement Standards and Procedures, http://www.eeoc.gov/litigation/manual/ 3-4-a_settlement_standards.html.

[10] 29 C.F.R. § 285.220(d).

[11] *Richardson v. Sugg*, 448 F.3d 1046, 1056 (8th Cir. 2006).

[12] *Richardson*, 448 F.3d at 1056 (quoting *Taylor v. Progress Energy, Inc.*, 414 F.3d 364, 372 (4th Cir. 2005)).

[13] *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 463 (4th Cir. 2007).

[14] *Taylor*, 493 F.3d at 462-63.

[15] *Taylor*, 493 F.3d at 458 (citations omitted).

[16] *Taylor*, 493 F.3d at 460.

[17] *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

[18] *Taylor*, 493 F.3d at 459-60 (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945)).

[19] *Taylor*, 493 F.3d at 460 (quoting S.Rep. No. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 7, 18) (emphasis added).

[20] *Taylor*, 493 F.3d at 462-63 (emphasis added).

[21] 29 U.S.C. § 626(f).

[22] 29 U.S.C. § 626(f)(1)(A)-(G).

[23] 29 U.S.C. § 626(f)(1)(H).

[24] 29 U.S.C. § 626(f)(1)(H).

[25] Civ. No. 06-943 (DWF/SRN) (D. Minn. April 4, 2007).

[26] *Id.*, pp. 4-5.

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[27] *Id.*
[28] *Id.*, p. 5.
[29] *Id.*, pp. 7-8.
[30] *Id.*
[31] *Id.*, p. 7.
[32] *Id.*, p. 8.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*, pp. 14-15.
[38] *Id.*, p. 14.
[39] *Id.*, p. 16.
[40] *Id.*, p. 18.
[41] *Id.*
[42] *Id.*, p. 19.
[43] *Id.*
[44] *Id.*, p. 20; *see also Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1244 (11th Cir. 2006) (rejecting the OWBPA challenge to releases that broke employee lists down by the employee's specific region).
[45] *Pagliolo*, pp. 24-25.
[46] *Id.*, p. 24.
[47] *Id.*, p. 25; *see also Mettit v. First Energy Corp.*, 2006 U.S. Dist. LEXIS 15089 (N.D. Ohio 2006) (ruling the OWBPA release invalid when
it does not include criteria for termination selections); *Commonwealth of Ma. v. Bull HN Info. Sys.*, 143 F.Supp.2d 134, 147, n. 29 (D. Mass. 2001) (holding that "eligibility factors" refers 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").
[48] *Pagliolo*, p. 27.
[49] *Id.*
[50] *Id.*
[51] *Id.*, pp. 27-28.
[52] *Id.*, p. 29.
[53] *Id.*
[54] *Id.*
[55] 2007 U.S. Dist. Lexis 85873 (D. Minn. November 20, 2007).
[56] *Id.*, *2.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*; *see also EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (7th Cir. 1992) (ruling collective bargaining agreements that waive the rights of employees to invoke internal grievance proceedings if they file charges of discrimination are facially retaliatory in violation of the ADEA); *EEOC v. U.S. Steel Corp.*, 671 F.Supp. 351 (W.D. Pa. 1987) (holding
a release conditioning the provision of enhanced retirement benefits on an employee's waiver of the right to file an EEOC charge and to participate in an EEOC proceeding was a per se violation of the ADEA's anti-retaliation provision), *rev'd on other grounds*, 921 F.2d 489 (3d. Cir. 1990); *cf. Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996) (affirming that an employer offer of settlement in exchange for agreement of its employee to restrict his communications with the Nuclear Regulatory Commission and other federal agencies constituted discrimination in violation of whistleblower protections provided by Section 210 of the Energy Reo
rganization Act of 1974).
[61] *See, e.g.*, Charles H. Fleischer, "
Validity and Effect of Will-Not-Reapply Covenants in Employment Discrimination Settlement Agreements," 22 Labor Lawyer 151 (Fall 2007).
[62] *See, e.g.*, EEOC Opposes Settlement Clauses That Bar Re-Application and Rehiring, BNA Daily Labor Report p. C-1 (April 4, 2008).
[63] Regional Attorney's Manual, Settlement Standards and Procedures, http://www.eeoc.gov/litigation/manual/3-4-a_settlement_standards.html.

benefits equal to Respondent's benefits from Appellant's pension, the district court had thereby failed to properly exclude all of Appellant's marital and premarital pension interests from Appellant's "available" income for maintenance purposes.

Appellant also argued that the district court had improperly included in his available income benefits attributable to Appellant's post-marital pension accumulation. However, the Court of Appeals affirmed on that issue, because case precedent holds that *post-marital* pension accumulation constitutes income available for payment of spousal maintenance.

The Court of Appeals ordered that Appellant's maintenance obligation be reduced to zero, based upon Appellant lacking any ability to pay spousal maintenance due to his reasonable living expenses being in excess of his available income. Finally, the Court of Appeals modified the effective date for the modified maintenance order because the district court's commencement date had no basis in the record.

Appellate Procedure
In re the Marriage of Clifford v. Bundy
(Filed April 8, 2008)

After the parties' divorce decree was entered, Appellant Wife requested amended findings. However, Appellant presented the motion for amended findings directly to the assigned judge, instead of filing the motion with the court administrator. Consequently, the motion for amended findings did not effectively extend the time for any appeal from the divorce decree.

The Court of Appeals observed that the appeal sought review of both the divorce decree and the district court's decision on the motion for amended findings. The Court of Appeals dismissed the appeal, since it was untimely as to the deadline to appeal from the divorce decree, and since the motion for amended findings was also technically untimely.