

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION****29 CFR Part 1625**

RIN 3046-AA68

**Waivers of Rights and Claims: Tender Back of Consideration****AGENCY:** Equal Employment Opportunity Commission.**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is publishing this final regulation stating that, under the Older Workers Benefit Protection Act of 1990, employees cannot be required to tender back the consideration received under a waiver agreement before being permitted to challenge the waiver agreement in court, and addressing related issues. The regulation protects older workers' rights under the Older Workers Benefit Protection Act.

**DATES:** Effective January 10, 2001.**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background***A. The Older Workers Benefit Protection Act of 1990*

In Title II of the Older Workers Benefit Protection Act of 1990 (Title II or OWBPA), Congress added section 7(f) to the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626(f) (ADEA), to set out requirements for ADEA waivers that would ensure that "older workers [are] not coerced or manipulated into waiving their rights under the ADEA."<sup>1</sup> Congress decided not to require supervision of ADEA waivers by the Equal Employment Opportunity Commission (EEOC or Commission), but emphasized "that the requirements of [T]itle II [are to] be strictly interpreted to protect those individuals covered by the Act."<sup>2</sup>

In the OWBPA, Congress proclaimed that "[a]n individual may not waive any right or claim \* \* \* unless the waiver is knowing and voluntary." 29 U.S.C.

626(f)(1). An ADEA waiver is valid only "if certain threshold requirements [are met and the waiver is] otherwise shown to be knowing and voluntary."<sup>3</sup> The OWBPA states that the waiver agreement must be "written in a manner calculated to be understood [by the employee], or by the average individual eligible to participate"; must specifically reference ADEA rights or claims; and must advise employees to consult an attorney before signing the agreement. ADEA waivers also must be in exchange for extra consideration, and must not waive rights or claims that arise after the agreement is executed.<sup>4</sup> Finally, the OWBPA directs employers to give employees specified periods of time to consider waivers and to revoke them. *Id.* section 626(f)(1)(A)-(G). When employers offer waivers in connection with an exit incentive or other group employment termination program, they must give employees certain information about the termination program itself, as well as lists of the job titles and ages of individuals eligible or selected for the program and the ages of those not eligible or selected but who were in the same job classification or organizational unit. *Id.* section 626(f)(1)(H). *See also* 29 CFR Part 1625.22.

In addition, an ADEA waiver is "knowing and voluntary" only if the employee accepts it "in the absence of fraud, duress, coercion, or mistake of material fact."<sup>5</sup> According to the OWBPA legislative history, courts evaluating the validity of an ADEA waiver should analyze this aspect of the "knowing and voluntary" question under the "totality of the circumstances approach." Congress rejected traditional contract principles as the basis for determining if an ADEA waiver is knowing and voluntary.<sup>6</sup>

<sup>3</sup> *Id.* at 31-32.

<sup>4</sup> These requirements also apply to a waiver in settlement of an ADEA charge filed with the EEOC. 29 U.S.C. 626(f)(2).

<sup>5</sup> S. Rep. No. 101-263, *supra* note 2, at 31. *See also* 29 CFR 1625.22(a)(3) ("Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver."). *Accord Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1228-29 (10th Cir. 1999); *EEOC v. Johnson & Higgins*, 5 F. Supp. 2d 181, 186 (S.D.N.Y. 1998).

<sup>6</sup> S. Rep. No. 101-263, *supra* note 2, at 32. For the analysis of "knowing and voluntary," the Senate Committee gave its approval to the "totality of circumstances" analysis used to uphold an ADEA waiver in *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988), but disapproved of "the approach adopted in *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987)," which applied ordinary contract principles.

Congress also provided that a court of competent jurisdiction would resolve "any dispute" that may arise over whether a waiver agreement was entered in compliance with the statutory requirements. 29 U.S.C. 626(f)(3). Congress intended that a valid OWBPA waiver would act as an affirmative defense.<sup>7</sup> The statute directs that the employer has the burden of proving that an ADEA waiver complies with the enumerated OWBPA requirements, assuming that the employer is the party asserting the validity of the waiver. *Id.*<sup>8</sup> Moreover, legislative history reveals that "once that occurs, the employee may produce additional evidence to suggest that the waiver was not 'knowing and voluntary,'"—*i.e.*, that the waiver is not valid due to one or more of the non-enumerated elements of the "knowing and voluntary" standard, such as fraud, duress, coercion or mistake of material fact.<sup>9</sup> In such a circumstance, the employer then must prove, with respect to the issues raised by the employee, that the waiver was both knowing and voluntary.<sup>10</sup>

*B. The Negotiated Rule on Waivers of Rights and Claims Under the ADEA*

In 1998, the EEOC published a final regulation on Title II of the ADEA, the product of a negotiated rulemaking under the procedures in the Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.* The final rule set forth the EEOC's interpretation of the standards in section 7(f) of the ADEA, covering the following subjects, among others: the wording of waiver agreements, waivers of future rights, consideration, time periods, informational requirements, waivers settling charges and lawsuits, the burden of proof, and the EEOC's enforcement powers. *See* 29 CFR 1625.22.

Some commenters on the negotiated rule had urged the Commission to address the question of whether employees can be required to tender back the consideration received under a waiver agreement before challenging the waiver agreement in court. However, about four months prior to publication

<sup>7</sup> S. Rep. No. 101-263, *supra* note 2, at 35 ("A waiver of rights or release of claims is generally available as an affirmative defense.")

<sup>8</sup> *See also* 136 Cong. Rec. 27,062 (1990) (Final Statement of Floor Managers) *reprinted in* 1 Staff of Senate Comm. on Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (S. 1511 and Related Bills), at 26 (1991).

<sup>9</sup> S. Rep. No. 101-263, *supra* note 2, at 35. Congress did not intend to force employers to "prove a negative" where no evidence of fraud, duress, or coercion exists." *Id.*

<sup>10</sup> *Id.*

<sup>1</sup> 136 Cong. Rec. 27,061 (1990), *reprinted in* 1 Staff of Senate Comm. on Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (S. 1511 and Related Bills), at 23 (1991).

<sup>2</sup> S. Rep. No. 101-263, at 31 (1990), *reprinted in* 1 Staff of Senate Comm. on Labor and Human Resources, 102d Cong., Legislative History of the Older Workers Benefit Protection Act (S. 1511 and Related Bills), at 350 (1991) [hereinafter S. Rep. No. 101-263].

of the final negotiated rule, the Supreme Court decided the issue of tender back in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). The Supreme Court held that a release that does not comply with the OWBPA requirements cannot bar an employee's ADEA claims, even if the employee did not tender back the consideration. The Commission decided, in light of *Oubre*, to address tender back and related issues in a subsequent guidance rather than in the negotiated rule.<sup>11</sup> The legislative rule published today fulfills that goal.

### C. The EEOC's Rulemaking Authority Under the ADEA

Congress granted the EEOC authority under the ADEA to issue legislative rules that it considers "necessary or appropriate" in enforcing the Act. 29 U.S.C. 628.<sup>12</sup> ADEA legislative regulations are properly used to resolve statutory ambiguities or omissions, through policies that are consistent with the purposes of the Act.<sup>13</sup> If the ADEA does not directly address a particular matter, the EEOC may adopt any rule that is "permissible" under the Act. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). A legislative rule is permissible if it is a reasonable exercise of an agency's rulemaking authority. *Id.* at 844, 845, 865, 866; *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1100 (9th Cir. 1998); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1448 (11th Cir. 1998). A legislative rule is not permissible if it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843; *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 864 n.8 (1st Cir. 1998). Legislative rules have the effect of law and are binding on the general public, subject to limited review by the courts. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)

<sup>11</sup> However, with regard to the administrative process, section (i)(3) of the negotiated rule provides that a waiver agreement cannot impose "any condition precedent, any penalty, or any other limitation adversely affecting" an individual's right to file a charge or complaint with the EEOC or assist the EEOC in an investigation. As noted in the preamble to the final negotiated rule, this provision forbids a requirement in a waiver agreement that an individual tender back the consideration before filing a charge or complaint of discrimination with the EEOC or assisting the EEOC in an investigation. 63 FR 30627 (1998).

<sup>12</sup> See *American Ass'n of Retired Persons v. EEOC*, 823 F.2d 600, 604 (D.C. Cir. 1987) ("It would be very difficult to find more permissive statutory language [than in 29 U.S.C. 628].").

<sup>13</sup> See *Pauly v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.").

(legislative rule has force and effect of law).

### D. The Decision in *Oubre v. Entergy Operations, Inc.*

In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court addressed the question of whether the OWBPA's statutory waiver scheme permits an employer to rely on contract theories of ratification and tender back to defend an ADEA waiver that does not comply with the OWBPA. The waiver in *Oubre* did not comply with three of the OWBPA's threshold requirements,<sup>14</sup> but the employer argued that it nonetheless was enforceable based on contract principles of ratification and tender back. The employer maintained that Ms. Oubre ratified the defective waiver because she did not return the money paid by the employer after discovering the waiver's deficiencies. *Oubre*, 522 U.S. at 425.

Rejecting this argument, the Supreme Court held that Ms. Oubre's waiver could not be given effect because it did not comply with the OWBPA, notwithstanding contract theories of ratification and tender back. The Court reasoned that the validity of an ADEA waiver should be determined solely with reference to the statutory scheme, because "[t]he OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law." *Oubre*, 522 U.S. at 427. The Court explained:

Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee "may not waive" an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids.

The Court also explained that reliance on these contract principles would "frustrate [the OWBPA's] practical operation as well as its formal command."<sup>15</sup> Many discharged employees would lack the resources to return funds received for the waiver, as a condition of ADEA litigation. The Court expressed concern that "[t]hese realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions \* \* \*. We ought not

<sup>14</sup> In procuring Ms. Oubre's ADEA waiver, Entergy Operations, Inc., did not comply with OWBPA in at least three aspects: (1) it did not give her enough time to consider the waiver; (2) it did not give her seven days after she signed the waiver to change her mind; and (3) the text of the waiver did not specifically refer to ADEA claims. *Oubre*, 522 U.S. at 424-25 (majority opinion).

<sup>15</sup> *Oubre*, 522 U.S. at 427 (majority opinion).

to open the door to an evasion of the statute by this device."<sup>16</sup>

Finally, the Court observed that, in the future, lower courts may need to inquire "whether the employer has claims for restitution, recoupment, or setoff against the employee" for return of the consideration paid in exchange for the invalid waiver. The Court expressly stated that it "need not decide those issues here, however."<sup>17</sup> In his concurrence, Justice Breyer raised the possibility of employers seeking restitution after suit commenced.<sup>18</sup>

## II. Review and Discussion of Public Comments

### A. Introduction and General Comments

The Commission received 27 comments in response to this Notice of Proposed Rulemaking (NPRM) or Rulemaking, which was published in the **Federal Register** on April 23, 1999. 64 FR 19952. Of these comments, 19 were from representatives of employers and eight were from representatives of employees or older persons. Before reviewing and discussing the public comments on specific sections of the NPRM, the Commission addresses some general comments received from representatives of employers.

First, employer representatives questioned the Commission's authority to promulgate this regulation, arguing that the EEOC cannot regulate the contents of an ADEA waiver agreement if the agreement was entered into in a "knowing and voluntary" fashion under the OWBPA. As explained in detail below, however, the Commission is regulating the content of waivers only to the extent necessary to fully effectuate the OWBPA's "knowing and voluntary" standard.

Employer commenters also asserted that the Commission does not have the authority to regulate covenants not to sue. These comments led the Commission to refine its reasoning related to covenants not to sue. For the reasons set forth below, the Commission has the authority to regulate covenants not to sue because they operate as waivers in the ADEA context. Thus, as a logical outgrowth of the proposed rule and the comments on it, the Commission has drafted the final rule to reflect a unified approach to waivers and covenants not to sue, as well as tender back and damages.

Furthermore, an employer representative contended that the proposed regulation would not be

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 428.

<sup>18</sup> *Id.* at 433 (Breyer, J., and O'Connor, J., concurring).

entitled to judicial deference because it interprets the Supreme Court's decision in *Oubre* rather than the OWBPA itself. However, these rules do not solely interpret the decision in *Oubre*. The EEOC is construing the OWBPA through this regulation, and the regulation promulgated herein is fully supported by a reasoned interpretation of the requirements of the OWBPA. Obviously, the Commission is required to take the Supreme Court's decision in *Oubre* into account in promulgating the regulations.

Finally, several management representatives commented that this regulation may undermine the Commission's support of voluntary resolution of cases through mediation. Specifically, they contended that this regulation may discourage employers from participating in EEOC mediations because waivers entered into in conjunction with ADEA mediation settlements will be perceived as vulnerable to challenge. The Commission, however, is satisfied that this regulation will not weaken its mediation program.

According to a recent independent and comprehensive survey of employers and charging parties who have participated in the EEOC's National Mediation Program, the overwhelming majority of participants find it to be highly effective, express strong satisfaction with the process, and are willing to participate again if party to a discrimination charge.<sup>19</sup> These survey results reflect that, among other things, EEOC mediation is fully voluntary and is a process in which the basic interests of both parties are addressed. A mediation settlement is only achieved when the parties have addressed all of their interests and identified a mutually satisfactory solution, including agreement to any waiver provision. This is entirely distinct from the situation where an employer conditions severance, early retirement, or other benefits offered in connection with a layoff or reduction-in-force on the signing of a waiver.

#### B. Comments on Proposed 29 CFR 1625.23(a): Tender Back

Paragraph (a) of this rule, as proposed and published for comment in the **Federal Register**, stated:

An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a

charge of discrimination with EEOC or any state or local fair employment practices agency. Retention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver. A clause requiring tender back is invalid under the ADEA.

Comments on this provision were not numerous. One employer representative stated that the provision, while perhaps unnecessary in light of the Supreme Court's holding in *Oubre*, was mostly "unobjectionable." A few employer representatives objected vigorously to aspects of the proposal, as discussed below. Employee representatives did not comment.

#### 1. The "No Tender Back" Rule Applies to All Waiver Challenges

The basic rationale for paragraph (a) of this regulation is that the OWBPA forecloses the employer defenses of tender back and ratification<sup>20</sup> because these defenses would effectively result in enforcement of noncompliant OWBPA waivers despite Congress' admonition that "[a]n individual may not waive" an ADEA right or claim unless the waiver is knowing and voluntary.<sup>21</sup> Paragraph (a) of the proposed regulation stated that "[r]etention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver." Three management representatives asserted that the "no tender back" rule should apply only if the waiver obviously fails to comply with OWBPA's enumerated statutory requirements (for example, if the waiver does not refer to the ADEA, or it does not advise legal consultation). Under this approach, it would follow that tender back *could* be required if an individual challenged a waiver on the basis of fraud, duress, or other circumstances beyond the document itself.

The Commission considered these comments but concluded, for the following reasons, that the "no tender back" rule must apply regardless of a waiver's facial OWBPA compliance. First, the validity of a waiver agreement is not always apparent from its face, even with regard to the enumerated OWBPA requirements. For example, assessing the validity of a waiver in

connection with an exit incentive or a group termination program subject to the OWBPA's informational requirements generally requires an examination of the unique facts of a particular workforce reduction or termination. If the commenters' suggested approach were adopted, the tender back requirement could operate to allow employers to enforce group waivers that did not, in fact, comply with the informational requirements. Such a result would undermine enforcement of one of the OWBPA's critical components.<sup>22</sup>

Second, the commenters' suggestion would open the door to enforcement of OWBPA waivers that did not comply with the statute because they were tainted by fraud or duress. The Commission does not agree with the view that the OWBPA omits these common law prohibitions and, therefore, that any such challenge remains subject to ratification and tender back, even in the aftermath of *Oubre*. To the contrary, Congress contemplated that the OWBPA's standard for "knowing and voluntary" would incorporate *both* the enumerated statutory requirements *and* the requirement that the waivers be adopted "in the absence of fraud, duress, coercion, or mistake of material fact."<sup>23</sup> If the "no tender back" rule is necessary to effectuate the OWBPA's enumerated requirements, then it also must be applicable to enforce the fundamental requirement that OWBPA waivers be free of fraud, duress, coercion, or mistake of material fact.<sup>24</sup>

<sup>22</sup> In enacting the OWBPA, Congress was especially concerned about protecting older employees included in group terminations. See S. Rep. No. 101-263, *supra* note 2, at 32 ("[E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is not a function of their individual status. Under these circumstances, the need for adequate information \* \* \* before waivers are signed is especially acute.").

<sup>23</sup> *Id.* at 31-32 ("The unsupervised waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal. The individual also must have acted in the absence of fraud, duress, coercion, or mistake of material fact."). See *also id.* at 35.

<sup>24</sup> The Commission agrees with the conclusion reached on this point by the court in *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1229 (10th Cir. 1999), in which the releases at issue complied with the express statutory requirements of the OWBPA, but the court nevertheless held that "the appellants' failure to tender back their severance benefits \* \* \* ha[d] no effect on their ability to challenge the waivers of their ADEA claims under the OWBPA" because of fraud, duress or other reasons. *But see Reid v. IBM Corp.*, 95 Civ. 1755 (MBM), 1997 WL 357969 (S.D.N.Y. June 26, 1997) (holding that the principles of ratification and tender back would

<sup>19</sup> See Dr. E. Patrick McDermott, Dr. Ruth Obar & Dr. Anita Jose, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program* (Sept. 20, 2000) <http://www.eeoc.gov/mediate/report/>.

<sup>20</sup> *Oubre*, 522 U.S. at 430-31 (Breyer, J., and O'Connor, J., concurring) ("As a conceptual matter, a 'tender back' requirement would imply that the worker had ratified her promise by keeping her employer's payment.").

<sup>21</sup> *Oubre*, 522 U.S. at 427 (majority opinion). See *also id.* at 430-31 (Breyer, J., and O'Connor, J., concurring).

## 2. Tender Back Clauses

One employer representative recommended that the Commission permit negotiation of tender back clauses as part of waiver agreements. The Commission does not adopt this recommendation, and the final rule retains the prohibition against tender back clauses.<sup>25</sup> Allowing a tender back clause would undermine the OWBPA, as interpreted in *Oubre*. The basic rationale for this regulation is that the OWBPA abrogates the common law doctrines of tender back and ratification because their operation opens the door to enforcement of noncompliant OWBPA waivers.<sup>26</sup> Prohibiting tender back by operation of law, but allowing it by operation of contract, would unacceptably undermine the statute and elevate form over substance.

One employer representative commented that the Commission's use of the word "invalid" in the NPRM as to tender back clauses "leaves open the question of whether \* \* \* the inclusion of such provisions might somehow invalidate the ADEA waiver itself."<sup>27</sup> This employer representative maintained that inclusion of a tender back clause should not invalidate a waiver that otherwise was "knowing and voluntary" under the OWBPA. The final regulation does not address the question of severability because the NPRM did not present the issue, and the record on it is very limited. The Commission believes, however, that contrary to the position advanced by the employer, there is a strong argument that inclusion of an invalid provision in an ADEA waiver agreement—such as a tender back clause or a damages provision—should invalidate the entire waiver. Under this point of view, inclusion of such provisions in a waiver would make the agreement misleading in a material sense and thus violate the OWBPA's requirement that waivers be calculated to be understandable by the

apply where a waiver met the minimum requirements of the OWBPA even if not knowing and voluntary for some other reason, such as fraud or duress). For the reasons discussed herein, the Commission believes that *Reid*, which predates the Supreme Court's decision in *Oubre*, was decided incorrectly.

<sup>25</sup> However, the rule on tender back clauses has been removed from paragraph (a) and incorporated into paragraph (b).

<sup>26</sup> See *Oubre*, 522 U.S. at 427 (majority opinion).

<sup>27</sup> This commenter made the same observation regarding the Commission's use of the phrase "not permitted" in paragraph (b) of the NPRM as to covenants not to sue, and the discussion above also applies to covenant not to sue. One employee representative argued however, that inclusion of a covenant not to sue should create a rebuttable presumption in related litigation that the waiver was not knowing and voluntary.

individual or by the average individual eligible to participate.<sup>28</sup>

## 3. Tender Back and State or Local Fair Employment Practices Agencies

Two management commenters objected to the wording of paragraph (a) where it stated that if an individual alleges that a waiver is not knowing and voluntary, tender back is not required prior to "filing either a lawsuit or a charge of discrimination with \* \* \* any state or local fair employment practices agency." These commenters contended that the Commission lacks authority to specify the conditions required to file a complaint with state or local agencies. To clarify this regulation, the Commission incorporates the following language in the sentence referring to state and local agencies:

\* \* \* or any state or local fair employment agency acting as an EEOC referral agency for purposes filing the charge with EEOC.

## 4. Final Regulatory Language for Paragraph (a)

Accordingly, paragraph (a) of the final rule will state:<sup>29</sup>

An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

### C. Comments on 29 CFR 1625.23(b): Covenants Not To Sue

Paragraph (b) of the proposed regulation, as published for comment in the **Federal Register**, stated:

A covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement, is invalid under the ADEA, whether the covenant or other arrangement is part of the agreement or is contained in a separate document. A provision allowing an employer to recover costs, attorneys' fees, and/or damages for the

<sup>28</sup> 29 U.S.C. 626(f)(1)(A).

<sup>29</sup> Note that paragraph (a) of the final rule uses the phrase "waiver agreement, covenant not to sue, or other equivalent arrangement" where appropriate to reflect the Commission's unified approach to waivers and covenants not to sue. Section C of the Preamble discusses covenants not to sue.

breach of any covenant or other arrangement is not permitted.

## 1. Summary of Employee Comments

Employee representatives stated that the use of covenants not to sue clearly offends Congress' intent to allow individuals to test ADEA waivers in court. One employee representative maintained that the Commission needs to implement more powerful disincentives for using covenants not to sue than simply stating that they are invalid under the OWBPA. According to this commenter, an employer that uses a covenant not to sue should be subject to: A rebuttable presumption in related litigation that the waiver was not knowing and voluntary; an automatic finding of a willful ADEA violation; and a finding of retaliation if the employer seeks to recoup past benefits or abrogate future benefits. The Commission has considered these comments but believes that the final rule reflects the commenters' concerns without unduly altering the legislative balance crafted by Congress.

## 2. Summary of Employer Comments

A number of management representatives acknowledged that a covenant not to sue that is part of a waiver agreement is enforceable only if the overall waiver agreement is knowing and voluntary under the OWBPA. As a corollary to this proposition, several commenters agreed with the employer representative who stated that "[i]f the employee successfully invalidates the release because it does not comply with OWBPA, an employer's breach of contract claim is worthless."

Some representatives of employers asserted that the Commission does not have the authority to regulate covenants not to sue. Employers also contended that the OWBPA does not affect the ability of the employer and employee to enter into a covenant not to sue, under which the employer is entitled to damages and/or attorneys' fees if the employee goes to court and the covenant is upheld. Commenters on behalf of employers asserted that a contrary result would encourage litigation and discourage employers from offering attractive severance packages in exchange for waivers. According to these commenters, the chilling effect of the damages provisions commonly included in such covenants is necessary to retain the OWBPA's balance between employer and employee interests.

One employer representative argued against paragraph (b) of the proposed rule because, in the commenter's view, "a prevailing defendant is already

entitled as a matter of right to receive full reimbursement for all of its taxable costs (see 28 U.S.C. 1920), and may also be awarded its counsel fees if \* \* \* the employee's claim 'was frivolous, unreasonable or groundless.' *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).<sup>30</sup> Other commenters made similar arguments. Finally, an employer representative contended that, even if the Commission ultimately concludes that the use of covenants not to sue is inconsistent with the OWBPA, the Commission should provide that only the covenant, rather than the entire waiver agreement, is unenforceable.

### 3. Discussion

The NPRM addressed the legality of covenants not to sue and stated that such covenants were invalid due to the chilling effect on valid ADEA claims of damages and/or attorneys' fees provisions as well as the language of the covenants themselves. Because the chilling effect of damages or attorneys' fees could give life to waiver agreements that violate the OWBPA, the final rule continues to prohibit the use of provisions allowing the recovery of damages and/or attorneys' fees simply because suit has been filed. Based on further analysis in light of the comments, however, the final rule recognizes that an ADEA promise not to sue, by itself, is the functional equivalent of a waiver and therefore subject to the OWBPA requirements and restrictions. Thus, a covenant not to sue that comports with the requirements of the OWBPA will provide the employer with a defense against the employee's ADEA claim of age discrimination, and will entitle the employer to a dismissal of the employee's suit after the covenant has been upheld. In addition, attorneys' fees and costs will continue to be available under established principles. The final rule prohibits additional damages and/or attorneys fees because they would violate the statute. The final rule adopts a unified standard for waivers and covenants not to sue (and any other equivalent arrangements), pursuant to the Commission's authority to enforce the OWBPA.

#### (a) Attorneys' Fees and Damages

##### (i) Attorneys' Fees and Costs Will Continue to be Available to Employers Under Established Principles

As noted above, a few management commenters contended that the prohibition against covenants not to sue in paragraph (b) of the NPRM was inconsistent with the established law which permits the award of attorneys' fees and costs to prevailing employers in certain circumstances. One commenter took the position that

prevailing employers are entitled to attorneys' fees if the employee's claim was "frivolous, unreasonable or groundless," and to costs as a matter of right.

The courts have held that attorneys' fees are available for ADEA defendants where the plaintiff litigated in "bad faith."<sup>30</sup> The "frivolousness" standard suggested by one commenter is the Title VII standard and does not apply to the ADEA.<sup>31</sup> In any event, the Commission does not intend to displace the established principles governing attorneys' fees under the ADEA. An employer would be entitled to attorneys' fees if the employee's suit were brought in bad faith.

The Commission agrees with the commenters' point on the issue of costs and therefore has deleted references to costs from the final rule where appropriate. As with attorneys' fees, the Commission does not intend to disturb established law with respect to costs. However, employers may not recover costs beyond those available under established law in ADEA cases.

In order to clarify these matters, the Commission has added a sentence to paragraph (b) stating that the rule is "not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law."

##### (ii) *The Chilling Effect Conflicts with the OWBPA*

The Commission remains concerned about the chilling effect that the potential for attorneys' fees (other than those currently available) and damages would have on good faith OWBPA challenges. Several commenters in fact agreed that the possibility of such remedies exerts a chilling effect on ADEA litigation, although employee and employer representatives disagreed about the propriety of that chilling effect. In the Commission's view, the financial risk of pursuing an ADEA claim in the face of such remedies would, as a practical matter, discourage individuals from pursuing even cases

<sup>30</sup> See *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1437 (11th Cir.) (citing cases, and reasoning that because the ADEA borrows the attorneys' fee provision of the Fair Labor Standards Act, which speaks only in terms of attorneys' fees for plaintiffs, "a district court may award attorneys' fees to a prevailing ADEA defendant only upon a finding that the plaintiff litigated in bad faith"), *cert denied*, 119 S. Ct. 405 (1998); *Cesaro v. Thompson Publishing Group*, 20 F. Supp. 2d 725, 726-27 (D.N.J. 1998) (same).

<sup>31</sup> Cf. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (under Title VII a prevailing defendant can get attorneys' fees "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith") (emphasis added).

about which they were fairly optimistic. Because the chilling effect of these penalties could give life to waiver agreements that were not compliant with the OWBPA, and thereby undermine enforcement of the statute, the Commission's final rule forbids any provision that threatens to impose any condition precedent, penalty, or other limitation that would adversely affect an individual who exercises his or her right to challenge an agreement covered by the OWBPA.

The Commission's conclusion that the chilling effect of damages or attorneys' fees is at odds with the OWBPA is supported by the Supreme Court's reasoning in *Oubre*. The Supreme Court in *Oubre* recognized the effect that financial pressure may have on an individual's willingness to bring a case. In the context of tender back, the Court reasoned that many individuals will "lack the means to tender [the] return" of funds received in exchange for the waiver and, therefore, will refrain from bringing cases they otherwise might pursue.<sup>32</sup> Employers' perceptions that individuals will be deterred from seeking judicial assessment of ADEA waivers, in turn, may "open the door to an evasion of the statute."<sup>33</sup> The same unacceptable consequences that led the Supreme Court to reject a tender back requirement in *Oubre* would result if employee litigants faced the prospect of damages and/or attorney fees for breach of covenants not to sue.<sup>34</sup>

The chilling effect of damages or attorneys' fees also disturbs the balance between litigation and voluntary resolution that Congress crafted in the OWBPA. Congress was concerned about protecting employee rights, particularly in the group termination context, as it allowed unsupervised ADEA waivers.<sup>35</sup> In the OWBPA, Congress allowed employers to offer OWBPA-compliant waivers without EEOC supervision, but at the same time vested in "a court of competent jurisdiction" the authority to resolve "any dispute that may arise" over the validity of the waiver.<sup>36</sup> Permitting employers to chill employees from testing unsupervised ADEA waivers, by threatening to impose damages or attorneys' fees, would

<sup>32</sup> *Oubre*, 522 U.S. at 427 (majority opinion).

<sup>33</sup> *Id.*

<sup>34</sup> Cf. *Oubre*, 522 U.S. at 431 (Breyer, J., and O'Connor, J., concurring) ("Courts must avoid allowing a recovery that has the effect of substantially enforcing the contract that has been declared unenforceable, since to do so would defeat the policy that lead to the rule in the first place." (quoting *d. Dobbs, Law of Remedies* 982 (1973))).

<sup>35</sup> See S. Rep. No. 101-263, *supra* note 2, at 31-32.

<sup>36</sup> See 29 U.S.C. 626(f)(3). See also *supra* notes 7-9.

impede access to judicial review and thus undermine this legislative balance.

Representatives of employers stated that a final regulation prohibiting damages and attorneys' fees would send a signal to employees that they could bring ADEA challenges "with impunity." In the Commission's view, the suggestion that such a regulation will result in a flood of litigation is not persuasive. The Commission notes that no facts have been offered in support of such a suggestion. Employees executing waivers, covenants, or equivalent arrangements will understand the consequence of the agreement—that their pursuit of ADEA discrimination claims in litigation will fail if they knowingly and voluntarily entered into their agreements. While the possibility of frivolous lawsuits always exists, the Commission believes that a knowing and voluntary process helps ensure that an employee who has signed a waiver will not view a later lawsuit as fruitful.

(iii) *The Chilling Effect of Damages Provisions Cannot Be Limited to Situations Where the Underlying Waiver Is Valid.*

Some employer representatives contended that damages provisions at least should be enforceable when they are included in waiver agreements that are found to be knowing and voluntary under the OWBPA. In this circumstance, they reasoned, OWBPA compliance would not be undermined if litigation were chilled. The Commission does not agree that the chilling effect can be limited so neatly.

These commenters assume that the validity of ADEA waivers is easily discernable from the face of the agreement. However, as discussed above with respect to tender back, compliance with the OWBPA may not be apparent from the face of the document if the statute's informational requirements are applicable, or if the individual alleges that the waiver is not knowing and voluntary on the basis of fraud, duress, coercion, or mistake of material fact. See *supra* at II.B. Additionally, as another management commenter acknowledged, even individuals who are fairly certain that an ADEA waiver is unenforceable may choose not to bring suit simply because they are unwilling to risk liability for damages or the employer's attorneys' fees.

Two management commenters asserted that the Commission's own administrative investigation of ADEA charges guarantees that the Commission will advise individuals of the validity of their OWBPA waivers before filing suit. The nature of the ADEA's enforcement mechanism, however, belies this reasoning. ADEA charging parties need

not receive a "right to sue" letter before going to court. They "need only wait 60 days after filing the EEOC charge. Thus, the ADEA plaintiff can sue in court even if the EEOC has not yet completed its investigation \* \* \*."<sup>37</sup> Moreover, were the Commission to assign staff attorneys to assess the legal sufficiency of all waivers presented in ADEA charges, as one commenter suggested, the waivers would then be supervised by the EEOC. However, Congress rejected proposals that EEOC supervise waivers.<sup>38</sup> In any event, such administrative assessment would not be determinative because ADEA litigation in court is *de novo*. Cf. 29 U.S.C. 626(c)(1).

(b) *ADEA Covenants Not To Sue Are Equivalent of ADEA Waivers and Therefore Subject to EEOC Regulation.*

Absent imposition of attorneys' fees and/or damages for breach, ADEA covenants not to sue are the functional equivalent of waivers. The Commission interprets the OWBPA proscription that "[a]n individual may not waive any right or claim unless the waiver is knowing and voluntary"<sup>39</sup> to govern covenants not to sue just as it does waivers. The Commission finds support for its unified approach in traditional contract principles,<sup>40</sup> in the decision in *Oubre* and in other case law,<sup>41</sup> and in discussion in the OWBPA legislative history.<sup>42</sup> Common law distinctions between waivers and covenants not to sue<sup>43</sup> are insufficient to exclude ADEA

covenants from the OWBPA requirements. Reading the statute to include covenants not to sue best respects the OWBPA's "practical operation as well as its formal command."<sup>44</sup> Accordingly, a covenant not to sue under the ADEA is subject to the OWBPA, as interpreted in this regulation, whether the covenant is included in a waiver agreement, is in a second document, or is standing alone. Under this analysis, an OWBPA-compliant covenant not to sue can be asserted as a defense to defeat an ADEA claim, and thus will entitle the employer to a dismissal of the employee's suit after the covenant has been upheld. (An accompanying provision for damages is not enforceable. See *supra* discussion at II.C.3.a)).

However, a point of caution is warranted with respect to such covenants. Although ADEA covenants not to sue (absent damages) operate as the functional equivalent of waivers, they carry a higher risk of violating the OWBPA by virtue of their wording. An employee could read "covenant not to sue" or "promise not to sue" as giving up not only the right to challenge a past employment consequence as an ADEA violation, but also the right to challenge in court the knowing and voluntary nature of his or her waiver agreement. The chance of misunderstanding is heightened if the covenant not to sue is added to an agreement that already includes an ADEA waiver clause. The covenant in such a case would have no legal effect separate from the waiver clause. Nonetheless, its language would appear to bar an individual's access to court.

Employers therefore must take precautions in drafting covenants not to sue so that employees understand that the covenants do not affect their right to test the knowing and voluntary nature of the agreements in court under the OWBPA. By investing "court[s] of competent jurisdiction" with the authority to resolve "any dispute that may arise over \* \* \* the validity of a waiver,"<sup>45</sup> Congress manifested in the plain language of the statute its intention to permit an employee who signed an ADEA waiver, to sue his or her employer upon the belief that the waiver did not comply with the

<sup>37</sup> *Hodge v. New York College of Podiatric Medicine*, 157 F.3d 164, 168 (2d Cir. 1998) (citations omitted). See 29 U.S.C. 626(d).

<sup>38</sup> S. Rep. No. 101-263, *supra* note 2, at 31 (stating the OWBPA "provides for the first time by statute that waivers not supervised by the EEOC may be valid and enforceable").

<sup>39</sup> 29 U.S.C. 626(f)(1).

<sup>40</sup> See J.D. Calamari, *The Law of Contracts* § 21.11 (4th ed. 1998) ("[i]f the promise is one never to sue, it operates as a discharge just as does a release") (citing 5A Corbin on Contracts § 1251 (1964)); 66 Am Jur. 2d *Release* § 2 (1973).

<sup>41</sup> See *Oubre*, 522 U.S. at 433 (Breyer, J., and O'Connor, J., concurring) (writing interchangeably about waivers and promises not to sue); *Klee v. Lehigh Valley Hosp.*, No. 97-4642, 1998 WL 995850, at \*4 (E.D. Pa. Nov. 5, 1998) (treating covenant not to sue as falling under the OWBPA: "We also note that the covenant not to sue in the severance agreement is valid because it comports with the requirements elucidated by the statute for a knowing and voluntary waiver of the right to sue under the ADEA."), *aff'd on other grounds*, 203 F.3d 817 (3d Cir. 1999).

<sup>42</sup> Cf. H.R. Rep. No. 101-664, at 86 (1990), *reprinted in* 1 Staff of Senate Comm. on Labor and Human Resources, 102d Cong., *Legislative History of the Older Workers Benefit Protection Act* (S. 1511 and Related Bills), at 293 (1991) [hereinafter H.R. Rep. No. 101-664]; S. Rep. No. 101-263, *supra* note 2, at 60 ("Employees are typically offered a substantial cash bonus to retire early in exchange for signing a waiver or release agreeing not to sue the company later for age discrimination.").

<sup>43</sup> "The difference [between a release and a covenant not to sue] is primarily in the effect as to

third parties \* \* \*"<sup>66</sup> Am Jur. 2d *Release* § 2 (1973). "A general release of one among several joint tortfeasors operates to release from liability all of them. In contrast, a covenant not to sue will only release the one to whom it is given." *Frey v. Independence Fire & Cas. Co.*, 698 P.2d 17, 21 (Okla. 1985).

<sup>44</sup> *Oubre*, 522 U.S. at 427 (majority opinion).

<sup>45</sup> 29 U.S.C. 626(f)(3).

OWBPA. Thus, any provision in a waiver agreement that would cause an employee to believe that he or she could not seek a judicial determination of the validity of the waiver misrepresents the rights and obligations of the parties to the agreement. Such a misrepresentation conflicts with the OWBPA requirement that a valid waiver agreement must be "written in a manner calculated to be understood" by the employee "or by the average individual eligible to participate." 29 U.S.C. 626(f)(1)(A).

(c) *Discussion of Additional Management Recommendations.*

Management representatives also commented that the proposed regulation's reference to "other arrangements" could be read to prohibit an employer from enforcing covenants not to sue that were negotiated as part of noncompetition or trade secret clauses. The Commission did not intend its regulation to extend beyond the ADEA in this fashion. Accordingly, the Commission has revised the regulation to refer specifically to an ADEA waiver agreement, covenant not to sue, or other equivalent arrangement.

In addition, while the Commission takes no position on non-ADEA provisions such as non-disparagement and confidentiality clauses, it notes that settlement agreements sometimes contain such clauses along with liquidated damages provisions for breach. A reasonable employee must be able to determine that any liquidated damages provisions for breach of non-ADEA clauses have no effect on the employee's ability to bring an ADEA charge or lawsuit challenging the waiver.

4. *Final Regulatory Language for Paragraph (b)*

Accordingly, paragraph (b) of the final rule will state:

No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

D. *Comments on 29 CFR 1625.23(c): Restitution, Recoupment, or Setoff*

Paragraph (c) of the proposed regulation stated that if an employee successfully challenged a waiver and prevailed on the merits of an ADEA claim,

courts have the discretion to determine whether an employer is entitled to restitution, recoupment, or setoff (hereinafter, "reduction") against the employee's damages award. These amounts never can exceed the lesser of the consideration the employee received for signing the waiver agreement or the amount recovered by the employee.

The remainder of this proposed regulation included, among other provisions, "[a] nonexhaustive list of the factors that may be relevant to determine whether, or in what amount, a reduction should be granted."

1. *Summary of Employee Comments*

Employee representatives endorsed the position that only setoff or recoupment should be allowed, and only to the extent that the employee wins damages based on a finding of employment discrimination. These commenters contended that employees would be chilled from bringing meritorious waiver challenges and age discrimination cases by the possibility of being required to return a severance payment under any other circumstances. They contended that this chilling effect also would discourage individuals from pursuing injunctive relief in the absence of significant damages. Even if damages were awarded, however, employee representatives favored denying recoupment or setoff when the consideration for the release was paid by a party other than the employer. For example, they stated that employers should not be allowed to recoup their consideration when it had been paid by a *bona fide* employee pension or welfare benefit plan under ERISA in the form of enhanced benefits. One employee representative also asserted that a reduction should not be permitted if the employer had willfully violated the ADEA. Finally, this commenter urged the Commission to delete employers' financial condition as a factor for courts to consider in determining whether recoupment was appropriate.

2. *Summary of Employer Comments*

Commenters representing employers criticized the Commission's proposal that restitution, recoupment, or setoff be permitted only to the extent that the employee is ultimately awarded damages for employment discrimination. Employers emphasized that the Supreme Court in *Oubre* did not decide the question of restitution, recoupment, or setoff, and that Justice Breyer explored the possibility of restitution in his concurrence.

Employers contended that restitution should not be limited to the lesser of the consideration or the plaintiff's recovery.

They reasoned that restitution in excess of the plaintiff's recovery is "a reflection of the plaintiff's overcompensation for the satisfaction of potential claims," rather than a tender back penalty. Some employers expressed concern about the situation of the employer whose waiver is invalid but who prevails on the underlying age claim; under the Commission's proposed rule, this employer would not be entitled to restitution.

Employers also asserted that setoff should not be discretionary if damages are awarded, because existing law entitles them to a reduction of back pay awards by the amount of severance pay. Most employer representatives criticized the factors proposed by the Commission for courts to use when deciding whether to grant a reduction, or how much to grant. They contended that some of the equitable factors proposed by the Commission would result in ADEA plaintiffs receiving double recovery because the court already would have addressed the same considerations in awarding damages. Employers also criticized the Commission's proposal that courts could equitably apportion the amount paid for the waiver among the rights waived, to calculate the proper reduction in ADEA damages. Employers emphasized that they pay one amount to a departing employee in exchange for a waiver of all his or her rights under the pertinent laws, and in their view, this amount cannot be apportioned.

3. *Discussion*

The Commission has considered the comments submitted and, for the reasons set forth below, has not changed its position that restitution, recoupment, or setoff must be limited to the lesser of the amount of the award to the prevailing ADEA plaintiff, or the amount of consideration the employee received for the waiver. The Commission, however, has decided to delete from the final regulation the list of factors "that may be relevant to determine whether, or in what amount, a reduction should be granted."<sup>46</sup>

The Commission's rule on restitution, recoupment, and setoff, is based on the same statutory interpretation as the rule prohibiting employers from obtaining damages or attorneys' fees for breach of a covenant not to sue or another agreement covered by the OWBPA. Restitution can be tantamount to tender back if it is awarded in the absence of plaintiff's damages or in excess of those

<sup>46</sup> 64 FR at 19957.

damages.<sup>47</sup> If the prospect of making tender back before litigation would deter those who lack funds from pursuing good faith cases, then the prospect of making the same payment at the conclusion of litigation also would have a chilling effect. To state the obvious, plaintiffs do not know before bringing a case whether, or to what extent, they will obtain damages.

Accordingly, if restitution were not limited in the way set out in paragraph (c), employees deciding whether to bring suit would confront the possibility of not winning damages (or winning negligible damages) but still being compelled to return their full severance pay.<sup>48</sup> For those individuals who have used the severance pay for living expenses and lack the means to return it now or in the future, the prospect of restitution would present a large financial risk that would discourage them from moving forward. Even though this potential financial cost of bringing suit would not impose the same immediate and certain obstacle as a tender-back requirement, it nonetheless could be significant, especially for those older workers with limited or declining earning potential. As a result, older workers could be deterred from bringing age discrimination claims even though their waivers, if so challenged, might not be knowing and voluntary under the OWBPA. The Commission cannot allow this result consistent with its mandate to enforce the OWBPA.<sup>49</sup>

This position is consistent with the Supreme Court's interpretation of the OWBPA in *Oubre*. The majority and Justice Breyer spoke of employer claims and requests for restitution, recoupment, or setoff against the former employee.<sup>50</sup> The Commission is not barring claims for restitution, recoupment, or setoff. The Court in *Oubre*, however, did not rule on the availability of restitution, recoupment, or setoff. Therefore, *Oubre* does not preclude all limits on the extent to which these remedies may be available. In the Commission's view, the limits

contained in this regulation are appropriate because they will reinforce compliance with the OWBPA waiver provisions. Importantly, they also are consistent with the Court's reasoning in *Oubre* that common law contract principles cannot be allowed to interfere with enforcement of the statute.<sup>51</sup>

The Commission, however, has deleted the list of factors for deciding whether, and to what extent, to award restitution, recoupment, or setoff. These factors were not central to the Commission's interpretation of the statute. Additionally, many of the employer comments regarding the factors were persuasive. For example, the Commission agrees that it typically would be difficult to equitably apportion a waiver payment among all the different claims waived. The Commission also understands employers' concerns about the proposed factors addressing the nature and severity of the underlying employment discrimination. Finally, the Commission understands employee representatives' comments favoring the deletion of the factor addressing the employer's financial condition.

Because the Commission is deleting this list of factors, it would be inappropriate to add new factors as suggested by employee representatives. The Commission, therefore, cannot incorporate two employee representatives' recommendation to direct courts to consider whether a release payment was provided directly by the employer or by an ERISA pension fund. While the Commission agrees that this may be an important consideration,<sup>52</sup> the Commission

<sup>51</sup> See *id.* at 427 ("The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law."). Cf. *supra* note 6, discussing legislative history showing that Congress rejected the use of contract law principles for analyzing OWBPA waivers.

The Commission is not persuaded that an employer who prevails on the merits of the ADEA discrimination claim, but who nonetheless used an invalid OWBPA waiver, should receive restitution of the amount paid for the waiver. The basic principle is that restitution generally is unavailable if the agreement is unenforceable on grounds of public policy, "unless denial of restitution would cause disproportionate forfeiture." Restatement (Second) of Contracts § 197 (1981). As one employee representative observed, the denial of restitution would not cause a disproportionate forfeiture if the employer materially violated the OWBPA waiver provisions.

<sup>52</sup> See *Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) ("The magistrate judge held that Doyne's back and front pay awards should be reduced by the amount of pension benefits he has received and will receive \* \* \*. We are persuaded by the arguments of Doyne and the Equal Employment Opportunity Commission, *amicus curiae*, that the pension payments are from a collateral source and should not have been deducted.") *EEOC v. O'Grady*, 857 F.2d 383, 391

believes its significance is properly resolved by the courts.

#### 4. Final Regulatory Language for Paragraph (c)

Accordingly, the paragraph (c) of the final rule will state:

##### *Restitution, Recoupment, or Setoff*

(1) Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, "reduction") against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

##### *E. Comments on 29 CFR 1625.23(d): Abrogation*

Paragraph (d) of the proposed regulation stated that:

No employer may unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA.

The Commission received several comments from representatives of employers about this provision. One commenter stated that this proposed rule could be interpreted as prohibiting abrogation in circumstances in which there has not been an ADEA challenge. By its terms, the proposed language only pertains to the ADEA, and therefore no change is warranted.

Another commenter stated that an employer and employee should be allowed to include as part of a waiver agreement a provision stating that if the ADEA waiver is defective under the OWBPA, the employer will correct the defect and the employee will be required to execute the corrected waiver rather than file suit in court. The Commission is not persuaded by this comment. Congress could not have intended, in commanding that employees "may not waive" an ADEA claim unless the waiver satisfies the OWBPA, to allow employees' OWBPA rights to be subject to a promise which itself does not comply with the OWBPA. Accordingly, a promise to correct a defective waiver has no effect on the

(7th Cir. 1988) (district court's refusal to offset pension benefits against a back pay award was not an abuse of discretion).

<sup>47</sup> As stated in note 3 of the NPRM, recoupment and setoff, by definition, serve to limit the defendant's recovery to no more than the amount of plaintiff's damages. Black's Law Dictionary 1275, 1372 (6th ed. 1990).

<sup>48</sup> These individuals would include those who contemplate seeking primarily injunctive relief, for example, reinstatement in their former position.

<sup>49</sup> Cf. H.R. Rep. No. 101-664, *supra* note 42 at 90-91 (stating that legislation on ADEA waivers could impose, among others, the requirement that, "[i]f the waiver is set aside for any reason, any damages received through a discrimination action shall be offset by the consideration received for the waiver") (emphasis supplied).

<sup>50</sup> *Oubre*, 522 U.S. at 428 (majority); *id.* at 433 (Breyer, J., and O'Connor, J., concurring).

employee's ability to pursue an ADEA claim.

Another commenter argued for a rule stating that when an employer learns that a release is invalid under OWBPA, the employer may stop making payments due under the release, cure the defect, and offer the employee a new release in exchange for new consideration. According to this commenter, the employee in that situation would be free to sign the new release or pursue an ADEA claim. The Commission does not agree that an employer may cancel its obligation to the employee as soon as it learns that a waiver does not comply with the OWBPA.<sup>53</sup> The Commission agrees, however, that the employer in this circumstance may present the employee with a new ADEA waiver, independently valid under each of OWBPA's requirements, which the employee is free to accept or reject.

One commenter interpreted the language that no employer may "unilaterally" abrogate to mean that an employer may abrogate its duties with respect to an individual who has challenged the waiver as not knowing and voluntary, reasoning that the employee's action would make the abrogation bilateral. The Commission does not intend this interpretation. An employee does not abrogate a waiver agreement, covenant not to sue, or other equivalent arrangement by exercising the guaranteed OWBPA right to have the agreement's validity determined by a court.<sup>54</sup> As stated above, an OWBPA waiver gives the employer an affirmative defense, not a guarantee of freedom from litigation. To avoid any further misinterpretation, the Commission has removed the word "unilaterally" from the final rule.

The Commission has adopted the following final rule on abrogation in paragraph (d):

No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

This rule applies to the Commission's administrative process as well as litigation.

<sup>53</sup> See *Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d 307, 315-17 (S.D.N.Y. 1998) (interpreting Justice Breyer's concurrence in *Oubre*, and deciding that an invalid release could not permit the employer to use "self help" by withholding severance benefits from an employee who filed an ADEA claim).

<sup>54</sup> The Commission thus does not agree with the *Butcher* court's suggestion that if a waiver is held valid, the employer is entitled to terminate severance benefits because the employee breached the release agreement by filing suit. *Id.* at 313.

### Executive Order 12866, Regulatory Planning and Review

Pursuant to section 6(a)(3)(B) of Executive Order 12866, this final rule has been reviewed by the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation is significant, but will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local or tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

### Paperwork Reduction Act

EEOC certifies that the rule does not require the collection of information by EEOC or any other agency of the United States Government. The rule does not require any employer or other person or entity to collect, report, or distribute any information.

### Regulatory Flexibility Act

In the NPRM, the Commission certified that the proposed regulation will not have a significant economic impact on a substantial number of small entities. The Commission reached this conclusion because the regulation does not impose a burden that is not imposed by the OWBPA. One management representative commented that the Commission did not provide a factual basis for the certification, pursuant to 5 U.S.C. 605(b).

The Commission has reconsidered the issue of certification. It continues to believe that its initial analysis is correct. It also concludes that, even assuming that the regulation imposes additional burdens on small entities, it would not have a significant economic effect on a substantial number of small entities. Between 1995 and 1999, a total of 98 charges involving waivers under the ADEA were filed against ADEA-covered small entities (those with between 20 and 499 employees)<sup>55</sup> with the EEOC and with state and local fair employment practices agencies, combined. This results in an average of only about 20 charges per year against small entities. An ADEA lawsuit cannot be filed without first filing an ADEA charge with the EEOC.

According to statistics published by the Small Business Administration, Office of Advocacy, there are about

<sup>55</sup> The size standard used by the Small Business Administration varies by industry; however, the SBA uses the "fewer than 500 employees" cut off when making an across-the-board classification.

530,000 ADEA-covered small entities.<sup>56</sup> Thus, on average each year, there is only one ADEA charge filed against a small entity challenging a waiver for every 26,500 ADEA-covered small entities. No evidence has been presented to the Commission supporting the conclusion that there would be an increase in charges against small entities. Even if, after this regulation takes effect, there is a discernable percentage increase in ADEA charges involving waivers filed against small entities, the total number of such charges will remain insignificant because the current number of charges is so small. Based on the foregoing, the Commission concludes that the rule will not have a significant economic impact on a substantial number of small entities.

### List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee benefit plans, Equal employment opportunity, Retirement.

Dated: December 5, 2000.

**Ida L. Castro,**  
*Chairwoman.*

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission amends 29 CFR part 1625 as follows:

### PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

**Authority:** 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10-68; Secretary's Order No. 11-68; sec. 12, 29 U.S.C. 631; Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. Section 1625.23 is added to Subpart B—Substantive Regulations, to read as follows:

#### § 1625.23 Waivers of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices

<sup>56</sup> The Commission used figures for the years 1992 through 1996, the most recent years for which statistics are available from the Small Business Administration. Although the number of small entities generally does not vary greatly from year to year, it rose slightly each year during that period, from 508,000 in 1992 to 552,000 in 1996. If that upward trend has continued, then the average number of small entities during the period of 1995 to 1999 would be somewhat higher.

agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

(b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions

allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

(c) *Restitution, recoupment, or setoff.*

(1) Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, "reduction") against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the

employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(d) No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

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