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**SCIENTIFIC AND OTHER EXPERT TESTIMONY: UNDERSTAND IT; KEEP IT
OUT; GET IT IN**

Robert D. Kolar

**EMPLOYERS' SETTLEMENT AGREEMENTS WITH DEPARTING EMPLOYEES
UNDER ATTACK**

Louis P. DiLorenzo and Patrick V. Melfi

LAWSUITS AGAINST LITIGATORS? TRY TORTIOUS INTERFERENCE

T. Leigh Anenson

**HOMEOWNER'S INSURANCE: ADDITIONAL LIVING EXPENSES – THE INSURER'S
OUNCE OF PREVENTION**

Helen Johnson Alford and Gabrielle Reeves Pringle

**RECENT DEVELOPMENTS IN POLITICAL RISK INSURANCE IN THE ASIA PACIFIC
REGION: AN ANTIPODEAN PERSPECTIVE**

Oscar Shub and Robert Carey

**ATTORNEY-CLIENT PRIVILEGE AND DEPOSITION PREPARATION OF FORMER
EMPLOYEES**

Meloney Cargil Perry

**FOCUS ON THE INSURING CLAUSE: ELEMENTS AS THEY RELATE TO CON-
STRUCTION DEFECT CLAIMS**

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Employers' Settlement Agreements with Departing Employees Under Attack[†]

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*The departmental interpreters of the laws in Washington . . .
can always be depended on to take any reasonably good law
and interpret the common sense out of it.*

Mark Twain¹

I.

INTRODUCTION

Many employers have been using the same standard settlement agreement with departing employees for decades, and even longer in some cases. For some, the last legal review of their standard agreement was some seventeen years ago when the Older Worker Benefit Protection Act ("OWBPA") was first passed. However, more recent developments—particularly enforcement litigation by the Equal Employment Opportunity Commission ("EEOC")—proves that what many considered a stagnant area of the law is simply not, and that employers should reassess their standard settlement agreements.

[†] This article is submitted by the authors on behalf of the FDCC Employer Practices and Workplace Liability Section.

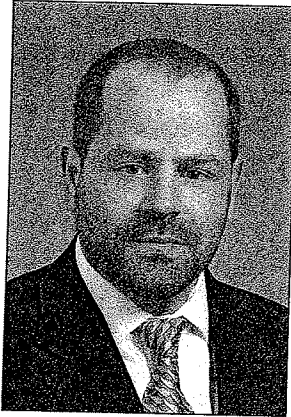
¹ THE WIT & WISDOM OF MARK TWAIN 135 (Alex Ayres ed. 1987).



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One emerging trend is that some federal courts have shown renewed interest in ensuring that releases that encompass age discrimination claims are written in "plain English." IBM lost two recent cases where appellate courts found, among other things, that the company's release agreement contained confusing legalese and, thus, did not comply with OWBPA's requirement that releases be "written in a manner calculated to be understood" by an average employee.²

² *Syverson v. Int'l Bus. Mach. Corp.*, 461 F.3d 1147, 1158 (9th Cir. 2006); *Thomforde v. Int'l Bus. Mach. Corp.*, 406 F.3d 500, 504 n.1 (8th Cir. 2005) (together the "IBM cases").



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On a different front, in August 2006, the EEOC persuaded a federal judge in Maryland that an employer's conditioning the receipt of severance benefits offered to employees during a reduction in force ("RIF") on their agreement not to file any EEOC charges was unlawful.³

This article examines the various risks associated with utilizing clauses and provisions commonly found in employers' settlement agreements, such as covenants not to sue,⁴ confidentiality provisions and EEOC charge-filing bans. It is intended as an aid to an employer's self evaluation of the terms in their present agreement and, depending upon the provisions being used and the employer's risk aversion level, possible need for revisions.

II.

THE IBM CASES: AVERAGE EMPLOYEES DON'T OWN A BLACK'S LAW DICTIONARY

The overriding issue in the IBM cases was whether the company's use of the legal terms "release" and "covenant not to sue" in separate paragraphs of the same agreement was confusing. In short, both the Eighth and Ninth Circuits found that it was. A release

³ EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414, 421 (D. Md. 2006) ("[C]onditioning benefits on the waiver of a right to file an EEOC charge at all—as opposed to the right to file a lawsuit or collect monetary damages—interferes with the public interest in EEOC enforcement of the ADEA, and is impermissible.").

⁴ Some describe attorneys who include a covenant not to sue in the same settlement or severance agreement containing a release as persons prone to wear a belt and suspenders. Others, such as the authors, consider them careful management attorneys who want to make sure everyone understands the terms of the arrangement, including its finality, and the employer's severance or settlement payment is not used to finance a new lawsuit.

provision indicates the releasor is waiving claims against a releasee or releasees. In other words, it serves to extinguish a cause of action or a potential cause of action. A covenant not to sue, however, involves a further promise never to commence litigation with respect to a claim extinguished by the "Release." Often times, breach of a covenant not to sue will be punishable by payment of the employer's attorneys and costs incurred in defending against the released claim. Unfortunately, OWBPA regulations expressly prohibit covenants not to sue that provide for the employer's recovery of attorney's fees in the event the employee breaches the covenant.⁵

The release provision in the IBM settlement agreement unequivocally stated that it encompassed claims arising under the Age Discrimination in Employment Act ("ADEA").⁶ The covenant not to sue paragraph, however, expressly provided that it did "not apply to actions based solely under the [ADEA] That means that if you were to sue IBM . . . only under the [ADEA], you would not be liable under the terms of this Release for their attorneys' fees and other costs" Presumably, the drafters of this IBM language did so in an attempt to carve out ADEA claims and avoid any argument that the provisions of the agreement, which provided for attorneys' fees in the event of a breach, violated OWBPA's "tenderback" regulation.

Both appellate courts in the IBM cases concluded that it was unclear from the agreement whether ADEA claims were covered by the release.⁸ Moreover, both appellate decisions openly questioned using both a release and covenant not to sue in the same agreement:

The confusion ensues, in part, from including in a single document two concepts that, technically speaking, cannot coexist. Under the classic definitions contained in Black's Law Dictionary and in the case law quoted above, a covenant not to sue is pertinent only if the underlying right is *not* extinguished, while a release extinguishes any underlying right. Where both nonetheless appear in the same document, the covenant not to sue largely swallows the release—and the negation of the covenant not to sue can therefore be read as negating the release as well.⁹

⁵ 29 C.F.R. § 1625.23(b) (2007).

⁶ *Syverson*, 461 F.3d at 1157.

⁷ *Id.* (alterations in original).

⁸ *Syverson*, 461 F.3d at 1158; *Thomforde v. Int'l Bus. Mach. Corp.*, 406 F.3d 500, 503 (8th Cir 2005) (making the interesting observation, "how can an employee bring suit solely under the ADEA if the employee has waived all claims under the ADEA?").

⁹ *Syverson*, 461 F.3d at 1160; *see also Thomforde*, 406 F.3d at 504 ("[T]he differences between a release and a covenant not to sue are fairly amorphous and may not be readily apparent to a lay reader.").

Both courts also noted that, through better drafting (e.g., additional provisions explaining the interplay between the term "release" and "covenant not to sue"), IBM might have provided for an independent covenant not to sue that contained the exception for the OWBPA regulations.¹⁰

There are a few "big picture" drafting lessons to be taken from the IBM cases.

First, both appellate courts relied upon and endorsed the OWBPA regulation advising that "waiver agreements [must be drafted] in plain language . . . [which] usually will require the limitation or elimination of technical jargon and of long, complex sentences."¹¹

Second, the IBM cases highlight the risks of using releases that contain arguably inconsistent provisions. For example, a common practice among many management-side lawyers is to append a general release intended as a freestanding exhibit to settlement agreements (and that are generally patterned off a pre-printed form that releases "*any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this release*"). Consideration should be given to abandoning such freestanding general releases because using two separate release provisions to cover the same settlement (one that could arguably conflict with the other) could lead to claims that the agreement was confusing and not written in a manner calculated to be understood.¹²

Finally, the IBM cases raise serious questions regarding the use of both a release and a covenant not to sue in the same agreement. The primary benefit of a covenant not to sue appears to be adding the penalty of attorneys' fees and defense costs in the event of a breach. Other than deterrent value, there does not appear to be a tremendous upside to including such a covenant given that the OWBPA tenderback exception¹³ would have to be expressly carved out for an ADEA claim. However, it would probably be a rare event that employees (especially those represented by counsel) would seek to invalidate the release on any grounds other than the ADEA. Moreover, even if a subsequent non-ADEA challenge were filed that could be subject to the recovery of fees, a realistic cost benefit analysis might argue against litigation.

A. *Lockheed Propels Additional Litigation*

The EEOC's underlying theory in *Lockheed* was that the inclusion of an EEOC charge-filing ban in the proposed settlement agreement used during the RIF was "facially retaliatory" and, thus, a violation of every anti-discrimination statute enforced by the EEOC.¹⁴

¹⁰ *Syverson*, 461 F.3d at 1160; *Thomforde*, 406 F.3d at 504.

¹¹ *Syverson*, 461 F.3d at 1160-61 (quoting 29 C.F.R. § 1625.22(b)(3)); *see also Thomforde*, 406 F.3d at 504.

¹² Some might opine that an agreement with a general release, a special release, and a covenant not to sue is probably moving away from "belt and suspenders" and more towards "beating a dead horse."

¹³ See 29 C.F.R. § 1625.23.

¹⁴ *See EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414 (D. Md. 2006).

The EEOC's recent victory against Lockheed was widely publicized and—within a month of its publication—it apparently emboldened the agency to initiate a string of enforcement cases, including those against Eastman Kodak, Land O' Lakes, and Sara Lee.¹⁵

Such aggressive enforcement activity appears to run contrary to the congressional emphasis on voluntary compliance and conciliation that was a cornerstone of early employment discrimination legislation; indeed, the House sponsor of Title VII expressly stated that “[o]nly if conciliation proves to be impossible do we expect the [EEOC] to bring action in Federal district court.”¹⁶

In any event, the EEOC's enforcement activity has not been confined to any one specific provision or clause; rather, the challenges have included, inter alia, a general release clause (i.e., the *Lockheed* case), a non-cooperation clause (i.e., the *Kodak* case) and a representation of no present intent to sue (i.e., the *Land O' Lakes* case).¹⁷ Accordingly, a challenge could be based on any clause that can reasonably be interpreted to restrict the employee's right to file an EEOC charge or access to or participation in EEOC proceedings.

In response to the EEOC's position, at least one major U.S. employer agreed to affirmatively state in all of its release agreements that the signatory employee retains the right to file an EEOC charge. EEOC and Kodak entered into a consent decree whereby the company agreed to include the following language in all of their release agreements with employees:

Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. You further represent that no claims, complaints, charges or other proceedings are pending in any court, administrative agency, commission or other forum relating directly or indirectly to your employment by Kodak.

*Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or anyone else on your behalf.*¹⁸

¹⁵ See, e.g., Complaint, EEOC v. Eastman Kodak, No. 06 CV 6489 (W.D.N.Y. Sept. 29, 2006); Complaint, EEOC v. Sara Lee Corp., No. 06 CV 645 (S.D. Ohio Sept. 29, 2006); Complaint, EEOC v. Land O' Lakes, Inc., No. 06 CV 3828 (D. Minn. Sept. 25, 2006).

¹⁶ *Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1307 n.11 (8th Cir. 1975) (quoting remarks of Congressman Perkins, 188 CONG. REC. 7563 (1972)).

¹⁷ See *supra* note 15.

¹⁸ Consent Decree at 3-4, *Eastman Kodak Co.*, No. 06 CV 6489 (emphasis added).

III.
DID *SUNDANCE* STOP THE MUSIC?

In a separate case coming out of Ohio decided in October 2006—and as if on cue—the Sixth Circuit Court of Appeals, in *EEOC v. Sundance Rehabilitation Corp.*¹⁹ explicitly rejected the EEOC's facial relation theory:

And, as we have noted, the charge-filing ban may be unenforceable; but its inclusion in the Separation Agreement does not make Sundance's offering that Agreement in and of itself *retaliatory*.

In sum, the employees of Sundance have not been deprived of anything by the offering of the Separation Agreement. Those who choose to accept it are better off, by receiving a benefit that was not part and parcel of the employment relationship . . . Those employees who reject the agreement obviously do not give up any rights. And, as we have noted above, employees may, if they wish, accept the Agreement and argue later that parts of it may be unenforceable under existing or expanded precedent. Under these circumstances, simply offering the agreement is not facially discriminatory.²⁰

Whether the facial retaliation theory will survive the *Sundance* reversal remains to be seen. Notably, *Sundance* drew a dissent that demonstrates the issue remains far from clear cut:

The distinction the majority opinion makes between facial retaliation and what is surely intimidation cuts too fine a line. The majority in effect says that an employee who believes he or she has an EEOC enforceable claim or at a minimum is willing to testify in an EEOC enforcement action should sign the agreement, take the money and then go forward with the EEOC. If Sundance sues for a return of the severance pay, then the defense of retaliation should be raised and may carry the day.²¹

The Sixth Circuit's reversal in *Sundance* should have repercussions for the expected appeal to the Fourth Circuit in *Lockheed*. Facets of the *Lockheed* district court opinion that may be suspect in light of the *Sundance* reversal include its findings that the refusal to sign an agreement constitutes protected activity and that the severance benefits at issue were "part

¹⁹ 466 F.3d 490 (6th Cir. 2006).

²⁰ *Id.* at 501.

²¹ *Id.* at 503 (Cohn, J., dissenting).

and parcel of the employment relationship” (the latter finding was vigorously contested by the employer who argued “was additional compensation . . . offered in exchange for giving up a right”).²²

IV.
ENFORCEABILITY OF EEOC CHARGE-FILING BANS AND PROVISIONS
THAT RESTRICT ACCESS TO THE ADMINISTRATIVE AGENCY

Separate and distinct from the facial retaliation theory at issue in *Lockheed* and *Sundance* is the question of whether an agreement that includes an EEOC charge-filing ban is enforceable at the agency level in the first instance. The short answer is no. The seminal case regarding enforceability is *EEOC v. Cosmair*.²³ The Fifth Circuit in *Cosmair* held such a waiver unenforceable, stating:

Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination. . . . We hold that an employer and an employee cannot agree to deny the EEOC the information it needs to advance this public interest.²⁴

Likewise, the EEOC’s position is that, regardless of what context the agreement arises out of, it is unenforceable if it encompasses an EEOC charge-filing ban.²⁵

Cosmair is also the source of the generally accepted principle that, “although an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf.”²⁶ The legislative history from OWBPA endorsed *Cosmair*’s approach: “An employee may validly waive the right to recover in his own lawsuit as well as the right to recover in a suit brought by the Commission on his own

²² *EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414, 419 (D. Md. 2006).

²³ 821 F.2d 1085 (5th Cir. 1987).

²⁴ *Id.* at 1090.

²⁵ EEOC ENFORCEMENT GUIDANCE NOTICE No. 915.002, NON-WAIVABLE RIGHTS UNDER EEOC ENFORCED STATUTES (April 10, 1997) (“Notwithstanding the format or context of the agreement in which such language might appear, promises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy.”).

²⁶ *Cosmair*, 821 F.2d at 1091.

EMPLOYERS' SETTLEMENT AGREEMENTS WITH DEPARTING EMPLOYEES

behalf."²⁷ Further, both OWBPA and its regulations specifically incorporate prohibitions against EEOC charge-filing bans.²⁸

Notably, apart from unenforceable charge-filing bans, any other provisions that can be interpreted as requiring the signatory employees to refuse to cooperate with the EEOC or refuse to assist fellow employees in EEOC proceedings are also unenforceable. In *EEOC v. Astra USA, Inc.*, the court explained that:

[A]n employee's right to communicate with the EEOC must be protected . . . [I]t is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer. Thus, a waiver of the right to assist the EEOC offends public policy under both the ADEA and Title VII.²⁹

The policy announced in *Astra* can also extend beyond releases to handbooks and policies. For example, in *EEOC v. Morgan Stanley & Co.*,³⁰ the court concluded that an employer's code of conduct provision that required that an employee "not initiate any contacts with a governmental or regulatory body or attorney regarding [subpoenas, investigations, inquiries and requests] without coordinating with Law or Compliance" chilled employee communications with the EEOC.³¹ The court, therefore, invalidated the provision.³² Even a garden variety confidentiality clauses that prohibit employees from discussing the settlement or the agreement with anyone except their lawyer, family members, or tax advisors, unless compelled by law to disclose such information, are likely to be viewed by the EEOC as chilling access to the agency.

V. THE EMPLOYER'S DILEMMA

The EEOC's facial retaliation theory is, in large measure, the Agency's desired extension of the rule first announced in *Cosmair*. The recent publicity of the *Lockheed* and *Sundance* cases, however, has highlighted a problem employers have long faced but ignored. That

²⁷ S. REP. NO. 101-263 (1990), as reprinted in 1990 U.S.C.C.A.N. 1509, 1541.

²⁸ 29 U.S.C.S. § 626(f)(4) (LexisNexis 2007) ("No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by [EEOC]."); 29 C.F.R. § 1625.22(i)(2) (2007) ("No waiver agreement may include any provision prohibiting any individual from: (i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or (ii) Participating in any investigation or proceeding conducted by EEOC.").

²⁹ 94 F.3d 738, 744 n.5 (1st Cir. 1996).

³⁰ No. 01CIV8421RMBRLE, 2002 WL 31108179 (S.D.N.Y. Sept. 20, 2002).

³¹ *Id.* at *2 (alterations in original).

³² *Id.*

problem is the unenforceability of an EEOC charge-filing ban or any other provisions that restrict access to the agency or participation in its proceedings. For many, the prevailing wisdom has been to include the bans, knowing that the EEOC will not honor them, in the hope that it will dissuade many signatory employees from filing charges. That approach is not risk free.

There is authority holding that an unenforceable EEOC charge-filing ban will *not* invalidate the entire release (i.e., while the release will not be enforceable at the administrative agency level, it may still be effective as a bar to a subsequent lawsuit).³³ *Wastak*, relying on *Cosmair*, held that an unenforceable EEOC charge-filing ban did not invalidate the release as to the subsequent ADEA lawsuit. Its detailed discussion on enforceability is noteworthy:

[The plaintiff] in fact filed an EEOC charge, and [the Employer] does not take issue with the filing of that charge, but only with the subsequent filing of a *lawsuit* in violation of the terms of the Release.

... Had Congress intended that a charge-filing ban of the sort here would operate to invalidate a waiver, it could have ... stated so explicitly ...

... [A] knowing and voluntary waiver of the right to sue is not void solely because it also references a charge-filing ban, a conclusion explicitly adopted by the court in *Cosmair*. Notably, the court in *Cosmair* cited for this proposition the Restatement of Contracts [Section 184(1)], recognizing that the conclusion is largely driven by a straight-forward application of well-settled principles of contracts law, [which provides that] “[i]f less than all of an agreement is unenforceable ... a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.”

... As Judge Aldisert pithily noted: “You don’t cut down the trunk of a tree because some of its branches are sickly.” Put simply, the presence of a sickly charge-filing ban does not render this release involuntary, unknowing or otherwise void.³⁴

However, what the *Wastak* decision gave with the right hand, it took away with the left:

We note, however, that a regulation that became effective after the incident before us clearly precludes the inclusion of provisions that prohibit resort to administrative process. *See* 29 C.F.R. § 1625.22(i)(2). ... The presence of such a prohibition

³³ *See Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3d Cir. 2003).

³⁴ *Id.* at 290-92 (internal citations omitted).

EMPLOYERS' SETTLEMENT AGREEMENTS WITH DEPARTING EMPLOYEES

in a waiver agreement that is subject to this regulation could certainly lead a court to find, under proper circumstances, that the waiver either "ha[d] the effect of misleading, misinforming, or failing to inform" the plaintiff, [in contravention of] 29 C.F.R. § 1625.22(b)(4), thus rendering the waiver not "knowing and voluntary" and, therefore, invalid.³⁵

No clear majority or consensus view has emerged post-*Wastak* regarding whether an unenforceable EEOC charge-filing ban included in a release, in contravention of the OWBPA regulations, invalidates the release as to subsequent ADEA lawsuits. For example, a district court in *Thiessen v. General Electric Capital Corp.* held that a release was enforceable as to the subsequent lawsuit, stating:

[T]he court is unwilling to conclude that an otherwise knowing and voluntary waiver would be invalid simply because the language of the waiver could be interpreted to interfere with the employee's right to communicate with the EEOC when communications with the EEOC are simply not an issue in the litigation.³⁶

In contrast, another district court, in *Romero v. Allstate Insurance Co.*,³⁷ concluded that the employer's releases should be voidable at the option of the employee, in part, because it contained an improper ban. The court stated: "the releases, on their face, violate [OWBPA] and 29 C.F.R. § 1625.22(i)(2), which provides 'no waiver agreement may include any provision prohibiting an individual from [filing an EEOC charge].'"³⁸

The potential high-stakes nature of a decision to gamble on a release with an unenforceable EEOC charge-filing ban is dramatically highlighted by the circumstances described in *Romero*:

- Allstate presented more than 6,000 employee-agents with an offer of severance in exchange for a release which contained an EEOC charge-filing ban;³⁹
- 99.7% of the employee agents signed the releases (only 19 refused);⁴⁰

³⁵ *Id.* at 293 n.6; see also *Commonwealth v. Bull HN Info. Sys., Inc.*, 143 F. Supp. 2d 134, 148 (D. Mass. 2001) (holding unenforceable EEOC charge-filing ban in release precluded a "knowing and voluntary" OWBPA-compliant waiver and, thus, that the releases were not a bar to subsequent ADEA lawsuits).

³⁶ 232 F. Supp. 2d 1230, 1242-43 (D. Kan. 2002).

³⁷ No. 01-3894, 2004 U.S. Dist. LEXIS 5261, at *5-7 (E.D. Pa. 2004), *rev'd on other grounds* 404 F.3d 212 (3d Cir. 2005).

³⁸ *Id.* at *6.

³⁹ *Id.*

⁴⁰ *Id.*

- The court was not persuaded by Allstate's argument that it never sought to enforce the EEOC charge-filing ban: "Allstate contends that it had no intention of precluding the filing of charges, and notes that more than 300 employee-agents did file charges with the EEOC without any repercussions. The difficulty with this argument, however, is that we have no way of knowing how many other employee-agents failed to pursue charges before the EEOC simply because they accepted the release language at face value."⁴¹
- The court issued a declaratory judgment that the releases are "voidable at the option of the persons who signed the releases" and certified a class action consisting of employee-agents who signed the release.⁴²

Outside of the ADEA context, it is generally accepted that a release that is not OWBPA-compliant does not automatically invalidate other released claims as a matter of law (e.g., Title VII or state law claims).⁴³ However, employers relying on non-OWBPA-compliant releases to foreclose subsequent non-ADEA litigation (e.g., Title VII, ADA, EPA) still must establish that the waiver was "knowing and voluntary" as to those other claims under a "totality of the circumstances test."⁴⁴

⁴¹ *Id.*

⁴² *Id.* at *10-11; *see also*, Consent Decree, EEOC v. Ventura Foods, LLC, No. 05-663 (D. Minn. Sept. 1, 2006). Under an EEOC consent decree, Ventura Foods agreed to notify former employees who signed releases of their right to file EEOC charges. Also, they agreed to re-offer severance benefits to anyone who refused to sign.

⁴³ *See, e.g.*, *Cordoba v. Beau Deitl & Assocs.*, No. 02-Civ-4951, 2003 U.S. Dist. LEXIS 22033, at *22 n.6 (S.D.N.Y. Dec. 8, 2003) ("Non-compliance with the OWBPA provisions does not invalidate [the plaintiff's] release of her Title VII, [N.Y. State Human Rights Law] NYSHRL or [N.Y. City Human Rights Law] NYCHRL claims because OWBPA applies only to ADEA claims." (citing *Branker v. Pfizer, Inc.*, 981 F. Supp. 862, 867 (S.D.N.Y. 1997)).

⁴⁴ *See, e.g.*, *Tung v. Texaco Inc.*, 150 F.3d 206 (2d Cir. 1998) (holding Title VII release enforceable as to Title VII claims because it met the "totality of circumstances test" but unenforceable as to ADEA claims because it did not comply with OWBPA's disclosure requirements (i.e., the release failed to properly disclose the list of employees required in the RIF scenario)).

The non-exhaustive factors that are considered in the totality of circumstances test to determine whether a Title VII release is knowing and voluntary overlap to a fair extent with the OWBPA analysis and include the following: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the release before signing it; (3) the plaintiff's role in deciding the terms; (4) the clarity of the release; (5) whether the plaintiff had an attorney or was advised to consult one; and (6) the consideration for the release. *Cordoba*, 2003 U.S. Dist LEXIS 22033 (collecting Second Circuit cases).

VI.
THE RISKS OF INCLUDING AN EEOC CHARGE-FILING BAN

Wastak suggests that a release that contains an unenforceable EEOC charge-filing ban in contravention of the OWBPA regulations may not foreclose subsequent ADEA litigation. There are no cases holding that under the totality of the circumstances test applied to the other anti-discrimination statutes, an unenforceable EEOC charge-filing ban will preclude a finding that the release was knowing and voluntary. However, it must be remembered that the public policy against EEOC charge-filing bans extends beyond the ADEA to all of the EEOC enforced statutes, contrary to some requirements that are clearly OWBPA-specific (e.g., the age and job title disclosures and forty-five day consideration period required during a RIF or group severance programs).⁴⁵ Thus, such a ban appears susceptible to the argument that it is misleading or a material misrepresentation of the signatory employees' legal rights as to the full spectrum of the EEOC-enforced statutes.

Accordingly, the inclusion of a EEOC charge-filing ban is, at best, an uncertain proposition at this point in time for several reasons. First, it is premature to proclaim that the *Sundance* reversal is the death knell of the EEOC's "facially retaliatory" theory (although the anticipated appeal of *Lockheed* to the Fourth Circuit may provide employers with additional ammunition). Second, there is risk that a court will refuse to enforce such a release and will allow subsequent age discrimination lawsuits (because, inter alia, it contravenes the published OWBPA regulations). Finally, while there is no supporting case law, there appears to be a viable argument that any such release will be invalid not only with regard to the ADEA, but perhaps all of the EEOC-enforced anti-discrimination statutes as well (because valid waivers under those statutes must also be knowing and voluntary).

Admittedly, almost all of the releases challenged by the EEOC have explicit or overt language specifically prohibiting employees from filing EEOC charges or restricting access to the agency's proceedings.⁴⁶ There is, however, at least one case suggesting that even in the absence of an explicit EEOC charge-filing ban and even without the word "charge" appearing in the general release paragraph, such a release may still be overbroad. In *Commonwealth v. Bull HN Information Systems, Inc.*,⁴⁷ there was no explicit EEOC charge-filing ban; however, the court took issue with the waiver of all "claims":

⁴⁵ See 29 U.S.C.S. § 626(f)(1)(F)(ii) (LexisNexis 2007).

⁴⁶ See Part II.A, *supra*.

⁴⁷ 143 F. Supp. 2d 134 (D. Mass. 2001).

Further, the 1994 Releases expressly interfere with employees' rights to file charges with the EEOC and to participate in EEOC proceedings or investigations. Bull's 1994 Releases purport to proscribe a laid-off employee from "SUING BULL FOR ANY CURRENT OR PRIOR CLAIMS ARISING OUT OF HIS/HER EMPLOYMENT WITH OR TERMINATION FROM BULL" or "bringing or maintaining any complaints or claims," including ADEA claims. . . . This broadly worded prohibition, which extends beyond judicial actions to encompass all "claims," flies in the face of the OWBPA's clear proscription of any interference with an employee's right to instigate or participate in "an investigation or proceeding conducted by the Commission." Under the circumstances, therefore, the [releases] cannot be considered "knowing and voluntary."⁴⁸

If an employer decides to forego inclusion of the affirmative *Cosmair* language, the original decision in *Cosmair* may be the best support available in the event of a challenge to the release. The release language in *Cosmair* provided: "[Employee releases employer] from all actions, causes of action, claims and demands whatsoever including, but not limited to, any claims, such as those under any federal, state or local law dealing with discrimination in employment."⁴⁹

The Fifth Circuit in *Cosmair*, considering this language, concluded: "The release did not obligate [the employee] not to file a charge. His filing of a charge did not constitute a breach. [The employer] was not relieved of its obligation to perform."⁵⁰ The concern remains, however, that *Cosmair* is a pre-OWBPA case. Recent appellate decisions have focused on OWBPA regulations advising that waivers must be drafted in plain language and must avoid distinctions that may not be readily apparent to a lay reader.⁵¹

⁴⁸ *Id.* at 147-48; see also *EEOC v. Lockheed Martin Corp.*, 444 F. Supp. 2d 414, 421 (D. Md. 2006) (reviewing general release language that did not include the word "charge" and commenting in a less than helpful manner that "[r]ead in isolation, this provision might or might not encompass EEOC charges").

⁴⁹ *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1087 (5th Cir. 1987).

⁵⁰ *Id.* at 1089.

⁵¹ *Syverson v. Int'l Bus. Mach. Inc.*, 461 F.3d 1147 (9th Cir. 2006); *Thomforde v. Int'l Bus. Mach. Inc.*, 406 F.3d 500 (8th Cir. 2005). These cases focused on the language of 29 C.F.R. § 1625.22(b)(3).

VII.
POTENTIAL DRAFTING SOLUTIONS

One "quick-fix" to which many employers have turned is the use of affirmative language informing potential signatory employees that, even if they sign the agreement, they still have the right to file an EEOC charge (as Kodak did in its Consent Decree with the EEOC).⁵² Such a provision might read as follows:

Employee understands that nothing in this Release prevents him/her from filing a charge (including a challenge to the validity of this agreement) with the Equal Employment Opportunity Commission (the "EEOC") or participating in any investigation or proceeding conducted by the EEOC. However, Employee understands and agrees that he/she is waiving any right to recover any monetary relief or other personal relief⁵³ as a result of any such EEOC proceedings or any subsequent legal action.

A riskier compromise would be:

Employee understands that nothing in this Release prevents him/her from filing a truthful charge with any governmental agency, and employer waives any right to recover any monetary or other relief from any such filing.

⁵² See *supra* note 47 and accompanying text.

⁵³ The Fifth Circuit stated that an individual can waive reinstatement. *EEOC v. W.M. Huber Corp.*, 942 F.2d 930, 932 (5th Cir. 1991) ("*Cosmair* was not meant to proscribe a release provision that precluded the employee from seeking through the EEOC his own reinstatement or back wages (as distinguished from an EEOC action to stop some ongoing discriminatory practice or procuring back wages or reinstatement for others."). EEOC guidance on non-waivable rights supports *Huber's* conclusion; however, it does not specifically address equitable relief. See EEOC ENFORCEMENT GUIDANCE NOTICE, *supra* note 23. Under the agency's guidance, an individual can waive his or her right to "personal recovery," but that waiver cannot interfere with the EEOC's right to enforce anti-discrimination laws by seeking relief "that will benefit the public and any victims of an employer's unlawful practices who have not validly waived their claims." *Id.*

The understandable employer reaction can best be summarized as “You cannot be serious! The only reason I am paying non-obligatory severance benefits in the first place is to avoid litigation. I do not want to affirmatively tell the employee that they can file with the EEOC or another government agency.” Such an employer reaction is not far fetched. Consider a downsizing case involving five hundred plus employees; if there is affirmative language in the agreement (which is possibly part of an ERISA-covered severance plan), how many EEOC charges might be filed? As a result, some employers have eschewed the affirmative language approach and, instead, completely “scrubbed” their agreements to remove any hint of an improper charge-filing ban or other restrictions on EEOC access (e.g., removing the word “charges” or “claims” from the waiver; scaling back the confidentiality provision; deleting any representation of no intent to sue or covenant not to sue; etc.). The preferred course depends upon an employer’s tolerance for risk in a specific situation. Employers who are willing to accept almost no risk have included the affirmative *Cosmair* language.

VIII. POST-DRAFTING PROBLEMS

Bull HN highlights another significant post-drafting problem: if the employer believes that the release encompasses administrative charges or notifies the prospective signatory employee or employees of that interpretation, it is very likely a court will consider that as evidence that the release contains an improper EEOC charge-filing ban. The *Bull HN* court specifically noted that “[i]n its deposition of [one of the company’s attorneys] the EEOC asked [the attorney] whether the term ‘claims’ [in the release] included claims filed with [the state administrative agency] or the EEOC. [The company’s attorney] answered affirmatively.”⁵⁴

IX. CONCLUSION

Although widely reported in trade publications, the emerging case law in this area has gone unnoticed by many. While the law is unsettled in some respects at this time (e.g., the legitimacy of the facial retaliation theory advanced in *Lockheed* and *Sundance*), a clear trend can be seen in other areas (e.g., a heightened emphasis on the use of “plain English” in the IBM cases). Given the present status, employers (and their outside and in-house counsel) would be well served to consider all of the following steps:

⁵⁴ *Bull HN Info. Sys., Inc.*, 143 F. Supp. 2d at 148 n.33. See also *Lockheed*, 444 F. Supp. 2d at 421 (“Furthermore, this interpretation is supported by Lockheed’s own statements to [the plaintiff] that if she decides to sign the release as is and receive severance benefits, she will have to dismiss her EEOC charge”); *Cosmair*, 821 F.2d at 1085 (company interpreted general release language to include administrative charges and improperly suspended severance benefits when one was filed).

EMPLOYERS' SETTLEMENT AGREEMENTS WITH DEPARTING EMPLOYEES

1. Gather together all versions of settlement agreements and separation agreements currently used by the company (and its subsidiaries), including any ERISA-covered severance plans that contain a release of claims requirement. Past experience has shown that, in some companies, these agreements have changed over time without counsel's knowledge; e.g., labor relations or human resources personnel use a release drafted by counsel in 1985 as a template for future settlements and, by 2007, the original document has morphed into a completely different agreement. The re-assessment of all agreements in use can quickly reveal outdated, superfluous or risky provisions.
2. Revise these agreements to incorporate as much "plain English" as possible to reflect the judicial preference for agreements that average employees can understand. A rule of thumb for reviewing counsel might be: "*if I don't understand what the purpose of the clause is or what it means, will a signatory employee?*" As just one example, many agreements contain a clause that the agreement itself will be a "complete defense" to any subsequent legal action brought by the employee. Reasonable attorneys could debate ad nauseam whether such a clause is an outright prohibition on EEOC-filings in the first place or whether it merely constitutes an affirmative defense to any such filing. That legal debate is largely irrelevant as the emerging case law places a premium on the average employee's understanding.
3. Determine the risk involved and the acceptable risk level to the company, taking the *specific* situation into account. Risk levels in this area do not exist in a vacuum and are not "one size fits all." Settling an isolated case for \$250 with a twenty-seven-year-old Caucasian male who remains employed by the company simply does not entail the same stakes as a release drafted in conjunction with an ERISA-covered severance plan that will be used in an upcoming RIF involving 9500 employees. The latter situation is ripe for EEOC enforcement activity with much at stake, while the former may never hit that agency's radar. Also, determine whether there are other regulators, e.g., the National Labor Relations Board or the Securities and Exchange Commission, who may be concerned about a denial of access or participation with their agency.
4. With the acceptable risk and tolerance levels in mind, consider whether to use commonly-recurring clauses that have triggered problems. Such an analysis would include answers to the following questions:
 - (a) Is the confidentiality clause necessary and, if so, is it overbroad; that is, could it be reasonably interpreted as restricting employee access to the EEOC?
 - (b) Is a covenant not to sue in this case needed or desired. For example, is the settlement with an employee earning less than \$25,000 annually (who is likely judgment proof) or a subsidiary vice president who earns seven figures?

- (c) Do any of the provisions that appear in the document arguably conflict. For example, is the general release of claims qualified or contradicted by another provision?
- (d) Could any part of the agreement be interpreted as an unenforceable EEOC charge-filing ban. For example, is there a representation of no present intent to sue the company by the signatory employee; does the word "charge" appear in the litany of actions waived in the general release; etc.?
- (e) Is any tenderback provision necessary and, if so, narrowly drafted so as to comply with applicable regulations?

Settlement agreements are a valuable tool for ending or avoiding litigation with current or former employees. However, careful drafting, including consideration of recent legal developments in the area, is required to insure the employer will enjoy the benefit of its bargain and not provide departing employees with money to finance subsequent litigation.

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