

# Labor Law Bulletin

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Labor and employment law trends  
of interest to our clients and other friends.

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## Defective Release Enables Terminated Workers To Pursue Age Claims

Two federal appellate courts have now held that a release signed by IBM employees who were terminated with severance benefits during a workforce reduction did not release the company from liability for age discrimination claims subsequently brought by those employees. In *Syverson v. International Bus. Mach.*, No. 04-16449 (August 31, 2006), the Ninth Circuit Court of Appeals held that IBM's release agreement was invalid. This decision follows a similar ruling from the Eighth Circuit Court of Appeals in 2005 construing the same release agreement. *Thomforde v. International Bus. Mach. Corp.*, 406 F.3d 500 (8th Cir. 2005).

IBM's release agreement contained typical language releasing the company from all employment related claims. It also contained what is called a covenant not to sue provision: "You agree that you will never institute a claim of any kind against IBM" and "if you violate this covenant not to sue . . . you agree that you will pay all costs and expenses of defending against the suit incurred by IBM . . ." However, the provision went on to say that "This covenant not to sue does not apply to actions based solely under the ADEA." The Eighth and Ninth Circuits considered this language sufficiently confusing to render the release unenforceable.

Regulations under the Older Workers Benefit Protection Act (OWBPA) allow an employee to release ADEA claims, but disallow an agreement that prohibits an employee from suing to challenge the enforceability of such a release. Apparently trying to comply with this regulation, IBM inserted an exception for ADEA claims in the covenant not to sue provision. However, the Ninth Circuit held that the "phrasing of the release and covenant not to sue engenders confusion over whether ADEA claims are in fact covered by the release or are excepted from it." This confusion failed to meet a fundamental requirement of the OWBPA that a release of ADEA claims be drafted in a "manner calculated to be understood by the average individual."

Both courts held that an average individual would not know whether he was waiving ADEA claims or not, with the release saying he was releasing such claims but with the covenant not to sue exception saying it does not apply to actions under the ADEA.

Given the legal resources at IBM's disposal, it is not unrealistic to assume that release agreements being used by hundreds of other employers, large and small, also may contain fatal legal defects. Many employers incorrectly view releases as cookie-cutter documents that, once drafted, can be used and reused in all cases and contexts. The OWBPA contains specific, technical requirements applicable to all release agreements (which doomed the IBM agreements) as well as additional, specialized requirements depending on the nature of the termination (whether individually negotiated or entered into as part of a group termination plan).

Vedder Price employment attorneys are available to prepare enforceable release agreements or to review agreements currently in use. If we can assist you, feel free to call Bruce Alper (312-609-7890) or any Vedder Price attorney with whom you have worked.

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Questions or comments concerning the Bulletin or its contents may be directed to its Editor, James S. Petrie (312/609-7660), or the firm's Labor Practice Leader, Bruce R. Alper (312/609-7890), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212/407-7780), or, in New Jersey, John E. Bradley (973/597-1100).

*Chicago*

222 North LaSalle Street  
Chicago, Illinois 60601  
312/609-7500  
Fax: 312/609-5005

*New York*

805 Third Avenue  
New York, New York 10022  
212/407-7700  
Fax: 212/407-7799

*Washington, D.C.*

888 16th Street, N.W.  
Suite 800  
Washington, D.C. 20006  
202/355-1395  
Fax: 202/355-1394

*New Jersey*

Five Becker Farm Road  
Roseland, New Jersey 07068  
973/597-1100  
Fax: 973/597-9607