

Important Developments in New York State Law

Employers in New York State should be aware of the following developments in labor and employment law:

State Funds May Not Be Used to Assist or Resist Union Organization Efforts

As of December 30, 2002, state funds may not be used by employers to finance efforts by their employees or outsiders to “encourage or discourage” union organizing. The law requires employers receiving state funds to certify that they have not used those funds for a prohibited purpose. Violations may result in a penalty of \$1,000, or three times the amount used inappropriately. The law is similar to recent statutes enacted in New Jersey and California. It is expected that the validity of these statutes will be challenged as violative of federal labor law.

New Sexual Orientation Discrimination Prohibition

New York State has now become one of 13 states to prohibit discrimination in employment, credit, housing, education and public services on the basis of sexual orientation. However, the law does not provide protection to transgender individuals.

Employers Must Accommodate Religious Practices

As of November 2002, New York State employers must accommodate an employee’s religious practices and beliefs unless the employer can show that doing so will cause undue hardship for the employer. This requirement may include providing time off or flexible work schedules for religious observance or other reasonable accommodations to those with sincerely held religious practices and beliefs.

Recent Developments In New York City Laws

New York City Human Rights Law Protects Transgender Individuals

The New York City Human Rights Law now defines gender to include “actual or perceived sex and shall also include a person’s gender identity, self-image, appearance, behavior or expression, or whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.” Thus, employers, housing providers and places of public accommodation may not discriminate against “transgender” individuals. Buffalo, Rochester and Suffolk County all have enacted similar prohibitions. In comparison, the New York State legislature has rejected efforts to provide anti-discrimination protection to transgender individuals.

Purchasers of Residential or Commercial Properties in NYC Must Retain All Employees

Last year, the New York City Council enacted the Displaced Building Service Worker Protection Act, which requires

owners, managers and contractors of newly acquired commercial properties of 100,000 square feet or more, and residential properties of 50 units or more, to retain the current union and non-union workers for a 90-day grace period. Prior to the purchase of a property or termination of a service agreement, the employer must notify employees and their union, if any, of their right to be retained for at least 90 days. During the 90-day period, employees may not be terminated, except for cause. At the end of the 90-day period, the employer must perform a written performance evaluation for each employee retained pursuant to the law. Employees terminated in violation of the law may be awarded back pay, attorneys’ fees and reinstatement. It is expected that the law will be challenged as a violation of federal labor law. ⚙

Specific Written Consent Needed to Bind Employees to Arbitration

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on their dockets, are under growing pressure to resolve and dispose of them, and are willing to send them to arbitrators if the employee has clearly consented to arbitration as the exclusive forum for the particular claim. Nonetheless, merely including an arbitration provision in an employee handbook — without a signed document that the employee specifically agrees to be bound by the arbitration provision—may not suffice even if the employee acknowledges that he or she received the handbook or had knowledge of the employer’s arbitration policy. ⚙

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labor & employment law newsletter

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Safeguarding of Confidential Business Information

Obviously, a company's competitive business advantage depends upon its ability to generate unique products, processes and relationships, which are known by law as trade secrets. As employees change jobs more frequently and consultants are

utilized for the development of key business strategies, the threat of trade secret theft increases. An often seen scenario involves disgruntled employees leaving with confidential information as they start their own competing ventures. Some such employees develop business plans

based upon their prior employers' confidential information and then solicit other company employees to join them in the competing enterprises. Unless a company has the forethought to safeguard trade secrets and to prohibit the solicitation of company employees by departing employees, the law may not

provide the company with a cause of action to prevent this scenario from becoming a reality. Companies should undertake proactive measures to both protect trade secrets and prohibit employee solicitation by departing employees.

A trade secret consists of any formula, pattern, device or compilation of information that is used in one's business, and that gives the owner an opportunity to obtain a competitive advantage over others who either do not know or use it.

In determining whether information constitutes a trade secret, courts have considered the following factors: 1) the extent to which the information is known outside the business; 2) the extent to which the information is known to employees and others involved in the



business; 3) the extent to which measures are taken to guard the secrecy of the information; 4) the value of the information to the business and its competitors; 5) the amount of effort or money expended in developing the information; and 6) the ease or difficulty with which the information could be acquired or duplicated by others.

Most inventions, technical formulas, customer data, pricing information,

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supplier information and business development strategies fall within the purview of a trade secrets. Under certain circumstances, customer lists may also fall under the classification of trade secrets. Courts have held that where a company's customers are not readily obtainable, but must be cultivated with great effort and secured through the expenditure of considerable time and money, the names of those customers are protected trade secrets.

Remedies against theft of trade secrets may include injunctions against theft or use of misappropriated trade secrets, and recovery of lost profits from the wrongdoers. However, in determining whether a remedy is available, the courts examine whether the company undertook reasonable efforts to protect against misappropriation. Companies should therefore consider developing trade secret protection programs that include the following elements:

- Separation of confidential information

from ordinary administrative communications;

- Disclosure of confidential information only on a need-to-know basis by designating communications as trade secrets or confidential information; and

Under certain circumstances, customer lists may also fall under the classification of trade secrets.

- Requirement that exiting employees return all company documents and information prior to departure and reacknowledge their confidentiality obligations.

By far, the best way to protect a business from an unauthorized disclosure of confidential business information is by way of confidentiality and nondisclosure agreements between the company and key employees or other persons such as consultants or contractors who may have access to the company's confidential information.

Such agreements should, among other things, identify the protected information, contain an acknowledgment by the employee or contractor that he or she will not disclose the information except as authorized by the company, and an acknowledgment that the company will be entitled to obtain an injunction and liquidated damages for violation of the agreement. Additional protections can be afforded by way of noncom-

pete and nonsolicitation agreements that prohibit employees from participating in competing ventures or soliciting other employees to join them in such an endeavor following their departure from the company.

By developing trade secret protection programs and obtaining noncompete, nonsolicitation and nondisclosure agreements, a company not only reduces the likelihood of unauthorized trade secret disclosure but ensures that it may obtain relief in court in the event of such disclosure. ❁

HIPAA Privacy Standards

The Health Insurance Portability and Accountability Act (HIPAA) is a federal statute that creates, among other things, a privacy rule designed to protect the privacy of an individual's medical records and other personal health information. This article concentrates its attention on HIPAA's privacy rule.

The United States Department of Health and Human Services is responsible for regulating and monitoring certain kinds of businesses to ensure that they are HIPAA-compliant. These businesses, which HIPAA refers to as "covered entities," include: 1) health care providers, such as hospitals, nursing homes and physician groups; 2) health care clearinghouses; and 3) employer-sponsored health plans.

The purpose of the privacy rule is to set minimum required national standards for the protection of health information

for health care providers and plans. HIPAA also recognizes the current technology needs of providers and plans, and accordingly balances patients' rights to privacy protection with encouragement to exchange health information electronically in order to improve the operation of the health care system and reduce administrative costs.

As a preliminary matter, it must be noted that the privacy rule creates a federal "floor" of safeguards to protect confidentiality of medical information. Many states have their own laws creating privacy protections as well, which may give rise to a question as to whether HIPAA or the state laws should be followed if they provide different levels of protection. To the extent that HIPAA directly conflicts with, or provides greater privacy protection than, a state law, HIPAA should be followed because it preempts a state law. To the extent that the state law provides

greater privacy protection than HIPAA, the state law must still be followed.

The central focus of the HIPAA privacy rule is that it prescribes a "minimum necessary standard" that requires health care providers and plans to evaluate their practices and enhance their safeguards as needed to limit unnecessary and inappropriate acts and disclosure of protected health information.

The privacy rule requires health care providers and plans to: 1) notify individuals about their privacy rights and how their information can be used; 2) adopt and implement privacy procedures for its practices, hospitals or plans; 3) train employees so that they understand the privacy procedures; 4) designate an individual employee to be responsible for overseeing proper adoption of, and adherence to, the privacy procedures; and 5) secure patient records containing individually identifiable health information



so it is not readily available to those who do not need it.

The notice that health care providers and plans are required to give to individuals must: 1) be in writing; 2) contain an effective date; and 3) describe a) how the provider or plan may use and disclose the medical information; b) what the individual's rights are and how the individual may exercise them; c) what the provider's or plan's legal duties are with respect to the information; and d) who the individual may contact for further information. This notice must be posted on the provider's or plan's web site and must be made available to anyone who asks for it.

The privacy rule requires health care providers and plans who conduct several common types of electronic transactions to use standardized code sets and unique identifiers to protect the private health information transmitted in the transactions. The United States Department of Health and Human Services is adopting and establishing these codes and identifiers. These transactions include: 1) health claims, or equivalent encounter information, and attachments; 2) plan enrollment and disenrollment; 3) plan eligibility; 4) fee and premium payment and remittance advice; 5) injury reports; 6) claim status; and 7) referral certification and authorization.

The privacy rule also requires health

care providers and plans to limit the use and disclosure of protected health information on a day-to-day basis, regardless of electronic transactions, by adopting reasonable safeguards and procedures to protect an individual's privacy. Such reasonable safeguards include: 1) speaking quietly when discussing a patient's condition with family members in a waiting

room rather than a public area; 2) avoiding the use of a patient's name in public hallways and elevators; 3) posting signs to remind employees to protect patient confidentiality; 4) isolating or locking file cabinets and records rooms; and 5) providing additional security, such as passwords on computers that contain personal information.

The HIPAA privacy rule further establishes a foundation of federally protected rights that permit individuals to control certain uses and disclosures of their protected health information. For example, individuals have the right to access and amend their information, and the right to an accounting of disclosures of their

information. The privacy rule also allows an individual to act and exercise his or her rights through a designated "personal representative," who stands in the shoes of the individual and with whom the health care providers and plans must interact. Examples of a personal representative include: 1) a person with legal authority to make health care decisions on behalf of an individual; 2) a parent, guardian, or other person acting in loco parentis with legal authority to make health care decisions on behalf of a minor; or 3) a person with legal authority to act on behalf of the decedent or the estate.

Similarly, a health care provider or plan can utilize a "business associate" to assist in the performance of the activity involving the use or disclosure of protected health information. Typically, a business associate provides a vital role in claims processing or administration, data analysis and billing and benefit management, including third-party administration. Examples of a business associate include a benefits manager in a pharmacist network, a consultant performing a utilization review, an attorney performing legal services, or a third-party administrator performing claims processing.

The purpose of the privacy rule is to set minimum required national standards for the protection of health information for health care providers and plans.

Because health providers and plans that cover 50 or more participants or are administered by third-party administrators are subject to HIPAA's compliance standards, there are numerous requirements that must be implemented to avoid civil monetary penalties and/or possible criminal prosecution.

For more information about the privacy rule, see the fact sheet entitled *Modifications to the Standards for Privacy of Individually Identifiable Health Information — Final Rule*, which can be found at www.hhs.gov/news/press/2002pres/20020809.html, or contact Peckar & Abramson's Labor Relations and Employment Law Department. ❁

Workplace Substance Abuse: To Test or Not to Test?

Workplace substance abuse results in lower productivity, higher workers' compensation claims, more time away from work and higher medical costs. It also has been linked to crime on the job, and can affect employee mood and well-being. Employee drug and alcohol testing is one action an

employer can take (and, in some cases, may be required to take) to minimize the occurrence of substance abuse-related workplace incidents.

Why Implement a Substance Abuse Policy?

It May Be Required by Law or Contract:

There is a growing consensus that implementation of substance abuse policies benefit management and staff by engendering a safer, more productive and positive environment. Employers in many industries frequently chose to implement substance abuse policies that include, as a key component, drug and alcohol testing. Many companies require testing not just for their own employees but for all employees of contractors or service providers with whom they do business.

In addition, substance abuse testing is increasingly becoming required by law. For example, the Department of Transportation, Department of Defense, Department of Energy and the Nuclear Regulatory Commission are federal agencies that require contractors working for them to set up drug-testing programs. Similarly, the Drug-Free Workplace Act of 1988 requires employers receiving federal funds, or those that are parties to federal contracts, to certify to the federal government that they will provide drug-free workplaces. The act requires employers to publish a policy statement notifying employees that drug abuse in the workplace is prohibited, to establish a

drug awareness program to educate employees about the dangers of drug abuse and to take disciplinary action against employees who violate the drug abuse policy statement. The act neither mandates nor prohibits testing.

Elsewhere, on the state level, Ohio recently passed a new law that requires contractors working on state construction projects to test workers for drugs and alcohol. This law is similar in some ways to laws already on

Many Labor Organizations Acknowledge Its Safety Benefits:

Many unions are supportive of drug-testing policies because they help promote worker safety. For example, Sheetmetal Workers and Ironworkers' Unions in Wisconsin began a statewide random drug-testing initiative in 2001 aimed at promoting safety. Similarly, mechanical contractors and union plumbers and pipefitters in Minnesota and Wisconsin have been operating under mandatory statewide drug/alcohol testing and treatment programs since 2000.

When Can an Employer Consider Utilizing a Drug Test?

Pre-Employment Tests: To decrease the chance that a current drug user will be



the books in Florida and other state and local jurisdictions. The trend is clearly in favor of such tests, and can be of some financial benefit. In many states, companies that implement drug testing are eligible to receive discounts on their workers' compensation insurance premiums.

hired, some employers test job applicants at the time of a job offer. The offer depends on a negative drug test result.

Reasonable Suspicion and For Cause Tests: When an employee shows noticeable signs of not being fit for duty (for cause) or has a documented pattern of unsafe work behavior (reasonable

suspicion), the employee may be asked to take a drug test.

Random Tests: To discourage drug use among all employees, an employer may ask employees to take drug tests at random.

Post-Accident Tests: An employer may test employees who have been involved in an accident or unsafe practice incident to find out if alcohol or other drug use was a factor.

Post-Treatment Tests: When an employee has taken time off from work to go through an inpatient treatment program or when an employee is participating in some form of outpatient treatment, an employer may arrange for random testing of that employee to ensure that the employee remains sober.

What Are the Characteristics of an Effective, Comprehensive Drug-Free Workplace?

Here are some of the necessary elements for a lawful substance abuse-testing program:

- Obtain written acknowledgment of the policy and written consent to testing from each employee.
- Involve the recognized collective bargaining representative, if any, in the development of the policy. Drug and alcohol testing is a mandatory subject of collective bargaining. Unilateral implementation of a policy may constitute an unfair labor practice.
- Train management, supervisors and staff to understand their responsibilities under the policy.
- Provide access to treatment through employee assistance programs or outsourced treatment and counseling.

Is Drug Testing for You?

Employers who are engaged in safety-sensitive occupations have the strongest reasons to implement such a program even if not required by law or contract. Other employers, however, may also have good reasons for such a program. The advantages include controlling insurance costs; increasing employee safety, attendance and productivity; and avoiding negligent hiring and retention claims. Despite the start-up costs and potential for initial employee resistance, many have found that drug-free workplace policies and programs are beneficial to staff and management alike. ⚙

Specific Written Consent Needed to Bind Employees to Arbitration

An arbitration agreement, if properly drafted and implemented, can be a useful tool to minimize the risks associated with defending employment-related claims. In light of recent developments in case law pertaining to arbitration of employment claims, employers should reevaluate the enforceability of arbitration agreements and reassess their effectiveness in avoiding jury trials. Most importantly, employers implementing arbitration provisions should obtain from every employee a signed document indicating the employee's clear and unambiguous consent to be bound by the arbitration agreement. A recent New Jersey Supreme Court decision illustrates why this is a critical requirement.

Most of the litigation over enforceability of employer/employee arbitration agreements has focused on the issue of whether the employee's consent is "knowing and voluntary." Because employees have a statutory and perhaps constitutional right to a jury trial for many types of employment claims, such as discrimination claims, courts will not enforce an arbitration agreement unless it can be clearly shown that the employee has knowingly waived his or her right to a jury trial. In the case of *Leodori v. Cigna Corporation*, the New Jersey Supreme Court ruled that an employer could not enforce the arbitration provision contained in its employee handbook, even though the employee acknowledged having received the handbook, because the employee had not signed a written acknowledgment that he specifically agreed to arbitration as a term and condition of employment. Although courts in different states have been split as to whether it is sufficient to include an arbitration policy in an employee handbook or whether specific written consent by the employee is necessary, the latter appears to be the current trend and is the more prudent course.

Employers should also be aware of other circumstances affecting the enforceability of arbitration agreements. One circumstance is that the agreement must expressly state that it applies to any and all

claims arising out of the employment and should identify at least some, but not necessarily all, of the statutes governing the employment relationship. Another is language indicating that the employee is given a fair opportunity to consider the agreement, such as time to review with legal counsel and a chance to ask questions about its meaning. The agreement should not be unduly financially burdensome on the employee; a reasonable county and state venue should be chosen; and the employer should pay the costs of arbitration beyond an initial filing fee (although a few courts have determined employee financial hardship on a case-by-case basis). The agreement must state that it is a term and condition of employment, and specify the compensation given for signing the agreement, such as continued employment, a mutual promise to arbitrate or a higher wage. The agreement should also provide for mutual selection of an impartial arbitrator, and should provide that an award will be enforceable in federal court.

Arbitration Provisions Will Not Bar Litigation Brought by EEOC

Even a properly drafted and binding arbitration agreement will not serve to avoid all jury trials for employment related claims. Pursuant to the U.S. Supreme Court's decision last year in *EEOC v. Waffle House, Inc.* such agreements do prevent a non-party governmental agency (such as the Equal Employment Opportunity Commission (EEOC)) or a state Fair Employment Practice Agency (FEPA)) from litigating claims in court on behalf of an employee even if the individual employee chooses to discontinue his or her claim. Thus, if the EEOC or an FEPA files suit in court, an arbitration agreement will not serve to bar the action. Similarly, arbitration provisions in a union collective-bargaining agreement may not be enforceable against individual members since they are not necessarily a party to the labor agreement between the employer and the union.

Federal and state courts, burdened with more and more employment cases

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Employers Must Preserve Jobs for Military Reservists

In response to the September 11, 2001, terrorist attacks and subsequent geopolitical events, the federal government is calling upon many thousands of military reservists to return to active duty. The Uniform Services Employment and Reemployment Rights Act of 1994 (USERRA) provides certain well-deserved protections to these military reservists and their families, designed to minimize the negative impact of their absence from the workforce.

Under USERRA, military reservists must be reemployed by their pre-service employers following periods of military service unless the pre-service employers can demonstrate that reemployment would cause undue hardship on the employers. Reinstated employees are entitled to the seniority, rights and benefits that would have accrued from continuous employment during the period of military service. Further, employees or any covered dependents have the option to extend the employees' health insurance coverage for a period up to 18 months from the date of commencement of military service. USERRA does not require reemployment of individuals who are dishonorably discharged or who are discharged for misconduct.

USERRA applies to persons who perform voluntary or involuntary duty in the uniformed services during times of war or national emergency. These services include the Army, Navy, Marine Corps, Air Force, Coast Guard and Public Health Service Commission Corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard also gives rise to rights under USERRA. Uniformed service includes active duty, active duty training, inac-

tive duty training (such as drills), initial active duty training and funeral honors duty performed by National Guard and reserve members, as well as absences to attend medical examinations to determine fitness for any such duty.

Pre-service employers must reemploy service members if they meet five eligibility criteria:

- The person must have held a civilian job.
- The person must have given notice to the employer that he or she was leaving the job for service in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable.
- The period of service must not have exceeded five years.
- The person must not have been released from service under dishonorable or other punitive conditions and
- The person must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

USERRA establishes a five-year cumulative total on military service with a single employer, with certain exceptions allowed for call-ups during emergencies, reserve drills and annual scheduled training for active duty. USERRA also allows an employee to complete an initial period of active duty that exceeds five years for enlistees in special programs.

After the term of service is complete, time limits for a reservist to return to work under USERRA depend upon the duration of a person's military service.

The applicable time limits are as follows:

- **Less than 31 days of service:** By the beginning of the first regularly scheduled work period after the end of the calendar day of duty plus time required to return home safely and an eight-hour rest period. If this is impossible or unreasonable, then as soon as possible.
- **31 to 180 days:** Application for reemployment must be submitted no later than 14 days after completion of a person's service. If this is impossible or unreasonable through no fault of the person, then as soon as possible.
- **181 days or more:** Application for reemployment must be submitted no later than 90 days after completion of a person's military service.
- **Service-connected injury or illness:** Reporting or application deadlines are

USERRA applies to persons who perform voluntary or involuntary duty in the uniformed services during times of war or national emergency.

extended for up to two years for persons who are hospitalized or convalescing.

Upon reemployment, the employee must be treated as having been continuously employed for employee benefits plan purposes. For example, if the employer would have made contributions to benefits plans had the employee remained continuously employed, those contributions must be made for the period of military service upon reemployment of the employee. USERRA prohibits discrimination or retaliation against a person on the basis of past military service, current military obligations or intent to serve. Federal courts have ruled that a veteran need not show that military service was the motivating factor in an employer's decision not to reemploy him or her. Any unjustified failure to reemploy a returning veteran is actionable. Any discharge occurring within six months of reemployment must be based upon good cause. Voluntary compliance with this law is one of many ways that an employer can honor those members of the workforce, and their families, who dedicate their lives to protect our nation. 🌟

Noncompliant Separation Agreements Will Not Bar Employee Lawsuits

Regulations issued by the Equal Employment Opportunity Commission (EEOC) confirm that separation agreements cannot require employees to “tender back” severance benefits if they later bring age discrimination claims against the employer. The regulations also dictate that noncompliant separation agreements

will not serve to bar lawsuits by the employee, but will still bind the employer to fulfill its promises under the agreement.

In the case of group layoff plans, separation agreements are not binding unless the employee was provided with written information concerning all aspects of the plan. Thus, poorly drafted separation agreements backfire by permitting employees to retain severance benefits while they pursue discrimination claims and the employer remains bound to the agreement. Any separation agreement must therefore be carefully drafted in compliance with the new regulations to achieve its desired effect of preventing the occurrence of litigation.

Waivers Must Comply with Technical Requirements

In Title II of the Older Workers’ Benefit Protection Act of 1990 (OWBPA), Congress added Section 7(f) to the Age Discrimination in Employment Act (ADEA) to ensure that older workers are not coerced or manipulated into waiving their rights under the ADEA. Congress proclaimed that an employee may not waive any right or claim under ADEA unless the waiver is “knowing and voluntary,” and set forth requirements to ensure that the knowing and voluntary requirement is met.

To meet the knowing and voluntary standard, a waiver must:

- be written in a manner calculated to be understood by a person of average intelligence;
- specifically reference ADEA rights and claims;
- advise employees to consult an attorney before signing the agreement;
- provide 21 days for consideration

and seven days for revocation after acceptance;

- be in exchange for additional benefits or compensation; and
- be accepted by the employee in the absence of fraud, duress, coercion, or mistake of material fact.

If a waiver is requested from an employee in connection with an “exit incentive program” or “employment termination program,” each employee must be given at least 45 days to consider the agreement, instead of the 21-day consideration period required in individual termination situations. Under such incentive or termination programs, the employer must also disclose, in writing, the identity of groups of employees eligible for the program,

wish to challenge the waiver. For instance, employers may not require an employee to return payments made under the waiver before instituting a lawsuit; neither nor may they require the employee to pay damages or attorneys’ fees to the employer for filing suit. Similarly, an employer may not, on its own, abrogate or avoid the duties to which it has agreed even if the waiver is challenged. However, an employee who asserts a bad faith challenge to a waiver may be liable for the employer’s attorneys’ fees incurred in defending the challenge.

It is important to remember that certain claims like workers’ compensation or wage and hour claims are not waivable. Mistaken inclusion of non-waivable claims may invalidate the release, yet leave other provisions of the agreement, such as the payment provisions, intact.

Congress has attempted to strike a balance between allowing employers to obtain waivers and ensuring that

Poorly drafted separation agreements backfire by permitting employees to retain severance benefits while they pursue discrimination claims and the employer remains bound to the agreement.

the program requirements, any time limitations under the program, job titles and ages of all employees eligible or selected for the program and the same information for those who are not eligible or selected for the program.

Noncompliant Releases Will Backfire

Under EEOC regulations, waivers are not free of coercion if, among other things, they contain a “tender back” requirement or if they create other economic penalties for employees who

older workers do not unwittingly waive access to the courts to protect their rights under the ADEA. In striking that balance, Congress has determined that a waiver serves as an affirmative defense, with the burden on the employer to prove that the waiver is valid. If the release is invalid in any way, the employee may proceed with its claims while it retains the severance benefit and while the employer continues to be bound by the waiver. Drafting waivers that comply with the law is of obvious importance. ⚙️