



Information Every Business Needs to Know

HR & Benefits Advisor

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Brought to you by: **The Law Offices of Travis Bowen, PC**

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EEOC Releases Guidance on Waivers of Discrimination Claims in Severance Agreements



Highlighting the “devastating impact” of age discrimination, the U.S. Equal Employment Opportunity Commission (EEOC) held a public hearing on recent developments under the [Age Discrimination in Employment Act](#) (ADEA), including the effect on older workers of widespread layoffs, threats to employee benefits, and controversial recent court decisions.

The Commission issued a technical assistance document entitled, [Understanding Waivers of Discrimination Claims in Employee Severance Agreements](#), to help further explain the various facets of waivers as part of severance agreements. The EEOC’s

Conduct HR Self-Audits To Correct Hidden Problems

No one likes the sound of the word 'audit.' When any government agency, from the IRS to the EEOC 'invites' you to participate in an audit, you get nervous. Especially if it's been awhile since you've reviewed your HR processes.



That's where periodic HR self-audits can help. Instead of finding out through agency audit results that you've been incorrectly applying the rules, why not take some time on a regular basis to audit your processes yourself? Yes, it will take some time. But in the end, you may come out of an official audit with far less trouble.

Some of the HR areas you may want to audit include all policies and practices related to hiring, including Affirmative Action requirements, drug testing rules and background checks. Other key policy and practice areas of the employee relationship that should be reviewed due to their importance and sensitivity include discipline, leaves and terminations. Pay processes and your benefits program should also be audited make sure these areas are in compliance with current laws. It is also important to conduct an annual review of your policies and procedures manual and your employee handbooks to make sure they are up-to-date.

Allow Enough Time to Audit, Correct Issues

Before beginning an audit, make sure you're willing and able to dedicate the necessary time, for both the audit and for the follow-through. If you fail to correct deficiencies you find, you may leave the company more vulnerable than before, because litigators and government agencies can point to your lack of corrective action as evidence of willful violation.

On the other hand, though, your willingness to correct problems can demonstrate to those agencies and to your employees that you are

document explains terminated employees' rights and obligations when offered severance pay in exchange for a waiver of discrimination claims. The EEOC issued the document following a significant spike in age discrimination charges, and amid increased layoffs involving waivers of rights.

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

The EEOC is responsible for enforcing federal laws prohibiting employment discrimination. Further information about the EEOC is available on the agency's web site at www.eeoc.gov.

Changes to the Americans with Disabilities Act

The Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"), which became effective on January 1, 2009 makes it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA. The Act emphasizes that the definition of disability should be interpreted in favor of broad coverage of

committed to fair treatment and complying with the law. Not only will it show good-faith efforts during an official audit, it may have a positive impact on employee morale, especially if exit interviews or supervisor reports indicate problems.

To begin, determine which areas of HR you'd like to audit such as COBRA compliance. Then, decide which laws or regulations apply. Don't forget to consider state and local laws in addition to federal laws. Examine the procedures in the area you're auditing, including how you've been documenting the processes. Make sure that any practices that are understood but unwritten are formalized or changed.

Word Choice Important

If you find areas in which you're out of compliance, take immediate steps to bring those into compliance. Once the audit is complete, compile the results. Remember that the results report may become evidence in a lawsuit, so be careful about wording. Make sure the report demonstrates step-by-step how you conducted the audit, and keep it factual, without including conclusions. If you have a legal department or an attorney, they can be instrumental in helping you word the report so as to present an objective and accurate picture of your audit.

For more information about conducting an HR self-audit, check out the array of [tools and information](#) available to our subscribers.

Mental Health Parity Act & Group Health Plans

On October 3, 2008, the President signed the **Mental Health Parity and Addiction Equity Act of 2008** (MHPAEA). Key changes made by MHPAEA, which is generally **effective for plan years beginning after October 3, 2009**, include the following:



- If a group health plan includes medical/surgical benefits and mental health benefits, the financial requirements (e.g., deductibles and co-payments) and treatment limitations (e.g., number of visits or days of coverage) that apply to mental health benefits must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits;
- If a group health plan includes medical/surgical benefits and substance use disorder benefits, the financial requirements and treatment limitations that apply to substance use disorder benefits must be no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits;
- Mental health benefits and substance use disorder benefits may not be subject to any separate cost sharing

individuals to the maximum extent permitted by the terms of the ADA and generally should not require extensive analysis.

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways including:

Directs EEOC to revise that portion of its regulations defining the term "substantially limits";

Expands the definition of "major life activities" by including two non-exhaustive lists:

- The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
- The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");

States that mitigating measures other than "ordinary eyeglasses or contact lenses" should not be considered in assessing whether an individual has a disability;

Clarifies that an impairment that is episodic or in remission

requirements or treatment limitations that only apply to such benefits;

- If a group health plan includes medical/surgical benefits and mental health benefits, and the plan provides for out of network medical/surgical benefits, it must provide for out of network mental health benefits;
- If a group health plan includes medical/surgical benefits and substance use disorder benefits, and the plan provides for out of network medical/surgical benefits, it must provide for out of network substance use disorder benefits;
- Standards for medical necessity determinations and reasons for any denial of benefits relating to mental health benefits and substance use disorder benefits must be made available upon request to plan participants;
- The parity requirements for the existing law (regarding annual and lifetime dollar limits) will continue and will be extended to substance use disorder benefits.

Federal and State law – Generally, large employers with a group health plan must comply with the Federal parity requirements as well as state laws, whereas small employers (2-50 employees) with a group health plan will only be potentially subject to state laws. A state law that requires more favorable treatment of mental health benefits under health insurance coverage offered by issuers (generally, health insurance companies) would not be preempted by the provisions of MHPA and the interim rules. The combined effect of Federal and State rules will vary from state to state.

Please note the following can opt out of the Mental Health Parity Act.

A nonfederal government employer that provides self-funded group health plan coverage to its employees (coverage that is not provided through an insurer) may elect to exempt its plan (opt-out) from the requirements of MHPA and MHPAEA by issuing a notice of opt-out to enrollees at the time of enrollment and on an annual basis thereafter. The employer must also file the opt-out notification with CMS.

For more information on your state, contact the [Department of Insurance](#) (DOI) for the state in which you reside. Ask DOI about mental health parity and state laws mandating that mental health benefits be included in the plan. You may also go to www.ncsl.org/programs/health/Mentalben.htm for additional State specific information.

For more information on the MHPA go to the following Websites:

- [CMS](#) - links to the MHPA statute. Click on "The Mental Health Parity Act" in the left column and scroll down to the statute.
- For more information on the MHPA statute, regulation, fact sheet and other publications, please [click here](#) and scroll down to the MHPA.

is a disability if it would substantially limit a major life activity when active;

EEOC will be evaluating the impact of these changes on its enforcement guidance and other publications addressing the ADA.

For More Information:

[Notice Concerning The Americans With Disabilities Act \(ADA\) Amendments Act of 2008](#)

[ADA Statute](#)

Benefit Trends For Small Businesses



In an ongoing effort to track trends in employee benefits, MetLife recently released its 7th Annual Study of Employee Benefits Trends. The report includes strategies smaller companies can use in order to compete for talent with their larger counterparts.

The study indicates that salary and wages are key drivers behind employee loyalty. Eight-five percent of employees working for a small business, as defined in the study, say that salary and wages are very important in their loyalty to their employer. Ranked as very important by 71% are health benefits, followed by retirement benefits at 68%. Nonmedical benefits, like life, disability and dental insurance were also ranked very important by 66% of small business employees.

The study found that a majority of small businesses do offer employee benefits, although they don't provide as many benefits as do their larger counterparts. Ninety-five percent offer medical insurance; 65% offer dental insurance; 61% offer disability insurance; and 45% offer life insurance.

Don't Know What They Want? Ask Them!

The report also points out that small companies are more likely to feel the bite from costs associated with employee turnover and loss of productivity. To help increase employee retention, the report suggests that small companies consider adding inexpensive wellness programs and work/life balance initiatives. Better communication of your benefits is also important because if employees don't understand their benefits, you miss out on the loyalty they might inspire in your employees. Employee surveys can also help you find out how employees feel about your benefits, how much they understand about them, and what benefits they would like to have.

News about E-Verify

On July 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano announced the Administration's support for a regulation that will award federal contracts only to employers who use E-Verify to check employee work authorization. At the same time, Napolitano announced the Department's intention to rescind the Social Security No-Match Rule, which was never implemented and has been blocked by a court order.

No More Federal Contracts Without E-Verify

The Secretary announced that federal contracts will be awarded only to employers who use E-Verify to check employee work authorization. "Requiring those who seek federal contracts to use

this system will create a more reliable and legal workforce,” Napolitano said in a [press release](#). Full implementation of the rule will apply to federal solicitations and contract awards Government-wide beginning September 8, 2009.

About E-Verify

E-Verify, which compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers' employment eligibility, is a free web-based system operated by DHS in partnership with the Social Security Administration (SSA). The system facilitates compliance with federal immigration laws and helps to deter unauthorized individuals from attempting to work and also helps employers avoid employing unauthorized aliens.

The following is an overview of E-Verify usage:

- More than 134,000 employers currently use E-Verify, according to DHS;
- Since October 1, 2008, E-Verify processed more than 6,000,000 queries;
- The majority of users are satisfied with it, based on an April 2009 American Customer Satisfaction Index Survey.
- One reason employers like E-Verify may be its speed and efficiency. Independent research indicates that nearly 97% of the queries processed by the system are confirmed as work-authorized within 24 hours.

Improvements to E-Verify Continue

In addition to expanding participation, DHS continues to enhance E-Verify in order to guard against errors, enforce compliance, promote proper usage, and enhance security.

- E-Verify recently incorporated new processes to reduce typographical errors, and new features to reduce initial mismatches;
- In May 2008, DHS added access to naturalization database records, increasing the program's ability to automatically verify the status of naturalized citizens. The result was a reduction in citizenship-related mismatches of 39%;
- Department of State passport data was incorporated in February 2009, in an effort to reduce mismatches among citizens born outside the U.S.;
- Further initiatives designed to improve the accuracy of the Federal database are under way
 - new tools to guard against fraud, misuse and discrimination;
 - strengthening of training, monitoring and compliance; and
 - enhancements in privacy protections.

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