

## 1SUPPORTING STATEMENT

### Waivers of Rights and Claims Under the Age Discrimination in Employment Act; Informational Requirements.

#### A. Justification

The Age Discrimination in Employment Act (ADEA) allows employees to waive their rights to challenge termination from employment as age discrimination when several statutory conditions are met. If a waiver is requested in connection with exit incentives or other employment termination programs<sup>1</sup> offered to a group or class of employees, (hereinafter referred to as “programs”) the employer must inform the individual in writing of the class, unit, or group of individuals covered by such program, any eligibility factors for such program, any time limits applicable to such program, the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. The purpose of requiring the employer to disclose this information to the employee (hereinafter referred to as “informational requirements”) is to provide an employee with enough information regarding the program to allow that employee to make an informed choice whether or not to sign a waiver agreement. The employer does not provide the information to the EEOC. The ADEA and the implementing regulation solely require that the employer provide this information to applicable employees.

#### 1. Circumstances Making the Collection of Information Necessary

The Age Discrimination in Employment Act, 29 U.S.C. § 621, et. seq., allows for individuals to waive rights and claims protected under the Act, provided certain circumstances are met; particularly that the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). In order for a waiver in connection with a program to be considered knowing and voluntary, the employer must

inform[] the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to -  
(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and  
(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals

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<sup>1</sup> An “exit incentive program” is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled in exchange for their decision to resign voluntarily and sign a waiver. “Other employment termination program” refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver. 29 C.F.R. § 1625.22(f)(1)(iii)(A).

in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(f)(1)(H)(i), (ii). The regulation at 29 C.F.R. § 1625.22 clarifies that Section 626(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals. 29 C.F.R. § 1625.22(f)(1)(ii).

A “program” exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

29 C.F.R. § 1625.22(f)(1)(iii)(B). The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement. 29 C.F.R. § 1625.22(f)(1)(iv). The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement. 29 C.F.R. § 1625.22(f)(2).

The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate. 29 C.F.R. § 1625.22(f)(4)(i). The regulation further specifies how the information supplied to employees must be presented:

Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program.

In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

If the terminatees are selected from a subset of a decisional unit, the employer must still disclose information for the entire

population of the decisional unit.

29 C.F.R. § 1625.22(f)(4)(ii)-(v).

2. Purpose and Use of the Information

As stated above, when a waiver is requested in connection with a program, the employer must inform the individual in writing of the class, unit, or group of individuals covered by such program, any eligibility factors for such program, any time limits applicable to such program, the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow that employee to make an informed choice whether or not to sign a waiver agreement. The employer does not provide this information to the EEOC; the ADEA and the implementing regulation solely require that the employer provide this information to any employee it would apply to, and not to the Federal government.

3. Use of Information Technology and Burden Reduction

This collection of information is a matter of third party disclosure, and not one of reporting to the Federal government. The EEOC does not mandate the means by which the information collection is carried out. Accordingly, the EEOC has no knowledge of the manner by which respondents are collecting the information, or using information technology to reduce burden.

4. Efforts to Identify Duplication and Use of Similar Information

The regulation which implemented the ADEA waiver informational requirements, 29 C.F.R. § 1625.22, carefully tracks the statute, and does not impose any requirements above and beyond what Congress imposed in the ADEA itself. In implementing the regulation, the EEOC was careful not to add any burden to the minimum that Congress established.

5. Impact on Small Business or Other Small Entities

Again, the regulation which requires this collection of information does not impose any burden more stringent than what is contained in the ADEA itself. Accordingly, the burden imposed is the minimal burden required under the law.

6. Consequences of Collecting the Information Less Frequently

The statute requires that the information be disclosed each time the employer seeks waivers from employees in connection with an exit incentive or other employment termination program that is offered to a group or class of employees. EEOC cannot dispense with the disclosure requirement or allow an employer to make the disclosure less often.

7. Special Circumstances Relating to the Guidelines of 5 C.F.R. § 1320.5

There are no special circumstances applicable to this third-party disclosure.

8. Comments in Response to the Federal Register Notice

The notice required by 5 C.F.R. § 1320.8(d), informing the public of EEOC's intent to request an extension of the information collection requirements from OMB, was published in the Federal Register on May 27, 2016. 81 F.R. 33670-33671. No comments were received in response to this notice.

9. Explanation of any Payment or Gift to Respondents

This information collection does not involve any payments or gifts to respondents.

10. Assurance of Confidentiality Provided to Respondent

No assurances of confidentiality are provided to employers who make the third-party disclosures.

11. Justification for Sensitive Questions

This collection of information does not involve any sensitive questions.

12. Estimate of Hour Burden Including Annualized Hourly Costs

Number of respondents	127 (employers that experienced layoffs and requested ADEA waivers)
Frequency of Response	127 This assumes a minimum of one program per employer. (EEOC does not have data as to the existence of multiple programs per employer).
Annual Hour Burden	2,090.42 (for all 127 employers)

EEOC has updated its burden estimate methodology based on a limited survey conducted by EEOC in late 2016. The goal of the survey was to more accurately capture the actual costs of creating and distributing ADEA waivers and to better understand what type of employees were involved in this process. In this survey, EEOC examined EEO-1 Reports with particular emphasis on firms that indicated a lay-off and other reductions in their workforce within the past two years.

Based on EEOC's review of 2015 EEO-1 data, approximately 303 firms reported a reduction in force during the one-year reporting period in the comment field of the EEO-1 form. An estimated 127 or 42% of firms who reported a reduction in force requested waivers of ADEA rights from the employees affected by the reduction in force.

Based on data collected from participating employers, EEOC learned that the senior human resource managers and legal counsel bear the most significant brunt of the paperwork and human capital burden in drafting and distributing the waivers to employees. The burden hours for the creation of the ADEA waiver are estimated to be 8.25 per employer. Burden hours for the distribution of the ADEA waiver are estimated to be 8.21 per employer, for a total of 16.46 hours per employer. These figures were applied to 127 firms estimated to request waivers. The total hour burden for these 127 employers would therefore be 2,090.42 hours.

Per Table 1 and 2 below, the limited survey found that the approximate cost of preparing the ADEA waiver notice is \$310.90 per employer and the approximate cost of distributing the ADEA waiver notice is \$334.442848 per employer. The total per employer cost is therefore \$645.342848. For all 127 employers who are projected to have reductions in force and request waiver notices, the total preparation cost is \$39,484.30, and \$42,474.24 for distribution. The total cost for all 127 employers is \$81,958.54. Table 1 reflects the calculation of the costs of creating the ADEA waiver and Table 2 reflects the calculation of the costs of distribution of the ADEA waiver.

<b>TABLE 1: Computations related to preparing and drafting ADEA waiver burden estimate</b>					
	<b>WAGE RATE (HOUR)<sup>1</sup></b>	<b>PROJECTED HOURS PER EMPLOYEE</b>	<b>COST PER FIRM</b>	<b>TOTAL BURDEN HOURS</b>	<b>TOTAL COST</b>
					<b>N=127</b>
CLERICAL STAFF	15.41	0.11	15.52	13.97	1,971.04
SENIOR HUMAN RESOURCE MANAGERS	50.21	0.26	50.47	33.02	6,409.69
INTERNAL CORPORATE LEGAL COUNSEL	55.69	2.23	57.92	283.21	7,355.84
EXTERNAL CORPORATE LEGAL COUNSEL	55.69	2	57.69	254	7,326.63
CHIEF EXECUTIVE OFFICERS	49.37	0.12	49.49	15.24	6,285.23
COMPUTER SPECIALIST (IT PROFESSIONAL)	24.75	0.42	25.17	53.34	3,196.59
HUMAN RESOURCE SPECIALIST	28.06	1.61	29.67	204.47	3,768.09
PARALEGAL	23.47	1.5	24.9	190.5	3,171.19
<b>SUB TOTAL</b>	<b>302.65</b>	<b>8.25</b>	<b>310.9</b>	<b>1047.75</b>	<b>39,484.3</b>

<sup>1</sup> Wage hour rates listed in first column were obtained from the Bureau of Labor Statistics (see U.S. Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, <http://www/bls.gov/ooh/>).

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<b>TABLE 2: Computations related to distributing ADEA waiver burden estimate</b>					
	<b>WAGE RATE (HOUR)</b>	<b>PROJECTE D HOURS PER EMPLOYEE</b>	<b>COST PER FIRM</b>	<b>TOTAL BURDEN HOURS</b>	<b>TOTAL COST</b>
					<b>N=127</b>
HUMAN RESOURCE SPECIALIST	28.06	0.27	28.33	34.29	3,597.91
CLERICAL STAFF	15.41	0.5	15.91	63.5	2,020.57
SENIOR HUMAN RESOURCE MANAGERS	50.21	0.85	51.06	107.95	6,484.62
INTERNAL CORPORATE LEGAL COUNSEL	55.69	2.08	57.77	264.16	7,336.79
EXTERNALCORPORATE LEGAL COUNSEL	55.69	2	57.69	254	7,326.63
HUMAN RESOURCE SPECIALIST	28.06	.27	28.33	34.29	3,597.91
PARALEGAL	23.47	1.5	24.97	190.5	3,171.19
PAYROLL SPECIALIST	20.26	0.2	20.46	25.4	2,598.42
DEPARTMENT MANAGER	27.01	0.27	27.28	34.29	3,464.56
DEPARTMENT VICE PRESIDENT	57.44	0.27	22.642848	34.29	2,875.64
SUB TOTAL	361.3	8.21	334.442848	1042.67	<b>42,474.24</b>

Note: Chief Executive Officers, Computer Specialists and Data Entry specialist were excluded because they were not involved in any of the activities of the firms who utilized waivers.

13. Estimate of Total Annual Cost Burden to Respondent or Recordkeepers

No capital or operational expenses are expected as a result of this collection of information.

14. Annualized Cost to the Federal Government

As the recordkeeping requirement in this collection of information concerns only disclosures to third parties and not reporting to the government, there is no annualized cost to the Federal government.

15. Explanation for Program Changes or Adjustments

There are no changes or adjustments to this collection of information.

16. Plans for Tabulation and Publication

The results of this collection of information will not be published.

17. Reasons Display of OMB Expiration Date is Inappropriate

EEOC is not seeking an exemption to display of the expiration date.

18. Exception to Certification

There are no exceptions to the certification statement.