

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 programs¹ 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

¹ 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 terminees 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 05, 2020. 85 FR 26687-89. 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 Burden Hours Including Annualized Hourly Costs

Number of Respondents	2,425
Burden Hours per Respondent	16.19 hours
Total Annual Burden Hours	39, 260.75

Number of Respondents

The number of respondents utilized for this estimate is the total number of unique U.S. firms reporting a layoff in calendar year 2019. This aggregate information is derived from the monthly Challenger Job Cut Report¹. This source of data on layoffs is considered an authoritative source of data on layoffs in the U.S. and has been used in mass layoff research conducted by the Federal Reserve Bank². Prior to the March 2013 elimination of the Mass Layoff Statistics program, this information had been previously available from the Bureau of Labor Statistics.

¹ <http://www.challengergray.com/tags/job-cut-report>. Aggregate data provided by Colleen Madden Blumenfeld, Director of Public Relations and Research, Challenger, Gray & Christmas, Inc. (personal communication, April 6, 2020)

² <https://www.federalreserve.gov/econres/feds/files/2017088pap.pdf>

Additionally, for purposes of this estimate, EEOC assumes that:

- every firm reporting a layoff will request an ADEA waiver. EEOC does not have data on the proportion of firms requesting an ADEA waiver, and an exhaustive search of the legal, business, and social scientific literature by EEOC research librarians on the proportion or number of firms requesting an ADEA waiver yielded no relevant information. The use of this approach will estimate an upper bound, most likely erring on the side of overestimating the actual total burden; and,
- there is one ADEA waiver program per employer as EEOC does not have data as to the existence of multiple programs per employer.

Burden Hours per Respondent

In 2016 the EEOC conducted a limited survey as the foundation for estimating the Burden Hours per Respondent. 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.

For the current 2020 submission, the EEOC will rely again on this 2016 estimate of burden hours per respondent. Due to concerns about data quality given the current COVID-19 pandemic, and in accordance with OMB guidance memo M-20-16, the EEOC does not intend to conduct a new limited survey to re-estimate burden hours per respondent at this time.

Based on data collected from employers participating in the 2016 limited survey, 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 7.94 per employer, for a total of 16.19 hours per employer.

Total Annual Burden Hours

The Total Annual Burden Hours is calculated by multiplying the Number of Respondents by the Burden Hours per Respondent [2425 x 16.19= 39,260.75].

TABLE 1: Computations related to preparing and drafting ADEA waiver burden estimate*				
	<u>WAGE RATE (HOUR)³</u>	PROJECTED HOURS PER EMPLOYER	COST PER FIRM	TOTAL COST
Number of Respondents: 2425				
CLERICAL STAFF	\$18.69	0.11	\$2.06	\$4,985.56
SENIOR HUMAN RESOURCE MANAGERS	\$54.47	0.26	\$14.16	\$34,343.34
INTERNALCORPORATE LEGAL COUNSEL	\$58.13	2.23	\$129.63	\$314,352.51
EXTERNAL CORPORATE LEGAL COUNSEL	\$58.13	2.00	\$116.26	\$281,930.50
CHIEF EXECUTIVE OFFICERS	\$50.47	0.12	\$6.06	\$14,686.77
COMPUTER SPECIALIST (IT PROFESSIONAL)	\$25.70	0.42	\$10.79	\$26,175.45
HUMAN RESOURCE SPECIALIST	\$29.27	1.61	\$47.12	\$114,277.40
PARALEGAL	\$24.49	1.50	\$36.74	\$89,082.38
SUB TOTAL	\$319.35	8.25	\$362.82	\$879,833.89
*Totals may not sum due to rounding.				

TABLE 2: Computations related to distributing ADEA waiver burden estimate**				
	<u>WAGE RATE (HOUR)⁴</u>	PROJECTED HOURS PER EMPLOYER	COST PER FIRM	TOTAL COST
Number of Respondents: 2425				
HUMAN RESOURCE SPECIALIST	\$29.27	0.27	\$7.90	\$19,164.53
CLERICAL STAFF	\$18.69	0.5	\$9.35	\$22,661.63
SENIOR HUMAN RESOURCE MANAGERS	\$54.47	0.85	\$46.30	\$112,276.29
INTERNALCORPORATE LEGAL COUNSEL	\$58.13	2.08	\$120.91	\$293,207.72
EXT CORPORATE LEGAL COUNSEL	\$58.13	2	\$116.26	\$281,930.50
PARALEGAL	\$24.49	1.5	\$36.74	\$89,082.38
PAYROLL SPECIALIST	\$19.02	0.2	\$3.80	\$9,224.70
ADMINISTRATIVE SERVICES MANAGER	\$46.24	0.27	\$12.48	\$30,275.64
DEPARTMENT EXECUTIVE	\$50.47	0.27	\$13.63	\$33,045.23
SUB TOTAL	\$358.91	7.94	\$367.37	\$890,868.61
**Totals may not sum due to rounding.				

³ Wage hour rates listed in first column are based on 2018 Median Pay for the occupation indicated and were obtained online from the U.S. Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, <http://www.bls.gov/ooh/>. Accessed April 8, 2020.

⁴ Ibid.

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

Per Table 1 and 2 above, EEOC found that the approximate cost of preparing the ADEA waiver notice is \$362.82 per employer and the approximate cost of distributing the ADEA waiver notice is \$367.37 per employer. The total per employer cost is therefore \$730.19. For all 2,425 employers who are projected to have reductions in force and request waiver notices, the total preparation cost is \$879,833.89, and \$890,868.61 for distribution. The total cost for all 2,425 employers is \$1,770,702.50 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.

No capital 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.