

# CLIENT ALERT

## Employment & Labor

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### Unclear ADEA Release Held Unenforceable

The U.S. Court of Appeals for the Eighth Circuit recently held that a former employee's waiver of his rights under the Age Discrimination in Employment Act ("ADEA") was ineffective because it was not written clearly. In *Thomforde v. International Business Machines Corp.*, the Court reversed the District Court's grant of summary judgment to IBM and allowed an age discrimination suit to proceed, holding that the unclear waiver did not satisfy the requirements of the Older Worker Benefits Protection Act ("OWBPA").

#### The OWBPA and the ADEA

The ADEA generally prohibits employment discrimination based upon age. In 1990, the OWBPA amended the ADEA by providing that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. ... [A] waiver may not be considered knowing and voluntary unless at a minimum" the waiver satisfies certain requirements, including that "the waiver is part of an agreement between an individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate."

#### The Facts

Plaintiff Dale Thomforde worked as an engineer for IBM from 1973 to 2001. In 2001, as part of a reduction in force, IBM implemented an involuntary termination program. Pursuant to the program, IBM notified Thomforde that he had been selected for termination and provided him with a document entitled, "General Release and Covenant Not to Sue" (the "Agreement"). The Agreement included a release of all claims, including ADEA claims. The

Agreement also included a covenant not to sue, barring Thomforde from initiating any action against IBM and requiring him to pay IBM's attorneys' fees if he did. But the Agreement also provided:

This covenant not to sue does not apply to actions based solely under the [ADEA], as amended. That means that if you were to sue IBM ... only under the [ADEA], as amended, you would not be liable under the terms of this Release for their attorneys' fees and other costs and expenses of defending against the suit. This Release does not preclude filing a charge with the U.S. Equal Employment Opportunity Commission.

Before signing the Agreement, Thomforde asked his supervisor if the exception for ADEA claims contained in the covenant not to sue meant that he could sue IBM as long as he only asserted ADEA claims. After seeking guidance from IBM's Legal Department, Thomforde's supervisor e-mailed him the following response: "Regarding your question on the General Release and Covenant Not to Sue, the wording is as intended by IBM. The site attorney was not comfortable providing an interpretation for you and suggested you consult with your own attorney." After obtaining his supervisor's response, Thomforde consulted with an attorney and concluded that he could sign the Agreement and still pursue ADEA claims.

IBM terminated Thomforde's employment and he signed the Agreement. When he signed the Agreement, Thomforde provided his supervisor with a letter addressed to IBM's counsel. In the letter, Thomforde complained about his reduced retirement benefits. The letter also indicated that Thomforde would be pursuing "various legal channels under the anti-discrimination statutes" and "filing a complaint with the EEOC, following up with other possible legal

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action, as allowed under the General Release and Covenant Agreement.”

Thomforde subsequently filed a charge with the Equal Employment Opportunity Commission, which issued a “right to sue” letter. Thomforde filed a lawsuit.

### The District Court

IBM filed a motion for summary judgment, arguing that by signing the Agreement and accepting the benefits provided under it, he released all of his claims against IBM. The Court granted IBM’s summary judgment motion, holding that by signing the Agreement, Thomforde clearly waived any potential claims against IBM. The Court found that the waiver conformed to the requirements of the OWBPA, and was unambiguous and enforceable.

### The Eighth Circuit

On appeal, the Eighth Circuit explained that the “statutory requirements for waiver of ADEA claims are strict and unqualified” and that “if an employer fails to meet any of the statutory requirements, the waiver is ineffective as a matter of law.” In particular, the Court explained, if the Agreement was not “written in a manner calculated to be understood by such individual, or by the average individual eligible to participate,” then it could not effectively release ADEA claims.

The Court focused on particular provisions of the Agreement. Under one provision, Thomforde released IBM from all claims including those under the ADEA. The Agreement also stated that Thomforde agrees never to “institute a claim of any kind against IBM ... including, but not limited to, claims related to your employment with IBM.” The paragraph continued by providing that “[t]his covenant not to sue does not apply to actions based solely under the [ADEA].” Based upon these

provisions, the Court concluded that “one plausible reading of the document reveals that the employee releases IBM from all ADEA claims and agrees not to institute a claim of any kind against IBM, except the employees may bring an action based solely under the ADEA.” The Court explained that to someone without a clear understanding of the legal difference between a release and a covenant not to sue, these provisions would seem contradictory.

The Court considered IBM’s argument that the release and the covenant not to sue were “totally separate and distinct provisions of the Agreement.” The Court acknowledged that a “release of claims and a covenant not to sue serve different purposes,” but noted that “the differences ... are fairly amorphous and may not be readily apparent to a lay reader.” The Court explained that the “intended effect of the Agreement was to release the employee’s substantive claims under the ADEA, while preserving the employee’s right to challenge the validity of the release through a lawsuit” as required by law. But the Court stated that the Agreement failed to “explain how the provisions relate to each other or the limited nature of the exception to the covenant not to sue in light of the release of claims.” The Court stated that because IBM chose to use “legal terms of art” in the Agreement, it was obligated to “carefully explain” them. The Court also criticized the clarity of the Agreement in that it used the terms “release” and “covenant not to sue” interchangeably.

The Court concluded that, “[g]iven the lack of clarity in the Agreement, and IBM’s declination to tell Thomforde what it meant by the language, we hold that the Agreement is not written in a manner calculated to be understood by the intended participants as required by the OWBPA.” Accordingly, the Court held that the Agreement was

ineffective to waive Thomforde’s rights under the ADEA.

### Conclusion

The *Thomforde* case presents important guidelines that employers and their counsel should follow when drafting agreements intended to prevent former employees from suing them in the future. In particular, *Thomforde* emphasizes the need to draft agreements that a lay person can understand. Legal terms of art should be avoided where possible and, where unavoidable, must be clearly defined. Also, while an employer should urge an employee to seek the advice of counsel before signing an agreement, if the employee seeks clarification of the agreement’s provisions from the employer, the employer’s counsel should provide it, preferably in very easy to understand writing. Even better, the employer’s counsel should consider revising the agreement so that the provision is clear on its face. As the *Thomforde* Court explained, “[i]t seems axiomatic that if an agreement needs clarification, it is not written in a manner calculated to be understood.”

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For further Employment & Labor information, please contact:

David W. Garland, Co-Chair  
Employment & Labor  
973.643.6390  
[dgarland@sillscummis.com](mailto:dgarland@sillscummis.com)

Lester Aron, Co-Chair  
Employment & Labor  
973.643.5795  
[laron@sillscummis.com](mailto:laron@sillscummis.com)

### New Jersey

One Riverfront Plaza  
Newark, NJ 07102  
Tel: 973-643-7000  
Fax: 973-643-6500

[www.sillscummis.com](http://www.sillscummis.com)

### New York

30 Rockefeller Plaza  
New York, NY 10112  
Tel: 212-643-7000  
Fax: 212-643-6500