

# OLDER WORKERS BENEFIT PROTECTION ACT IN FLORIDA

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Richard Celler



Employment discrimination is certainly nothing new in the United States; however, over the past several decades a new type of employment discrimination has become more common – age discrimination. Not all that long ago it was customary for a worker to retire by age 65. More and more workers, however, are now putting off retirement until well into their 70s and beyond. It was also once common for an employee to remain with the same employer for his or her entire career.

Various factors have led to the downfall of the concept of “lifetime employment”, leading to a dramatic increase in the number of older workers actively seeking employment in today’s workforce. That, in turn, has led to an increase in claims of age discrimination in the workplace. Although the Age Discrimination in

Employment Act (ADEA) was passed in 1967 it soon became clear that the ADEA fell short of protecting workers from certain types of employment discrimination, specifically in the area of employee benefits. To rectify this, the Older Workers Benefit Protection Act was passed in 1990 as an amendment to the ADEA.

## WHAT IS THE PURPOSE OF THE OWBPA?



The Older Workers Benefit Protection Act was passed in 1990 as a result of the perceived need by Congress to clarify the protections afforded older workers under the ADEA. In *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 256 (1989) the Supreme Court effectively decided that the anti-

discrimination provisions of the ADEA did not apply to employee benefits. The OWBPA was passed the following year, making it clear that it is illegal for an employer to do any of the following:

- Use an employee's age as the basis for discrimination in benefits
- Target older workers for their staff-cutting programs

Require older workers to waive their rights without observing certain safeguards

## THE OWBPA AND BENEFITS

The OWBPA applies to the benefits an employer offers employees, including things such as medical and life insurance, disability benefits, and retirement or pension benefits. Under the OWBPA an employer cannot discriminate against older worker with regard to the benefits offered to workers unless the employer can prove that the disparity in benefits is the result of “significant cost considerations.” This does not necessarily mean an employer must offer the *same* benefits to all employees though. The non-discrimination requirement may be satisfied if an employer spends the same on each employee, even if that means older employees will receive less in benefits.

## HOW THE OWBPA APPLIES TO SEVERANCE

Employers are often faced with a need to downsize or reduce their workforce for one reason or another. Typically, this is done as a cost-saving measure when the company is struggling financially or because the company needs to raise capital for expansion. In order to make the process simpler, an employer may offer employees a severance package as an incentive for voluntarily resigning or retiring. As a general rule, an older employee costs an employer more, both in terms of salary and benefits, than his or her younger counterpart. Therefore, it might make sense to target older employees when an employer is trying to downsize; however, this can be perceived as discriminatory by older workers. To avoid the risk of an age discrimination lawsuit by employees who have been targeted during a company layoff or downsizing employers often require

employees to sign a release when a severance package is accepted. The purpose of the release is to get the employee to waive his or her right to file an age discrimination lawsuit against the employer. Requiring an employee to execute a release or waiver is allowable; however, for the release to be enforceable the OWBPA requires very specific procedures to be followed before the release is signed *and* requires the release to contain very specific language.



## RULES FOR A RELEASE UNDER THE OWBPA

When an employer requires an employee to sign a release as part of the severance package offered the worker pursuant to a voluntary termination of

employment, the release must meet the following requirements for it to be enforceable the release must:

- **Be in writing and be in language the average person can understand. Complex sentences and legal jargon should not be used.**
- **Not misinform or mislead the employee in any way.**
- **Not exaggerate the benefits being offered or the limitations being imposed on the employee for signing the release.**
- **Specifically refer to the ADEA.**
- **Specifically advise the employee to consult with an attorney.**
- **Not require the employee to waive rights or claims arising after the date the employee signs the release.**

Along with the above requirements, the release must also be made ***knowingly and voluntarily*** and an employee must have a minimum of 21 days to consider the release before being required to sign it. Finally, the employee must receive something of value above and beyond what the employee is already entitled to for signing the release. For example, an employee cannot be asked to sign the release in return for the employee's final paycheck to which the employee is already entitled by law.

## **SPECIAL RULES FOR GROUP TERMINATIONS OF WORKERS OVER AGE 40**

When an employer plans to request releases from a group of over 40 employees the OWBPA places even more requirements on the corresponding releases signed by the employees for the releases to be enforceable. A "group", for purposes of the extended requirements under the OWBPA, means two or more

people who are part of the same departure plan, even if they are let go at different times over a period of months. Along with the time frame an employee has to make a decision being increased from 21 days to 45 days, employers must provide employees who are part of an over 40 *group* the following information for a release to be enforceable:

- **The class, unit or group of employees covered by the exit program, whether voluntary or involuntary;**
- **Factors used to determine eligibility for the program and time limits, if any, applicable to the exit program;**
- **Job titles and ages of employees eligible for voluntary exit incentive programs or who were selected for involuntary termination programs;**
- **Ages of all employees in the same job classification or organizational unit either ineligible for the voluntary exit incentive program, or not selected for an involuntary termination program.**

If you believe your rights under the Older Workers Benefit Protection Act have been violated, or you have been asked to sign a release that is covered by the OWBPA, it is in your best interest to consult with an experienced Florida employment law attorney as soon as possible.

EEOC, [Older Workers Benefit Protection Act](#)

NOLO, [Older Workers Benefit Protection Act](#)

HR Hero, [Older Workers Benefit Protection Act](#)

<http://www.troutmansanders.com/severance-agreements-for-employees-over-40-understanding-the-older-workers-benefit-protection-act-06-04-2012/>

<http://theemploywerologist.com/2013/02/21/severance-agreements-and-the-older-workers-benefits-protection-act/>





## About the Author



### Richard Celler

Richard Celler is the Managing Partner of Richard Celler Legal, P.A., a/k/a the Florida Overtime Lawyer. He created this firm after having served as the Founding Member and Managing Partner of one of the largest employee/plaintiff side employment law divisions in the United States.

In November 2013, Mr. Celler left big firm life with the idea of reopening his own litigation firm with an emphasis on something most big firms cannot provide – a lower volume of cases, and more focus on the needs and attention of every single client.

Mr. Celler's practice focuses on all areas of the employment context from discrimination, harassment, and retaliation under the Florida Civil Rights Act, Title VII, the Family Medical Leave Act, and other employment related statutes. Additionally, Mr. Celler represents individuals in whistleblower and wage and hour litigation (overtime, minimum wage, commissions, final paychecks).

Many firms charge clients for an initial consultation to discuss their claims. Mr. Celler does not. You can call him or email him to discuss your case for free. If he elects to represent you, your case will be handled on a contingency basis, which means that he only gets paid, if you get paid. We encourage you to look at the remainder of our website for information on your rights and benefits in the workplace – [www.floridaovertimelawyer.com](http://www.floridaovertimelawyer.com).

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