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# Navigating the Murky Waters of Employment Waivers and Releases

By Eve I. Klein, Joanna R. Varon and Keith Greenberg

Lawsuits. Clients cannot bear to live with them and hope to live without them. In the context of employment disputes, an employer often seeks to prevent litigation by a former employee through the use of a waiver and release. In return for sufficient consideration, an employee agrees to waive any and all claims against his or her soon-to-be former employer and to release the employer from any liability arising from the employment or termination. Within the confines of traditional contract law issues, this arrangement appears relatively straightforward. However, the myriad state and federal statutes regulating the workplace have produced an array of varying limitations on an employer's ability to obtain an enforceable waiver of employment law claims. This article surveys the standards that must be met under

the major federal employment statutes, as well as those under New York state employment laws, to achieve a valid waiver and release of claims without litigation.

## General Waiver and Release

If an employee who signs a waiver later files a lawsuit, the employer would argue that the court should dismiss the case because the employee waived the right to sue. The employee would typically respond, however, that the waiver is not enforceable because it is legally invalid. Before addressing the employee's substantive claim, a court would initially determine whether the waiver is valid. As a general rule, "[t]he validity of waivers of discrimination claims are evaluated according to ordinary contract law principles."<sup>1</sup> Ordinary contract law prin-

ciples require that a release be knowing and voluntary and supported by consideration in order to be enforceable.<sup>2</sup> Similarly, “the severability of a [waiver provision] should also be determined according to contract law principles.”<sup>3</sup> As a federal district court has noted,

a knowing and voluntary waiver of the right to sue is not void solely because it also references a [n invalid provision]. . . . “You don’t cut down the trunk of a tree because some of its branches are sickly.” Put simply, the presence of a sickly [provision] does not render [a] [r]elease involuntary, unknowing, or otherwise void.<sup>4</sup>

In addition to ordinary contract law principles, employers should be aware of the various federal and state employment law statutes that limit or otherwise impose additional conditions on an employer’s ability to validly release employment-related claims.

### Title VII, ADA, EPA and Section 1981

An employee may waive or release an employer from liability for any past claim under Title VII of the Civil Rights Act of 1964,<sup>5</sup> the Americans with Disabilities Act (ADA),<sup>6</sup> the Equal Pay Act (EPA),<sup>7</sup> and 42 U.S.C. § 1981 (“Section 1981”).<sup>8</sup> The analysis required to determine whether a waiver and release of a Section 1981, EPA or ADA claim is valid and enforceable is the same used to determine the validity of a Title VII waiver and release.<sup>9</sup> A prospective waiver of an employee’s rights is void as a matter of public policy.<sup>10</sup>

A waiver of an employee’s Title VII rights must be knowing and voluntary,<sup>11</sup> though a release form “need not enumerate the specific claims [that] an employee is waiving” in order to waive rights under Title VII.<sup>12</sup> In determining whether an employee entered a release knowingly and voluntarily, a number of circuit courts use a totality-of-circumstances test, which varies slightly among jurisdictions.<sup>13</sup> One iteration of the test considers:

- (1) the employee’s education and business experience;
- (2) the employee’s input in negotiating the terms of the settlement;
- (3) the clarity of the agreement;
- (4) the amount of time the employee had for deliberation before signing the release;
- (5) whether the employee actually read the release and considered its terms before signing it;
- (6) whether the employee was represented by counsel or consulted with an attorney;
- (7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law; and
- (8) whether the employee’s release was induced by improper conduct on the defendant’s part.<sup>14</sup>

Courts have found waivers invalid, for example, where the plaintiff “was not clearly advised of his right to seek counsel[,] . . . was not given a sufficient amount of time to review the release . . . [, and] was also deprived of a

meaningful opportunity to negotiate the terms of the release.”<sup>15</sup>

Certain circumstances and practices in the procurement of waivers and releases of Title VII claims may raise red flags. Where evidence of fraud or undue influence may exist or where enforcement of the agreement might be against the public interest, the courts will take a closer look behind the scenes of the waiver and release agreement. The standard for challenging a completed waiver and release of a Title VII claim is substantial. If a party to the agreement seeks to challenge the terms of the release, the party “must come forward with specific evidence sufficient to raise a question as to the validity of the release.”<sup>16</sup>

Notably, a release of a Title VII claim may not require an employee to waive his or her right to bring an EEOC charge or limit the employee’s right to testify, assist or participate in an investigation, hearing or proceeding conducted by the EEOC.<sup>17</sup>

### FLSA

Generally, whether retrospective or prospective, an employee’s rights under the Fair Labor Standards Act (FLSA) “cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate.”<sup>18</sup> However, the waiver provision of the FLSA, found in § 216(c) of the act, provides an exception to this general rule.<sup>19</sup> The section states in relevant part:

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages.<sup>20</sup>

The waiver provision is presented as an alternative to litigation in addressing the employer’s liability to an employee who is owed compensation as a result of a violation of § 206 (minimum wage) or § 207 (overtime) of the FLSA.<sup>21</sup> As a federal district court has explained:

The waiver provision found in section 216(c) was added to the Act in 1949. Prior to that time employers had been reluctant to reach voluntary settlements with employees over claims for back wages because courts had held that any purported waiver or release of rights to unpaid compensation was null and void as against public policy and lacking in consideration. Thus an employer who settled a claim for back wages could never be sure that the employee with whom he settled would not later sue to collect liquidated damages and attorneys’ fees. The addition of the waiver provision

was intended to change this situation and create an incentive for employers voluntarily to accept settlements supervised by the Wage and Hour Division.<sup>22</sup>

The statute speaks specifically to the supervision of payment, that is, only once an agreement has been given and payment has been made, does it appear that waiver can occur.<sup>23</sup> In other words, until the employee accepts the settlement and the payment of back wages is tendered, no waiver of FLSA claims has been effectuated.<sup>24</sup> As the U.S. District Court for the Northern District of Illinois recently noted, an employee can waive his or her right to participate in an FLSA collective action, as separate and apart from the individual right.<sup>25</sup>

**An employee cannot waive his or her right to file an unfair labor practice charge under the NLRA.**

Should an employer choose to pursue an approved settlement, the employer should contact the local district office of the Wage and Hour Division of the Employment Standards Administration of the U.S. Department of Labor (the “Department”) and speak with an assistant director, who can guide the employer through that office’s process for overseeing settlement. Generally, the process will involve a short investigation by the office in order to ensure that the settlement agreement does not deprive the employee of his or her rights under the FLSA. A prudent employer should consider the possibility that, in pursuing approval of an FLSA settlement by the Department, the employer may invite more scrutiny of its wage-and-hour practices than it might otherwise receive or desire. Another option is that a waiver of FLSA rights may be approved by a court in the course of litigation.<sup>26</sup>

## NLRA

The National Labor Relations Board (NLRB) has long held that an employee cannot waive his or her right to file an unfair labor practice charge under the National Labor Relations Act (NLRA).<sup>27</sup> As a general matter, the NLRA permits employees to file an unfair labor practice charge if an employer interferes with their rights to organize; to form, join or assist a labor organization; to bargain collectively through representatives of their choosing; or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Provisions of severance agreements that limit an employee’s ability to file an unfair labor practice charge to enforce such rights will be deemed unlawful.

## ADEA

With the passage of the Older Workers Benefit Protection Act (OWBPA) of 1990,<sup>28</sup> the Age Discrimination in Employment Act (ADEA) underwent substantial revisions to its waiver provisions relative to the other federal antidiscrimination statutes. The OWBPA outlines with specificity the conditions for a waiver of ADEA rights and the manner in which the waiver process should proceed. It is important to note that a release of ADEA claims is not effective unless the release “conforms to the statute.”<sup>29</sup>

The OWBPA requires an employee waiver to be knowing and voluntary<sup>30</sup> in order to be valid, and it establishes safe-harbor levels of compliance with that requirement.<sup>31</sup> The OWBPA “explicitly places the burden on the party asserting the validity of a waiver to demonstrate that the waiver was ‘knowing and voluntary.’”<sup>32</sup> The waiver must be written so that it may be understood by the employee involved<sup>33</sup> or, if multiple employees are signatory to the waiver, so that it may be understood “by the average individual eligible to participate.”<sup>34</sup> Furthermore, the waiver must specifically refer to rights or claims arising under the ADEA;<sup>35</sup> it cannot waive prospective rights.<sup>36</sup> Additionally, the employee, in exchange for the waiver, must receive additional consideration beyond that to which the employee is already entitled<sup>37</sup> and must be advised, in writing, to consult with an attorney prior to executing the agreement.<sup>38</sup> The OWBPA’s knowing and voluntary standard also requires an employee to be given the option to revoke the agreement within seven days after the execution of the waiver.

The knowing and voluntary standard for the waiver of an ADEA claim varies, depending on the number of employees that the employer is discharging. When an employer discharges a single employee, the employee must be “given a period of at least 21 days to consider the agreement.”<sup>39</sup> However, when “a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the [employee] is given a period of at least 45 days within which to consider the agreement.”<sup>40</sup> Federal regulations explicitly state that a standardized formula or package of benefits that is available to two or more employees can constitute a termination program and trigger the group-layoff provisions of the ADEA.<sup>41</sup>

Where a waiver of an employee’s rights is requested in a group-layoff situation, the ADEA requires employers to provide to employees what is sometimes known as “the birthday list.”<sup>42</sup> The birthday list provides employees with comparative information relative to those selected and not selected for termination, so that the employee can make an informed decision about the waiver of a claim of age discrimination. Specifically, the statute requires an employer to 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 in the same job classification or organizational unit who are not eligible or selected for the program.<sup>43</sup>

In a new set of administrative guidelines dated July 15, 2009, the EEOC addressed, among other things, the substantial variations in the way courts have interpreted the statute's "eligibility factors." For example, some courts have defined eligibility factors simply as "[a]ll persons in the Construction Division,"<sup>44</sup> while other courts have interpreted the term to require an explanation of the particular selection "criteria, such as job performance, experience, or seniority, [that] an employer relied on in deciding who to terminate."<sup>45</sup>

Finally, the absence of even one of the OWBPA's knowing and voluntary factors may be sufficient to invalidate a release of ADEA claims.<sup>46</sup> Courts have invalidated ADEA waivers, for example, where the employee's waiver of ADEA claims fails to make any reference to rights arising under the ADEA,<sup>47</sup> fails to provide job titles of others selected for a group layoff,<sup>48</sup> and fails to directly advise the employee to consult a lawyer before signing a waiver.<sup>49</sup>

If an employee's waiver of ADEA claims does not comply with the requirements of the OWBPA, the waiver will not bar a subsequent ADEA action by that employee.<sup>50</sup>

## FMLA

An employee's ability to waive rights under the Family and Medical Leave Act (FMLA) has recently been expanded by a revision of the federal regulations that interpret the FMLA. Circuits have split over whether or not prior regulations should be interpreted to prohibit any waiver of FMLA rights<sup>51</sup> without, presumably, a Department of Labor process similar to the process required to obtain FLSA waivers. However, the revised regulation, effective January 16, 2009, prohibits only the waiver of prospective rights under the FMLA.<sup>52</sup> As a result, employees may waive retrospective rights under the FMLA without Department of Labor or court approval.

## USERRA

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the job rights of employees who voluntarily or involuntarily leave employment to undertake military service. Under USERRA, an employee who is activated for military duty is entitled to reemployment if

1. the employee has given advance written or verbal notice to the employer;
2. the cumulative length of absence from employment with that employer does not exceed five years;
3. the employee returns to work or applies for reemployment in a timely manner after the conclusion of his or her service; and
4. the employee has not been separated from service with a disqualifying discharge or under other-than-honorable conditions.

USERRA also requires employers to credit an employee's period of uniformed service as active employment for purposes of calculating the employee's "seniority and other rights and benefits determined by seniority" and requires employers to provide employees with the same non-seniority benefits it would provide to non-service members on a furlough or leave of absence.

Under USERRA, employees are prohibited from waiving their right to reemployment, even if they provide notice that they will not return to work. Employees may, however, waive their right to non-seniority benefits (*e.g.*, vacation leave), if they provide the employer written notice of their intent not to return to employment following their uniformed service.<sup>53</sup> Despite these limitations placed on the waiver of employees' USERRA rights, at least one federal court, albeit in a nonprecedential opinion, has held that employees may waive all of their rights under USERRA.<sup>54</sup>

## New York State Law Claims

Waiver and release of workers' compensation claims in New York is governed by § 32 of the Workers' Compensation Law.<sup>55</sup> Under that section, a waiver is available only once an employee has filed a claim.<sup>56</sup> In order to ensure a waiver is valid, a waiver agreement between "the claimant or the deceased claimant's dependents and the employer, its carrier, the special disability fund . . . or the aggregate trust fund" must be approved by the Workers' Compensation Board<sup>57</sup> or its designee.<sup>58</sup>

The board will approve the agreement, unless:

- (1) the board finds the proposed agreement unfair, unconscionable, or improper as a matter of law;
- (2) the board finds that the proposed agreement is the result of an intentional misrepresentation of material fact; or,
- (3) within ten days of submitting the agreement one of the interested parties requests that the board disapprove the agreement.<sup>59</sup>

If the board disapproves of an agreement, "it shall duly file and serve a notice of decision setting aside the proposed agreement."<sup>60</sup> Finally, "[a]ny agreement submitted to the board for approval shall be on a form prescribed by the chair,"<sup>61</sup> which includes the Section 32

Agreement (Form C-32) and the accompanying Claimant Release (Form C-32.1) "or, alternatively, contain the information prescribed by the chair."<sup>62</sup>

The waiver of many New York state employment law claims is subject to evaluation in accordance with traditional contract principles.<sup>63</sup> These laws include the New York State Minimum Wage Act,<sup>64</sup> the New York State Human Rights Law,<sup>65</sup> and the New York City Human Rights Law.<sup>66</sup> A worker's right to New York state unemployment insurance may not be waived under any circumstances.<sup>67</sup>

## Conclusion

The statutes, regulations, guidelines and caselaw discussed in this article demonstrate a complex maze of compliance that must be successfully traversed to achieve a valid waiver that courts and administrative agencies will respect and uphold. Underlying the various requirements to ensure a valid waiver and release is a simple and consistent theme: a fair waiver and release is likely to be a lasting and valid agreement. Despite the degree of complexity involved in their use, the waivers and releases – if drafted properly and fairly – can be an effective and relatively inexpensive way for employers to ensure against potentially expensive litigation. ■

1. *E.E.O.C. v. SunDance Rehab. Corp.*, 328 F. Supp. 2d 826, 838 (N.D. Ohio 2004), *rev'd on other grounds*, 466 F.2d 490 (6th Cir. 2006) (citing *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995)).
2. *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540–41 (8th Cir. 1987).
3. *SunDance Rehab. Corp.*, 328 F. Supp. 2d at 838.
4. *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 292 (3d Cir. 2003) (citations omitted). *See, e.g., McCall v. U.S. Postal Serv.*, 839 F.2d 664, 666 n\* (Fed. Cir. 1988) ("Even if an [employee's] attempted waiver of his right to file EEOC charges is void, that would not affect the validity of the other portions of the agreement.").
5. *Hampton v. Ford Motor Co.*, 561 F.3d 709, 716 (7th Cir. 2009).
6. *Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9, 12 (1st Cir. 1997).
7. *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006).
8. *Torrez v. Pub. Serv. Co. of New Mexico, Inc.*, 908 F.2d 687, 689 (10th Cir. 1990); *see also Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1352–53 (11th Cir. 1983).
9. *Rivera-Flores*, 112 F.3d at 11–12.
10. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).
11. *Id.* at 52 n.15.
12. *Hampton*, 561 F.3d at 716; *see also Smith v. Amedisys Inc.*, 298 F.3d 434, 443 (5th Cir. 2002) ("There is no obligation, however, under Title VII or federal common law, that a release must specify Title VII or federal causes of action to constitute a valid release of a Title VII claim.").
13. Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 Fla. L. Rev. 305, 307–308 (2006).
14. *Hampton*, 561 F.3d at 716–17 (citations omitted).
15. *Cole v. Gaming Entm't, L.L.C.*, 199 F. Supp. 2d 208, 213 (D. Del. 2002).
16. *Hampton*, 561 F.3d at 716.
17. *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1089–90 (5th Cir. 1987); *see EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542–43 (9th Cir. 1987).

18. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352 (11th Cir. 1982) (internal citations omitted).
19. 29 U.S.C. § 216(c).
20. *Id.*; *see, e.g., Niland v. Delta Recycling Corp.*, 377 F.3d 1244, 1247 (11th Cir. 2004).
21. 29 U.S.C. § 216(b).
22. *Sneed v. Sneed's Shipbuilding, Inc.*, 545 F.2d 537, 539 (5th Cir. 1977) (emphasis added) (internal citations omitted).
23. 29 U.S.C. § 216(c).
24. *See, e.g., Sneed*, 545 F.2d at 539 ("For there to be a valid waiver section 216(c) simply requires (a) that the employee agree to accept the payment which the Secretary determines to be due and (b) that there be 'payment in full.'"); *but compare Lynn's Food Stores*, 679 F.2d at 1353 ("An employee who accepts such a payment supervised by the Secretary thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages."), *with Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986) ("When private disputes are compromised, the people memorialize their compromise in an agreement. This agreement (the accord), followed by the payment (the satisfaction), bars further litigation. Payment of money is not enough to prevent litigation. If a potential defendant in a tort suit pays \$1,000 to the plaintiff, who cashes the check, this does not alone extinguish the plaintiff's right to sue. The \$1,000 might be a part payment. There must also be a release.").
25. *See Brown v. Sears Holdings Mgmt. Corp.*, No. 09-C-2203, 2009 WL 2514173 (N.D. Ill. Aug. 17, 2009).
26. *Lynn's Food Stores, Inc.*, 679 F.2d at 1353 ("The only other route for compromise of FLSA claims is provided in the context of suits brought directly by employees against their employer under section 216(b) to recover back wages for FLSA violations. When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.").
27. *See U-Haul Co.*, 347 NLRB No. 34, at \*13, 347 NLRB 375 (2006).
28. 29 U.S.C. § 626(f).
29. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998).
30. *See, e.g., Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1987).
31. 29 U.S.C. § 626(f)(1).
32. *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 117 (1st Cir. 1998) (citing 29 U.S.C. § 626(f)(3)).
33. 29 U.S.C. § 626(f)(1)(A).
34. *Id.*
35. 29 U.S.C. § 626(f)(1)(B).
36. 29 U.S.C. § 626(f)(1)(C).
37. 29 U.S.C. § 626(f)(1)(D).
38. 29 U.S.C. § 626(f)(1)(E).
39. 29 U.S.C. § 626(f)(1)(F).
40. *Id.*
41. 29 C.F.R. § 1625.22(f)(iii)(B).
42. Interview by Susan Wornick with Robert Sanders, Regional Director – Boston Office, Equal Opportunity Employment Commission, in Boston, Mass. (Nov. 28, 2008).
43. 29 U.S.C. § 626(f)(1)(H); *see, e.g., Currier v. United Techs. Corp.*, 393 F.3d 246, 251 n. 4 (1st Cir. 2004).
44. Understanding Waivers of Discrimination Claims in Employee Severance Agreements, [http://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html) (citations omitted).
45. *Id.*
46. *See, e.g., Tung v. Texaco Inc.*, 150 F.3d 206, 209 (2d Cir. 1998).
47. *Hodge v. N.Y. Coll. of Podiatric Med.*, 157 F.3d 164, 167 (2d Cir. 1998).

48. *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 431 (7th Cir. 2000).
49. *Am. Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 118 (1st Cir. 1998) (“Because American failed to directly advise their employees to consult a lawyer before making the election, we rule, as a matter of law, that American failed to meet its burden under the OWBPA.”).
50. *Oubre*, 522 U.S. at 428 (“[T]he release cannot bar the ADEA claim because it does not conform to the statute.”).
51. See, e.g., *Taylor v. Progress Energy Inc.*, 493 F.3d 454 (4th Cir. 2007); *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003).
52. 29 C.F.R. § 825.220.
53. 29 C.F.R. § 1002.152.
54. *Jolley v. Dep’t of Hous. & Urban Dev.*, 299 Fed. Appx. 966, 969 (Fed. Cir. 2008).
55. N.Y. Workers’ Compensation Law § 32 (“Workers’ Comp. Law”).
56. Workers’ Comp. Law § 32(a).
57. *Id.*
58. N.Y. Comp. Codes R. & Regs. tit. 12, § 300.36 (N.Y.C.R.R.) (“The agreement shall be reviewed by the chair, a designee of the chair, a member of the board, or a Workers’ Compensation Law Judge, who will make a determination whether to approve or disapprove the agreement.”).
59. Workers’ Comp. Law § 32(b).
60. Workers’ Comp. Law § 32(c).
61. 12 N.Y.C.R.R. § 300.36(b).
62. *Id.*

63. *Bachiller v. Turn On Prods., Inc.*, No. 00 Civ. 8701 (JSM), 2003 WL 1878416 (S.D.N.Y. Apr. 14, 2003).
64. *Simel v. JP Morgan Chase*, 05 CV 9750, 2007 WL 809689 (S.D.N.Y. Mar. 19, 2007).
65. *Bachiller*, 2003 WL 1878416, \*4 (“The ‘totality of the circumstances’ standard ‘is somewhat more stringent than the analysis called for under ordinary [New York State] contract law, for determining whether a release of discrimination claims was executed knowingly and voluntarily.’ *Nicholas v. NYNEX, Inc.*, 929 F. Supp. 727, 730 (S.D.N.Y. 1996). Accordingly, since Plaintiff has waived her federal claims, she has also waived her claims under New York State and New York City Human Rights Law. See *Laramie v. Jewish Guild for the Blind*, 72 F. Supp. 2d 357, 360 (S.D.N.Y. 1999).”).
66. *Id.* By contrast, for example, the waivers of claims under the New Jersey Law Against Discrimination (LAD) are evaluated through a “totality of the circumstances” analysis. See *Blum v. Lucent Techs., Inc.*, 2005 WL 4044579, at \*6 (N.J. Super. App. Div. May 30, 2006) (“[t]he proper standard upon which to evaluate a waiver of a claim under LAD [(Law Against Discrimination)] is the ‘totality of the circumstances.’ . . . Under the ‘totality of the circumstances’ standard, [the court] must consider the following factors: (1) the plaintiff’s education and business experience, (2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.”).
67. N.Y. Labor Law § 595 (2008) (“No agreement by an employee to waive his rights under this article shall be valid.”).



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