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Testimony



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Use of ADEA Waivers by
Large Corporations

Statement of
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Before the
Committee on Labor and Human
Resources
Subcommittee on Labor
United States Senate



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SUMMARY

Companies may sometimes require employees to waive their rights to file claims and lawsuits against the company as a condition for receiving enhanced benefits under special short-term programs designed to encourage early departure through some form of financial incentive (exit incentive programs). The Congress and others are concerned that companies' use of unsupervised waivers does not fairly protect the legal rights of older workers, particularly the right to file age discrimination claims under the Age Discrimination in Employment Act of 1967. These waivers are considered unsupervised because neither the government nor the courts oversee their use.

Using information obtained through a telephone survey of company representatives, we identified the prevalence and trends in waiver practices from 1979 to 1988 for 60 Fortune 100 companies.

Our results on the use of waivers over the years from 1979 through 1988, as reported by company officials, show that:

- 24 percent of the companies sponsoring an exit incentive program required employees to sign a waiver to receive enhanced benefits,
- 50 percent of companies having employees sign waivers did so in only one year, and
- overall, 40 percent of incentive programs with waivers included nonpension exit incentive benefits. The majority (63 percent) of these programs were offered in 1987 and 1988.

The number of companies using waivers increased over the past 10 years. The percentage of companies using waivers in exit incentive programs almost tripled over the decade. Overall, waivers were used most often during the years 1985 through 1988. Our analysis of trends in the use of waivers also shows that:

- from 1979 through 1984, few companies sponsoring incentive programs used waivers, and
- in 1987 and 1988, the two-year period when waivers were used the most, 27 percent of companies with exit incentive programs used them.

Companies using waivers reported doing so to avoid having terminated employees file claims and lawsuits against the company. Companies not using waivers opted not to because of the voluntary nature of their exit incentive programs.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss companies' use of waivers in exit incentive programs. When companies attempt to reduce employment, they may offer programs with extra or enhanced benefits to encourage employees to leave the company voluntarily. According to a recent study, 55 percent of a sample of large companies offered these exit incentive programs at least once during 1980 to 1985.¹

As a condition for receiving enhanced benefits under these programs, companies sometimes require employees to waive certain legal rights to file claims and lawsuits against the company. These waivers are considered unsupervised because neither the government nor the courts oversee their use. Waivers may cause workers to unknowingly release their legal rights. The Congress and others are concerned about companies' using them without oversight. Today we will describe our findings on companies' waiver practices to aid your efforts to explore this controversial practice.

BACKGROUND

Exit incentive programs are designed to encourage early departure from a company through some form of financial incentive

¹Hewitt Associates, Plan Design and Experience in Early Retirement Windows and in Other Voluntary Separation Plans, 1986.

offered to workers for a limited time. Common examples include (1) providing workers 'additional credit under the company pension plans' early retirement provisions or (2) offering some other specially designed exit incentive, like cash bonuses, not connected to the pension plan (nonpension benefits). Companies may also offer exit incentive programs which combine these two features. Companies may also choose to provide nonpension benefits to workers eligible for early retirement.

The Congress and others are particularly concerned about workers 40 and older waiving their rights to file age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA). This concern is driven in part by reports that some older workers may have been coerced into signing waivers or may have done so without being fully aware that such action would negate their rights under ADEA.

Because of the controversy surrounding the use of unsupervised waivers, the Equal Employment Opportunity Commission (EEOC) proposed a rule setting guidelines for the appropriate use of these waivers, which was scheduled to become effective in September 1987. Soon thereafter, the Congress passed legislation that directed the EEOC to suspend its proposed rule. This legislation will expire in September 1989. Under one provision of your proposed bill, the Age Discrimination in Employment Waiver Protection Act, S. 54, unsupervised waivers could not be

used as a condition for receiving enhanced benefits under exit incentive programs.

In January 1989, you asked us to review waiver practices of the Fortune 100 companies from 1979 to 1988. To accomplish this, we interviewed appropriate officials from 60 of these companies by telephone between February 9 and March 10, 1989.

COMPANY USE OF WAIVERS

About 82 percent of the Fortune 100 companies we surveyed sponsored an exit incentive program at least once during 1979 through 1988, according to company officials. About a quarter of these companies required their employees to sign a waiver as a condition for receiving enhanced benefits. Overall, waivers were used most often during the years 1985 through 1988.

Of those companies that sponsored exit incentive programs, 38 percent offered only enhanced early retirement benefits under the company's pension plan and 44 percent offered these benefits in combination with other types of benefits not related to the company's pension plan. The remaining 18 percent of companies offered nonpension benefits alone or in combination with early retirement benefits. Employees meeting or close to the pension plan's retirement eligibility age generally received benefits from the enhanced early retirement program. Workers who were not

eligible for early retirement benefits were offered other types of exit incentives.

Of those companies that offered enhanced early retirement benefits, 58 percent liberalized plan provisions by adding years to workers' age and/or years of service. This enabled employees to become eligible for retirement sooner than they otherwise would have and to get a greater pension amount than they would have received if their actual age and years of employment were used to calculate benefits. Other enhancements companies made to pension plans included (1) the elimination or reduction of early retirement penalties which reduce the pension benefit that would have been received at normal retirement and (2) a bridge payment which lasts until employees are eligible to receive social security benefits at age 62.

The nonpension exit incentives Fortune 100 companies used took a variety of forms--ranging from lump sum payments to continuing to pay employees' salaries after they leave. Of the companies sponsoring these incentives, 52 percent offered employees salary continuance for a specified period of time based on their service with the company.

Company officials reported that during 1979 through 1988:

- 24 percent of the companies sponsoring an exit incentive program required employees to sign a waiver to receive enhanced benefits (see figure 1),
- 50 percent of companies having employees sign waivers did so in only one year, and
- overall, 40 percent of incentive programs with waivers included nonpension exit incentive benefits. The majority (63 percent) of these programs were offered in 1987 and 1988.

10-YEAR TREND IN WAIVER USAGE

The number of companies using waivers increased over the past 10 years. The percentage of companies using waivers in exit incentive programs almost tripled over the decade (see figure 2). Overall, waivers were used most often during the years 1985 through 1988. Our analysis of trends in the use of waivers also shows that:

- from 1979 through 1984, few companies sponsoring incentive programs used waivers, and

-- in 1987 and 1988, the two-year period when waivers were used the most, 27 percent of companies with exit incentive programs used them.

SELECTED DATA ON PARTICIPANTS

Since our focus was on companies, we gathered participant data only if readily available. Complete data on workers' participation in exit incentive programs were not available from all our sampled companies. The companies we surveyed had at least 161,000 employees electing to leave through exit incentive programs between 1979 and 1988. This is an average of over 3,000 workers per company.

The data we obtained on the 161,000 employees show that:

- 97 percent left between 1985 and 1988,
- 51 percent left with enhanced early retirement benefits,
- 10 percent were required to sign waivers in order to receive enhanced benefits under any type of incentive program, and
- 3 percent signed waivers to receive enhanced early retirement benefits.

We also asked company officials about the factors influencing the decision to use waivers. In general, officials said their companies used waivers to avoid having terminated employees file claims and lawsuits after receiving enhanced benefits from exit incentive programs.

Most officials in companies not using waivers said that their companies did not because they believed that no claims or lawsuits would be filed given the voluntary nature of their exit incentive programs (see attachment). Officials also told us that they believed that the inclusion of waivers would have negatively affected their relationship with current employees. One company representative told us that he believed using a waiver would have raised suspicion about the integrity of the exit incentive program and the company's intent.

We plan to complete our work shortly and will include an analysis of the types of waivers used by companies in our sample. These waivers are now being mailed to us. We will issue a report to you after our analysis is complete.

Mr. Chairman, this concludes my prepared remarks. I will be pleased to respond to questions.

We asked the companies we surveyed why they did or did not use waivers. Some of their comments, as we recorded them, follow. Those companies using waivers were nearly universal in saying the company wanted to protect itself from lawsuits (or claims). One company official added that the company was "saving younger peoples' jobs."

Companies Without Waivers

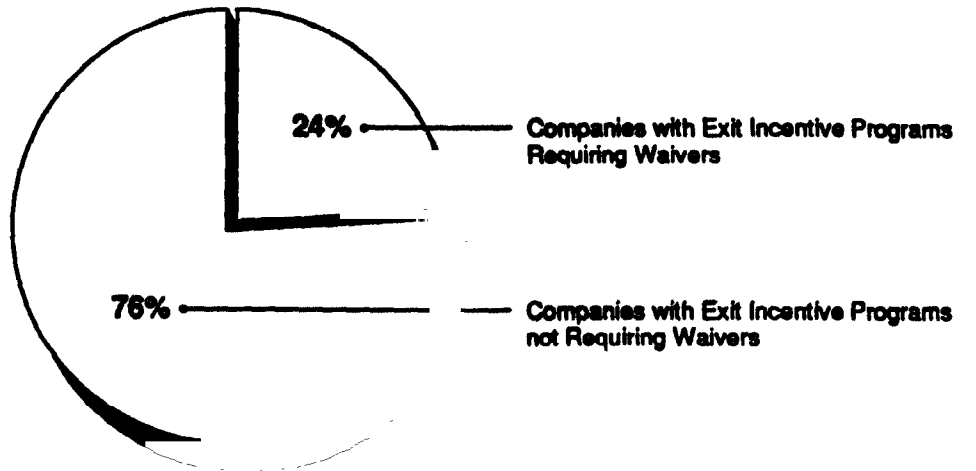
Officials in 19 companies indicated the company did not require a waiver because "the program was voluntary" (8 companies), "bad for employee relations" (6 companies) or "no lawsuit anticipated" (7 companies). "

Other comments:

- ". . . uncertainty as to the legal standing of waivers."
- ". . . insulting to employees."
- "Waivers wouldn't make any difference. Employees could still sue the company."
- "Waivers were not necessary because the program was strictly voluntary. The company counseled people on the details, including giving them instructions for computing benefits."
- "The program was voluntary: not performance-based separation."

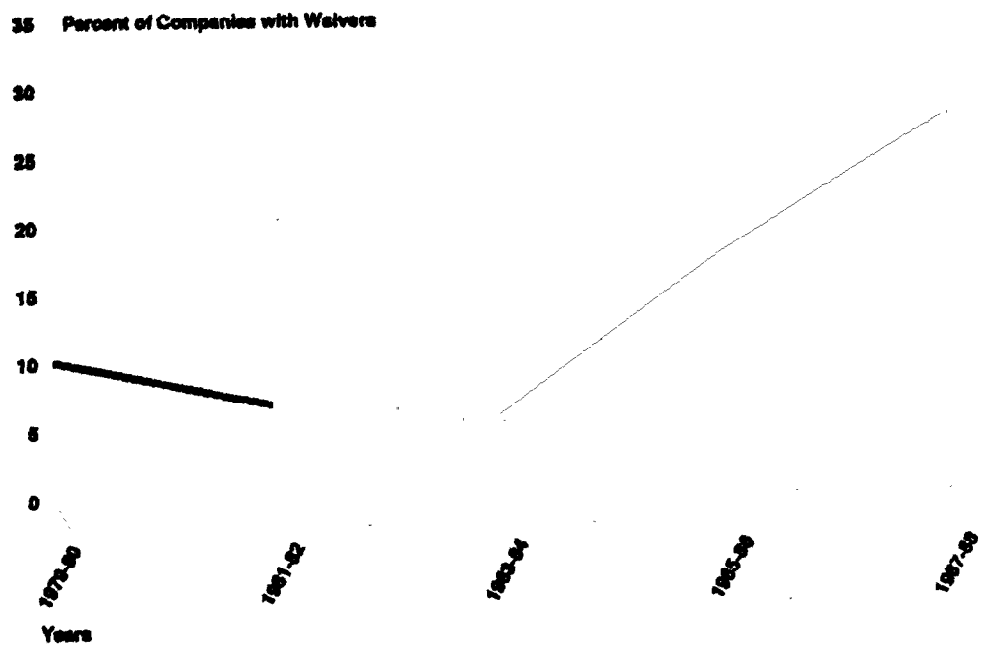
- "Each employee who thinks he or she might want to participate is counseled."-- ". . . purely voluntary program."
- "Because it was such a good deal the company did not think they would have problems."
- "We offered it to everyone eligible to retire and did not establish separate classes of employees."
- "downsizing is a legitimate business operation . . . there is no need for waivers."
- "program . . . voluntary, so . . . no point to a waiver."

**Figure 1. Waiver Usage by Fortune 100
Companies with Exit Incentive
Programs, 1979-1988**



Based on 49 Companies

Figure 2. Trends in Waiver Usage - Fortune 100 Companies with Exit Incentive Programs, 1979-1988



Based on 49 Companies