

By George M. Patterson

A Federal court in Colorado recently permitted a former employee to advance an age discrimination claim despite his prior execution of a severance and release agreement after his employment ended in connection with a reduction in force. The Court in *Foster v. Mountain Coal Company, LLC* invalidated the release of the age discrimination claim because it did not fully satisfy the Older Workers' Benefit Protection Act's "knowing and voluntary" requirement; in particular, it did not properly "advise" the employee to consult with an attorney before executing the agreement.

Congress included the "knowing and voluntary" requirement in the OWBPA in order to guarantee that older workers have every opportunity to make an informed choice whether or not to sign a release that includes an age discrimination claim. An employer will be unable to enforce the release of an age claim if the agreement and corresponding release fail to satisfy any of the eight factors set forth in the law, including that the agreement "advise" the individual "in writing to consult with an attorney prior to executing the agreement." The agreement in *Foster* informed the plaintiff, Robert Fisk, that he was signing it "voluntarily with full knowledge of its significance after opportunity for consideration and consultation with [his] attorney, family and/or advisors" Including passive language in the past tense indicating that Fisk had been given an "opportunity ... for consultation with an attorney" wasn't good enough the court said. It "only makes Fisk aware of a right that he has, but does not 'advise' him to take advantage, act on, or take any action regarding that right." Instead, the agreement should have explicitly advised Fisk to consult with an attorney before signing it.

The *Foster* decision comes on the heels of two federal EEOC lawsuits challenging waivers in employee severance agreements as overly broad and unlawful. Accordingly, employers should not lose sight of the fact that the current environment is rife with aggressive efforts to overturn provisions waiving age claims in severance agreements and should prioritize updating these agreements with an eye toward the latest developments. While offering severance in exchange for the waiver of future age claims remains a viable option for employers when layoffs are unavoidable, we expect civil rights agencies and enterprising plaintiffs' attorneys to continue using every available means to challenge these waivers.