KNOWING AND VOLUNTARY WAIVERS OF FEDERAL
EMPLOYMENT CLAIMS: REPLACING THE TOTALITY OF
CIRCUMSTANCES TEST WITH A “WAIVER CERTAINTY” TEST

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I. INTRODUCTION

Suppose you own a company and you decide to terminate an employee. Other employees have unsuccessfully sued your company for federal employment discrimination, and you want to avoid another discrimination lawsuit and its legal costs. So you offer a generous severance package to this employee, provided that he signs a severance agreement which contains a waiver of all legal claims related to his employment with (or termination from) your company. Both the agreement and waiver are crystal-clear.

You do not require the employee to sign the agreement “on the spot.” Instead, you afford him a twenty-one day period in which to review the agreement. In addition, the agreement advises the employee to consult with legal counsel before he signs it, but he chooses not to consult an attorney regarding the agreement or its waiver of employment claims. The employee then signs the agreement on the last day of the review period and returns it to you. Per the agreement, your company then pays all of the severance compensation to the employee.

Now, suppose this employee immediately sues your company under various federal employment law theories, such as employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII) or the Americans with Disabilities Act of 1990 (ADA). In response to your company’s waiver defense, could the employee successfully argue that the waiver was not “knowing and voluntary” because he (1) did not actually consult with an attorney prior to signing the severance agreement, (2) did not actually read or consider the agreement, and (3) lacked sufficient business experience, sophistication, and education?

Nine federal circuits—the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh—now use a “totality of circumstances” test (totality test) to determine if a waiver of most federal employment claims was “knowing and voluntary.” This test contains no per se requirements for a knowing and voluntary waiver; instead, it includes six or more factors (depending upon the circuit) that a court must weigh to make that


2. Id. §§ 12101-12300 (2000).

3. See infra Part II.C. Twenty years ago, the federal courts applied a pure contract-based approach to make the knowing and voluntary determination. See infra Part II.B. This approach focused on traditional contract principles and defenses, such as clarity or ambiguity of the contract and whether duress, coercion, fraud, or mutual mistake existed in its execution. See infra Part II.B.
Some of the totality test’s factors are solely within the control of the employer and do not depend upon, or vary with, the employee. These “Employer-Controlled Factors” include the following: using clear, understandable waiver language; providing valuable consideration to the employee in exchange for the waiver; affording the employee adequate time in which to review and consider the waiver; and advising the employee to consult with an attorney prior to signing the waiver.

In contrast, many of the test’s factors—in some circuits, over half—depend solely upon the employee and are outside of an employer’s control. These “Employee-Dependent Factors” include the following: the employee’s education, background, and business experience; whether the employee actually consulted with an attorney before signing the waiver; the role that an employee played in deciding the terms of the agreement; whether the employee actually knew or should have known of his or her employment rights at the time of signing the waiver; and whether the employee actually read and considered the waiver before signing it.

Part II of this Article discusses the genesis and evolution of the totality test by reviewing the seminal cases in which nine of the federal circuits adopted the test during only a seven year period.

Part III discusses the Older Workers Benefit Protection Act of 1990 (OWBPA), which in part enumerates the requirements that employers must meet before an employee can knowingly and voluntarily waive a federal age discrimination claim under the Age Discrimination in Employment Act of 1967 (ADEA). While the OWBPA technically deals only with waivers of ADEA claims, it is important in any discussion of the totality test because its waiver requirements were, in part, Congress’s response to the inadequacies of that test.

Part IV presents the totality test’s two shortcomings: (1) its use of a pool of waiver factors, rather than per se waiver requirements and (2) its inclusion of Employee-Dependent Factors over which an employer has no control. This Part also discusses the four problematic consequences that result from these two features. First, the totality test penalizes good-faith...
employers—such as your company in the above example—who have taken the steps within their control to ensure a valid waiver because they are nonetheless compelled to defend a waiver challenge that is based on employee-dependent variables. Second, the test provides employees with inadequate waiver protection from bad-faith employers because it fails to impose any specific waiver-related requirements on those employers. Third, the totality test perpetuates waiver-related litigation that clogs judicial dockets because its Employee-Dependent Factors inject uncertainty into the validity of almost every waiver. Fourth, the test leads cost-conscious employers to reduce the amount of employee severance benefits because those employers offset benefits by their anticipated legal expenses in connection with waiver-related litigation. Part IV concludes by explaining how the totality test is inconsistent with the Congressional waiver philosophy of the OWBPA, which uses only employer-controlled requirements.

Part V of this Article proposes and then defends a new test—the Waiver Certainty Test—for determining whether a waiver of non-ADEA federal employment claims is knowing and voluntary. This new test imposes four employer-controlled requirements for a valid waiver: (1) it must contain clear, unambiguous waiver language; (2) it must be supported by valid consideration; (3) the employer must afford the employee up to twenty-one days to review the waiver before signature; and (4) the employer must advise the employee in writing to consult with legal counsel before signing the waiver. Part V explains how the Waiver Certainty Test fixes the totality test’s two shortcomings, dovetails with the Congressional waiver approach embodied in the OWBPA, and avoids the totality test’s four problematic consequences.

II. THE EVOLUTION OF THE TOTALLY TEST IN THE FEDERAL CIRCUITS

Prior to 1988, no federal circuit used the totality test to determine if a waiver of federal employment claims was knowing and voluntary. Beginning with the Third Circuit in 1988 and ending with the First Circuit in 1995, nine federal circuits adopted the totality test. Two circuits—the Fourth and Eighth—have not adopted this test and still adhere to a pure contract-based approach when making the knowing and voluntary determination.

12. See infra Part II.C.
13. See infra Part II.C.
14. See infra Part II.C. The D.C. Circuit has not ruled on whether the totality test or a pure contract-based approach should be used to make this determination. As a result, the D.C. Circuit is excluded from the circuit split comparison and discussion. See infra Part II.C.
A. The Supreme Court’s Alexander Decision—The Knowing and Voluntary Standard for Waivers of Federal Employment Claims

In 1974, the U.S. Supreme Court decided Alexander v. Gardner-Denver Co., and specified that a waiver of claims under Title VII must meet a knowing and voluntary standard. Alexander did not involve an employee who had signed a waiver in exchange for severance pay and then challenged the validity of the waiver. Instead, the issue before the Court was whether an employee who submits a Title VII race discrimination claim to final arbitration under a collective bargaining agreement’s grievance procedure retains the right to a de novo trial in federal court under Title VII.

However, the waiver issue became relevant when Gardner-Denver argued that Alexander had “waived” his Title VII claim by resorting to that grievance procedure and arbitration forum. This argument afforded the Court the opportunity to discuss when an employee can waive his or her Title VII claim. Rejecting Gardner-Denver’s waiver argument, the Court concluded that “[a]lthough presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver.”

Then, in a footnote, the Court set forth the knowing and voluntary standard for a valid waiver of a Title VII claim:

[P]etitioner and respondent did not enter into a voluntary settlement expressly conditioned on a waiver of petitioner’s cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee’s consent to the settlement was voluntary and knowing. In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee’s rights under Title VII.

16. Id. at 52 n.15.
17. Id. at 38. The Court ruled that an employee who seeks relief before an arbitrator (pursuant to a collective bargaining agreement’s grievance procedure) is not precluded from also pursuing a Title VII discrimination lawsuit in district court. Id. at 47-48, 59-60. Reasoning that an employee’s contractual rights under the collective bargaining agreement are “distinctly separate” from independent Title VII statutory rights, id. at 49-50, 52, the Court found the election of remedies doctrine inapplicable. Id. at 49.
18. Id. at 52.
19. Id.
20. Id. at 52 n.15 (emphasis added). Although Alexander applied the “voluntary and
While setting forth the “voluntary and knowing” standard for a valid waiver, the Court did not provide—nor has it since provided—any test or approach for determining whether a waiver meets that standard. Over the next twenty years, the circuits filled this void with either the totality test or a pure contract-based approach.

B. Post-Alexander and Pre-1988—The Use of a Pure Contract-Based Approach

Between the Supreme Court’s 1974 decision in *Alexander* and 1988, only a limited number of circuits were asked to determine whether an employee’s waiver of federal employment claims met the knowing and voluntary standard. The circuits confronting the issue tended to use a pure contract-based approach that analyzed the waiver as a simple contract.

For example, in the 1983 Eighth Circuit case of *Pilon v. University of Minnesota*, the university had settled a sex and age discrimination lawsuit brought by Pilon, a graduate student. Pilon had alleged that she was discriminatorily denied a Ph.D. The settlement involved a payment to Pilon in exchange for a general waiver of claims. Two months after signing the waiver, Pilon claimed that she had been denied faculty positions based on her sex and then attempted to collect under a consent decree that had been entered against the university in a separate Title VII sex discrimination lawsuit. The district court granted the university’s motion for summary judgment based on Pilon’s signed waiver.

Affirming the district court, the Eighth Circuit initially looked to contractual clarity and concluded that “the release is worded to clearly and unambiguously release all of Pilon’s claims against the university.”

The "knowing" standard to a Title VII waiver, the Court had previously applied this general requirement to other types of waivers as well. See, e.g., *Green v. United States*, 355 U.S. 184, 191 (1957) (discussing waiver of the double jeopardy defense and noting that “[i]n any normal sense, . . . [waiver] connotes some kind of voluntary knowing relinquishment of a right”); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (discussing waiver of the right to counsel and noting that “[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege”).

22. *See infra* Part II.C (explaining why more circuits began to address the knowing and voluntary waiver issue in the mid-to-late 1980s).
23. 710 F.2d 466 (8th Cir. 1983).
24. *Id.* at 466-67.
25. *Id.* at 467.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
court then addressed Pilon’s claim that she did not “knowingly and voluntarily” waive her Title VII claims because she had intended to exclude those claims from the waiver (and supposedly requested her attorney to do so). 30

Rejecting Pilon’s argument, the Eighth Circuit relied on contract-based principles, noting that “[i]f fraud or duress were claimed, Pilon would of course be entitled to show by evidence that she had not voluntarily signed the release, however clear and unambiguous its language . . . .” 31 In addition, the court “decline[d] to adopt the rule asserted by Pilon that even where a waiver of Title VII rights is unambiguous, a court must inquire into the voluntariness of the employee’s consent.” 32

Three years after the Eighth Circuit’s Pilon decision, the Sixth Circuit similarly decided Runyan v. National Cash Register Corp. 33 National Cash Register (NCR) notified Runyan—its fifty-nine-year-old in-house attorney—that it was terminating him for poor performance. 34 Runyan immediately claimed that his termination was the result of age discrimination. 35 The parties then negotiated an exit consulting agreement, and NCR later amended the agreement to provide higher consultant pay to Runyan in exchange for a full waiver of legal claims. 36 Runyan signed the waiver and worked the seven-month term of his consultant agreement. 37 Within six months after the consulting term expired, Runyan filed an ADEA age discrimination lawsuit against NCR. 38 The district court granted summary judgment to NCR on the grounds that Runyan knowingly and voluntarily waived his ADEA claims. 39

On appeal, the Sixth Circuit affirmed. 40 The court stated that “[i]n determining whether [Runyan] knowingly and voluntarily waived his ADEA claims, we apply ordinary contract principles.” 41 The court then

30. Id.
31. Id. at 468.
32. Id.
33. 787 F.2d 1039 (6th Cir. 1986).
34. Id. at 1040.
35. Id.
36. Id.
37. Id. at 1040-41.
38. Id. at 1041.
39. Id. at 1040.
40. Id. at 1045. Initially, the Sixth Circuit addressed the issue of whether an ADEA waiver—like a waiver of minimum wage and overtime claims under the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219 (2000)—required government supervision (by the EEOC or a court) in order to be valid. Runyan, 787 F.2d at 1041-42. The court concluded that unsupervised ADEA waivers were permissible. Id. at 1043-44 (reasoning that the FLSA and the ADEA covered different segments of workers).
41. Runyan, 787 F.2d at 1044 n.10. The Sixth Circuit stated that these contract principles should apply “‘where overreaching or exploitation is not inherent in the situation.’” Id. at 1045
concluded that there was no “overreaching” or “exploitation” in Runyan’s situation, as he was an experienced employment law attorney who had taken the benefit of the bargain despite his belief at the time that his ADEA waiver was invalid.\(^42\)

As Pilon and Runyan illustrate, the circuits that addressed the issue of waiver validity prior to 1988 focused on traditional contract principles, such as language clarity, adequate consideration, the absence of fraud or duress, and unconscionability or overreaching.\(^43\)

C. 1988 and Beyond: A Circuit-By-Circuit Analysis of the Evolution of the Totality Test

Almost fifteen years after Alexander, the totality test started its rise among the circuit courts. While the knowing and voluntary waiver issue had not been prevalent among the circuits before 1988, another legal issue surfaced in the mid-to-late 1980s that led more circuits to confront it.

That issue du jour was whether an employee’s waiver of ADEA age discrimination claims required government supervision (by the EEOC or a court) in order to be valid. As more plaintiffs began to argue that their ADEA waivers were invalid because they lacked government supervision, more circuits began to address federal employment waiver cases, especially those in the ADEA context. Because these circuits concluded  

(quotating D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 122 (1946) (Frankfurter, J., dissenting)).

One could view this language as implying that the Sixth Circuit potentially favored a different approach—perhaps a totality-type test—where overreaching or exploitation is inherent in the situation. Runyan itself did not answer that question, because the court neither described the circumstances that would constitute “inherent” overreaching or exploitation nor explained whether the pure contract-based approach would still apply if there was “inherent” overreaching or exploitation. \(^42\)

Regardless, the Sixth Circuit continued to apply the pure contract-based approach in other federal employment waiver cases until 1995. \(^43\) In 1995, the Sixth Circuit switched to the totality test. See infra notes 137-41 and accompanying text.

42. Runyan, 787 F.2d at 1044-45.

43. For other examples of pre-1988 circuit decisions applying the pure contract-based approach to federal employment waivers, see Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987) (noting that ADEA waivers do not require government supervision and finding that plaintiff’s ADEA waiver was knowing and voluntary under “ordinary contract principles,” because the waiver used “clear and simple language” and there was “no showing [that the employer] was guilty of exploitation or overreaching” (quoting Runyan, 787 F.2d at 1044 n.10)); Moore v. McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986) (finding that ADEA waivers are permissible “in the absence of fraud, deceit, or unconscionable overreaching”); Rogers v. Gen. Elec. Co., 781 F.2d 452, 456 (5th Cir. 1986) (finding that the plaintiff’s Title VII waiver was knowing and voluntary, because the release “clearly and unambiguously” waived all claims, she was not “forced” to sign the release, and “no evidence was introduced indicating fraud or undue influence”).
that government supervision of ADEA waivers was not necessary,\textsuperscript{44} they then had to address the circumstances under which an employee’s waiver was knowing and voluntary.

A discussion of the seminal cases in which nine of the circuits adopted the totality test is helpful in understanding the rationale for each circuit’s choice and the important role played by the test’s Employee-Dependent Factors.

1. 1988: The Third Circuit Adopts the Totality Test

The Third Circuit was the first to adopt the totality test for determining whether an employee knowingly and voluntarily waived federal employment claims. In \textit{Coventry v. United States Steel Corp.},\textsuperscript{45} United States Steel (USS) terminated Hallas—a foreman who had worked for USS in excess of thirty-five years.\textsuperscript{46} Less than three months earlier, Hallas had filed an age discrimination claim against USS with the EEOC and alleged that he had been previously laid off due to his age.\textsuperscript{47}

At the time of Hallas’s termination, USS notified him that he could qualify for certain severance pay (labeled a “pension benefit”) if he signed a form that waived ADEA (and Title VII) claims and all other state and federal employment-related causes of action.\textsuperscript{48} USS did not require Hallas to sign the waiver form within any set time period; instead, it notified him to meet with the personnel department to discuss his separation-related options.\textsuperscript{49}

At this meeting, USS again advised Hallas that he would receive the pension benefit only if he signed the waiver form.\textsuperscript{50} Hallas refused, because (as he later testified) he had doubts about the form’s legality.\textsuperscript{51} USS met again with Hallas a week later, and he again refused to sign the

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\textsuperscript{44} The Sixth Circuit in \textit{Runyan} was the first circuit to address (and reject) the argument that an ADEA waiver required government supervision. See \textit{supra} note 40. After \textit{Runyan}, several other circuits also rejected this argument. See \textit{supra} note 43 (the Eighth Circuit); \textit{infra} note 56 and accompanying text (the Third Circuit); \textit{infra} note 69 and accompanying text (the Second Circuit); \textit{infra} note 85 and accompanying text (the Fifth Circuit); \textit{infra} note 109 and accompanying text (the Fourth Circuit); \textit{infra} note 118 and accompanying text (the Eleventh Circuit); \textit{infra} note 160 and accompanying text (generally discussing the circuits’ rejection of this argument).

\textsuperscript{45} 856 F.2d 514 (3d Cir. 1988).

\textsuperscript{46} \textit{Id.} at 515-16. The named plaintiff, James Coventry, had originally filed an ADEA age discrimination class action lawsuit against USS; Hallas later elected to join the class action. \textit{Id.} at 515 & n.1.

\textsuperscript{47} \textit{Id.} at 516.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}
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waiver form.\footnote{\textit{Id}. at 516-17.} Ten days after this second meeting, Hallas returned to USS and signed the waiver form—approximately one month after he had initially received the form for his review.\footnote{\textit{Id}. at 517.} Within seven months after signing the waiver, Hallas joined an ADEA class action against USS.\footnote{\textit{Id}.} The district court ruled that Hallas’s ADEA claim was barred because he had knowingly and voluntarily signed the waiver.\footnote{\textit{Id}. at 524.}

On appeal, the Third Circuit addressed whether Hallas’s waiver of his ADEA claims met \textit{Alexander}’s knowing and voluntary standard.\footnote{\textit{Id}. at 522, 524. The Third Circuit also rejected the view that an ADEA waiver required government supervision in order to be valid. \textit{Id}. at 517, 521 n.8 (finding that “there has been general consensus that the private settlement of [ADEA] claims is not inconsistent with the ADEA”).} It observed that other circuits had relied upon “general principles of contract construction”—such as contract clarity and the presence or absence of fraud or undue influence—to make the knowing and voluntary determination.\footnote{\textit{See id}. at 522.}

However, the Third Circuit rejected this pure contract-based approach in favor of a totality of circumstances test:

\begin{quote}
We agree that this evaluation [of contract principles] is necessary and useful, but in our view, the inquiry into the validity of a release of discrimination claims does not end with the evaluation that would be applied to determine the validity of a contract. . . . [A] review of the totality of the circumstances, \textit{considerate of the particular individual who has executed the release}, is also necessary.
\end{quote}

\begin{quote}
. . . .
\end{quote}

Therefore, we adopt the view that in the determination of whether a waiver was signed knowingly and voluntarily, review of the totality of the circumstances in which it was signed must be had.\footnote{\textit{Id}. at 522-24 (emphasis added); \textit{see also id}. at 518, 522 (requiring close evaluation of various factors that are indicia of a knowing and voluntary waiver).}

The court reasoned that the totality test’s tighter scrutiny of ADEA waivers was preferable to a “necessary and useful,” but not sufficient, pure contract-based approach because the former furthered the “strong policy
concerns to eradicate discrimination in employment.”

The Third Circuit then enumerated six factors that comprised this “[c]areful evaluation of the release form itself, and of the complete circumstances in which it was executed”:

1. the employee’s education and business experience;
2. the amount of time the employee had, or had access to, the waiver before signature;
3. the role of the employee in deciding the terms of the severance agreement;
4. the clarity of the waiver;
5. whether the employee actually consulted with, or was represented by, legal counsel; and
6. whether the employee received consideration for the waiver that exceeded any benefits to which he or she was already entitled.

59. Id. at 522-23. The Third Circuit suggested that the differences between the totality test and the pure contract-based approach were minimal, because courts applying the latter—such as the Sixth Circuit in Runyan—actually considered totality test-type factors in making their decisions. Id. at 524 n.9. For example, the court stated that the Runyan court “considered other factors [beyond traditional contract principles], among them the fact that the plaintiff himself was a lawyer” who was knowledgeable in labor law. Id.

While courts may consider similar waiver-related facts under the two approaches, the approaches themselves are different legal tests. First, the legal foundation of each approach is distinct—the former uses only traditional contract principles, while the latter extends beyond those principles by imposing additional factors for a court to consider. Second, as the Coventry court even recognized, application of the pure contract-based approach and totality test to the same waiver-related facts can, and often does, yield different results as to a waiver’s validity. See id. at 522, 524 (noting that Hallas’s waiver would be valid under traditional contract principles, but finding that it was not knowing and voluntary under the totality test).

60. Id. at 523. The court borrowed these six factors from the New York district court case EEOC v. American Express Publishing Corp., 681 F. Supp. 216, 219-20 (S.D.N.Y. 1988) (applying a six-factor test to determine whether the plaintiff’s ADEA waiver was knowing and voluntary and finding that “several . . . factors . . . raise sufficient question as to the voluntariness” of that waiver, particularly that “[t]here [was] no indication that any of the release’s terms were negotiated” and that the plaintiff’s attorney “was not present when plaintiff[] signed the agreement” and had “advised . . . [the plaintiff] that the agreement was not binding”). As the sources for its six-factor test, the district court cited Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987) and DiMartino v. City of Hartford, 636 F. Supp. 1241, 1247 (D. Conn. 1986). Am. Express Publ’g Corp., 681 F. Supp. at 219.

However, neither Lancaster nor DiMartino used a six-factor totality test. In Lancaster, the Eighth Circuit expressly applied an “ordinary contract principles” approach to determine if an ADEA waiver was knowing and voluntary, 809 F.2d at 541 (quoting Runyan v. Nat’l Cash Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986)) (concluding that plaintiff’s ADEA waiver was knowing and voluntary, rather than the result of “exploitation or overreaching,” because the waiver was clear, no signature deadline had been imposed, and plaintiff was a management executive who had negotiated parts of the waiver). In DiMartino, the Connecticut district court relied on only three
Applying this totality test, the Third Circuit reversed the district court and concluded that Hallas did not knowingly and voluntarily sign the waiver.\textsuperscript{61} Even though (1) “the release was written in clear, specific language,” (2) “Hallas was competent enough to read and understand its literal meaning,” (3) he was sophisticated enough to even “doubt[] the legal adequacy of the form,” and (4) he actually had the release a full month before he signed it, the court said that was “not enough.”\textsuperscript{62} Instead, the Third Circuit relied significantly on the lack of evidence showing that “Hallas did in fact consult with an attorney” or had been encouraged to do so by USS.\textsuperscript{63} The court then speculated regarding the effect that Hallas’s lack of legal counsel had on his waiver:

Because Hallas did not have guidance from an attorney, \textit{it is at least plausible that he believed} that despite the language of the release, he had preserved his right to challenge the validity of the form . . . . A meaningful comprehension of the legal significance of a release of ADEA claims, as well as the ability to understand the literal definitions of its terms, is necessary to a “knowing” waiver. . . . \textit{The absence of assistance by an attorney makes the certainty that Hallas had that meaningful comprehension too doubtful for us to conclude that his waiver was knowingly executed.}\textsuperscript{64}

The \textit{Coventry} decision illustrates the important role that the totality test’s Employee-Dependent Factors (such as whether an employee actually retains legal counsel and whether an employee’s personal background allows for a “meaningful comprehension” of a legal waiver) can play in

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\item factors—whether the waiver agreement was in writing, whether it was clear or ambiguous, and whether the employee was actually represented by an attorney—to make the knowing and voluntary determination.\textsuperscript{636} F. Supp. at 1247-48 (concluding that plaintiff’s ADEA waiver was knowing and voluntary because each of these three factors was satisfied).
\item \textit{Coventry}, 856 F.2d at 524, 525.
\item \textit{Id}.
\item \textit{Id}. at 524-25.
\item \textit{Id}. at 525 (emphasis added). Three months after \textit{Coventry}, the Third Circuit decided \textit{Cirillo v. Arco Chemical Co.}, 862 F.2d 448 (3d Cir. 1988), and expanded its six-factor \textit{Coventry} test by adding another Employee-Dependent Factor and another Employer-Controlled Factor: (1) whether the employee knew or should have known his federal employment rights at the time of waiver signature and (2) whether the employer encouraged the employee to seek legal counsel prior to waiver signature. \textit{Id}. at 451-52, 455. Holding that Cirillo’s ADEA waiver was knowing and voluntary, the Third Circuit focused on the following Employee-Dependent and Employer-Controlled Factors: (1) the waiver language was clear; (2) Arco Chemical encouraged Cirillo to consult with an attorney; (3) Cirillo was “a literate, well-educated man” who had the waiver agreement one month before signing it; and (4) prior to signing the waiver, Cirillo had asserted age discrimination claims against Arco Chemical and thus “had specific reason to believe he was in a position to assert . . . the ADEA claims he [then sought] to press.” \textit{Id}. at 452-55.
\end{itemize}
evaluating that waiver’s validity. These factors led the Coventry court to nullify Hallas’s waiver, notwithstanding the fact that USS had taken those steps within its control to ensure that his waiver was knowing and voluntary.

2. 1989: The Second and Ninth Circuits Adopt the Totality Test

Within a year after Coventry, the Second and Ninth Circuits formally adopted the totality test for making the knowing and voluntary determination. In Bormann v. AT&T Communications, Inc., the Second Circuit aimed to “clarify the standard that should be used in deciding whether an employee signed a release [of ADEA claims] knowingly, willfully, and free from coercion.” After noting that the Sixth and Eighth Circuits applied an “‘ordinary contract principles’” approach while the Third Circuit used a “more stringent” totality of circumstances test, the court followed the Third Circuit and adopted the totality test. Borrowing from Coventry, the Second Circuit viewed the totality test to be more “consistent with the strong congressional purpose underlying the ADEA to eradicate discrimination in employment.” The court also stressed the “need to examine carefully any situation in which an older worker bargains away the statutory right to be free from age discrimination.”

The Second Circuit varied its totality test by “add[ing]” another consideration to the Coventry factors: whether the employer encourages (or discourages) an employee to consult with legal counsel. Applying the totality test’s careful examination, the court concluded that the twelve

65. Coventry, 856 F.2d at 525.
66. Id.
67. Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989); Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989).
68. 875 F.2d 399 (2d Cir. 1989).
69. Id. at 403. The Second Circuit also joined the Third, Sixth, and Eighth Circuits by concluding that an ADEA waiver did not require government supervision in order to be valid. Id. at 401-02.
70. Id. at 403 (quoting Runyan v. Nat’l Cash Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986) and citing Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987)). Despite citing the Sixth Circuit’s Runyan decision, the Bormann court had referred inadvertently to the Sixth Circuit as the Fifth Circuit in the opinion’s text. Id.
71. Id. (citing Coventry, 856 F.2d at 524).
72. Id.
73. Id.
74. Id. The Bormann court also considered whether the employee had a “fair opportunity” actually to consult with legal counsel prior to waiver signature. See id. However, this additional consideration is the functional equivalent of the second Coventry factor (the amount of time that the employee had the waiver before signing it).
plaintiffs knowingly and voluntarily signed their respective waivers. In reaching that conclusion, the court relied on the following Employee-Dependent and Employer-Controlled Factors: (1) the plaintiffs were second-level managers who were “experienced” in contracts; (2) the waivers were clear and unambiguous; (3) the waivers advised the plaintiffs that they “may wish to consult [their] attorney[s]”; and (4) the plaintiffs had the waivers for two to three months before signing them.

Three months after the *Bormann* decision, the Ninth Circuit decided *Stroman v. West Coast Grocery Co.* Unlike *Bormann* and *Coventry*—both ADEA cases—*Stroman* was a Title VII case and marked the first time that a circuit court applied the totality test outside of the ADEA context. While not mentioning those circuits applying the pure contract-based approach, the *Stroman* court cited *Coventry* and stated that the determination of whether Stroman’s waiver was “‘voluntary, deliberate, and informed’” rested on an evaluation of various “‘indicia.’”

The Ninth Circuit viewed four totality test factors as being of “primary importance”: (1) the employee’s education and business experience (the first *Coventry* factor); (2) the presence of “a noncoercive atmosphere” for waiver signature (or, the time that the employer provided the employee to review the agreement before signing it (the second *Coventry* factor)); (3) the waiver’s clarity and non-ambiguity (the fourth *Coventry* factor); and (4) whether the employee consulted with an attorney before signing the waiver (the fifth *Coventry* factor).

Applying these factors, the Ninth Circuit concluded that Stroman’s waiver was knowing and voluntary. Specifically, the court relied on the following Employee-Dependent and Employer-Controlled Factors: (1) Stroman had received “training in the Army and [had a] business management-related community college degree” and thus “possessed the education and skills necessary to understand that . . . he waived all legal claims”; (2) Stroman was not coerced into signing the agreement immediately but had it “several days” before signing it; and (3) Stroman—who did not retain a lawyer to review the agreement—was neither discouraged nor precluded from having legal counsel do so before

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75. See id.
76. Id. at 401, 403 (emphasis in original).
77. 884 F.2d 458 (9th Cir. 1989).
78. See id. at 461, 462.
79. Id. at 462 (quoting *Coventry* v. U.S. Steel Corp., 856 F.2d 514, 522 (3d Cir. 1988)). Other than citing to *Coventry* and to prior Ninth Circuit precedent that had used an “all the circumstances” approach to evaluate waivers in other contexts, the Ninth Circuit did not expand on its reasons for adopting the totality test for federal employment waivers. See id.
80. Id.
81. See id. at 462-63.
he signed it.\textsuperscript{82}

3. 1990: The Fifth and Tenth Circuits Adopt the Totality Test and Congress Passes the Older Workers Benefit Protection Act (OWBPA)

With three federal circuits having adopted the totality test in a two-year period, the Fifth and Tenth Circuits would follow suit in 1990. In addition, Congress entered the fray in October 1990 by enacting the OWBPA, which set forth per se requirements for a knowing and voluntary waiver of age discrimination claims under the ADEA.\textsuperscript{83}

In its April 1990 decision in \textit{O’Hare v. Global Natural Resources, Inc.},\textsuperscript{84} the Fifth Circuit adopted “a totality of the circumstances approach” for determining “what constitutes a knowing and voluntary waiver under the ADEA.”\textsuperscript{85} Relying on \textit{Coventry} and \textit{Bormann}, the Fifth Circuit reasoned that the totality test was “consistent with the strong congressional purpose underlying the ADEA to eradicate discrimination in employment.”\textsuperscript{86}

For its totality test, the court used the six \textit{Coventry} factors.\textsuperscript{87} Concluding that O’Hare’s waiver was knowing and voluntary, the Fifth Circuit significantly relied on the following Employee-Dependent and Employer-Controlled Factors: (1) O’Hare was an attorney and had business experience and training with contracts; (2) he had the agreement

\begin{itemize}
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{84} 898 F.2d 1015 (5th Cir. 1990).
\item \textsuperscript{85} \textit{Id.} at 1017. The Fifth Circuit also rejected the argument that ADEA waivers required government supervision, based on its prior decision in \textit{EEOC v. Cosmair, Inc., L’Oreal Hair Care Division}, 821 F.2d 1085, 1091 (5th Cir. 1987) (finding that an ADEA waiver need not be supervised in order to be enforceable), and made reference to the Second, Third, Sixth, and Eighth Circuit decisions that had also reached the same conclusion. \textit{See O’Hare}, 898 F.2d at 1017.
\item \textsuperscript{86} \textit{Id.} (quoting Bormann \textit{v. AT&T Commc’ns}, Inc., 875 F.2d 399, 403 (2d Cir. 1989)). In adopting the totality test, the Fifth Circuit did not cite or distinguish its 1986 decision in \textit{Rogers v. General Electric Co.}, 781 F.2d 452 (5th Cir. 1986). In \textit{Rogers}, the Fifth Circuit applied traditional contract principles (rather than a totality-type test) to the plaintiff’s Title VII waiver and concluded that it was knowing and voluntary because the waiver language was clear, “no one forced [Rogers] to sign the release,” and there was no evidence “indicating fraud or undue influence.” \textit{Id.} at 456. As part of its analysis under these traditional contract principles, the court also discussed the fact that the plaintiff had been advised to consult with legal counsel and had been employed and “educated” by General Electric to “read and analyze complex Department of Defense contracts.” \textit{Id.} at 456 & n.8. While a court applying the totality test would also consider these types of facts, the \textit{Rogers} court nonetheless considered them within a pure contract-based approach. \textit{Id.; see also supra} note 59 (explaining that consideration of similar waiver-related facts under the two approaches does not mean that they constitute the same legal test).
\item \textsuperscript{87} \textit{O’Hare}, 898 F.2d at 1017.
\end{itemize}
for about one month before he signed it; and (3) he actually consulted with three different attorneys prior to signature. 88

Three months after *O’Hare*, the Tenth Circuit decided *Torrez v. Public*

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88. *Id.* at 1016-18. O’Hare had originally claimed that his ADEA waiver was invalid due to duress rather than arguing that his waiver did not meet the knowing and voluntary standard. *Id.* at 1016. However, the Fifth Circuit opted to analyze the knowing and voluntary angle rather than the Texas state law duress defense because it felt that “federal common law” was “the proper source of law for determining the validity of [a] waiver” and that the “policies embedded in the federal statute should not be frustrated by state law.” *Id.* at 1017. Thus, the court appeared to view the knowing and voluntary requirement as displacing the state law defense of duress. See *id.*

This Article does not dispute that a federally-created test should govern analysis of whether a federal employment waiver is knowing and voluntary. Indeed, the Waiver Certainty Test proposed in Part V is such a test because it includes two requirements—a twenty-one day review period and a requirement that the employee be advised to consult with an attorney—that exceed the typical state contract law requirements. See *infra* Part V.

Nonetheless, the Fifth Circuit’s view that the knowing and voluntary standard displaces state law contract defenses is flawed for three reasons. First, while *Alexander* introduced an additional knowing and voluntary standard for a Title VII waiver, the Supreme Court did not otherwise change the landscape for evaluating those waivers by abrogating other state law requirements for a valid contract (such as the absence of duress). See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 & n.15 (1974).

Second, while one may argue that the state law duress analysis is not important because the knowing and voluntary analysis will naturally invalidate any waiver signed under duress, that argument confuses the issue. The issue is not whether the results of the analyses could be similar; instead, it is whether one analysis was judicially intended to preempt another and whether the analyses themselves—duress versus knowing and voluntary—are legally distinct. Just because two analyses reach similar results does not mean that the analyses themselves are the same. If W+X=10 and Y-Z=10, the equations are different (as are the values of W, X, Y, and Z) even though their results are the same.

Third, the preemptive view overlooks situations where a waiver is knowing and voluntary under the totality test but might otherwise be invalid under state law duress theory. Suppose a company terminates an employee who is college-educated and has substantial business experience with contract negotiations, and the company offers to provide severance pay if the employee signs a severance agreement with a full waiver of legal claims. The severance agreement is crystal-clear, and it advises the employee to consult with an attorney prior to waiver signature, which the employee does. In addition, the employee was able to negotiate additional severance pay, ample consideration supports the agreement, and the company provides a full month to the employee to review the agreement before signing it. The employee signs the agreement on the last day of the review period and then receives his severance pay.

However, the company had some “inside information” before offering the employee the severance package. Specifically, it learned that the employee had borrowed a large sum of money from a loan shark, who told the employee that he (the loan shark) would seriously injure a member of the employee’s family if the money was not repaid within thirty days. The company had purposefully used this situation as the leverage to obtain the employee’s waiver of claims.

Under these facts, the employee’s waiver meets all of the *Coventry* factors and is knowing and voluntary under the totality test. However, the company’s conduct and misuse of its knowledge regarding the loan shark’s threats could arguably form the basis of a distinct duress defense under state law.
Service Co. In Torrez, the employer—Public Service Company of New Mexico (PSC)—terminated Torrez as part of a workforce downsizing. Torrez had worked for the company for almost nine years and was a foreman in the power plant’s maintenance department.

In its notification letter to Torrez, PSC indicated that he had thirty days to decide between a “voluntary” or “involuntary” severance package. While both packages provided full salary for four months and employee benefits for eight months, the voluntary package also permitted employees with five or more years of service to vest early in retirement benefits provided that they signed a waiver of legal claims. Torrez attended an orientation meeting for all terminated employees.

On the last day of his election period, Torrez chose the voluntary package and signed the waiver that covered “any and all claims which [he had] or might have [had], arising out of or related to [his] employment or resignation or termination from employment.” Torrez then filed a Title VII lawsuit against PSC in which he alleged race and national origin discrimination.

Focusing on the clear and unambiguous waiver language, the district court granted summary judgment to PSC on the grounds that Torrez had knowingly and voluntarily waived his Title VII claims.

Vacating the summary judgment order and remanding the case for trial, the Tenth Circuit felt that the district court’s analysis of Torrez’s waiver did not go far enough. While noting that some circuits “apply ordinary contract principles and focus primarily on the clarity of language in the release,” the court stated that the “majority of circuits . . . explicitly look beyond the contract language and consider all relevant factors in assessing a plaintiff’s knowledge and the voluntariness of the waiver.” The Tenth

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89. 908 F.2d 687 (10th Cir. 1990).
90. Id. at 688.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. See id.
97. Id.
98. See id. at 688, 690.
99. Id. at 689.
100. Id. The Tenth Circuit’s claim that a majority of the circuits had adopted the totality test was overstated. Only four circuits (the Second, Third, Fifth, and Ninth) had adopted the totality test at the time of Torrez.

The Torrez court had also included the Seventh Circuit within its list of circuits applying the totality test. Id. (citing Riley v. Am. Family Mut. Ins. Co., 881 F.2d 368 (7th Cir. 1989)). However, in Riley, the Seventh Circuit declined to evaluate a Title VII waiver under the totality test, where the “language of the waiver is unambiguous” and the plaintiff “is represented by counsel who actively negotiates the release.” Riley, 881 F.2d at 373, 374. Under those circumstances, the court
Circuit stated that the totality test was “the better one” and that “[the court’s] inquiry cannot end” with the necessary, but insufficient, evaluation of a contract’s language. Consistent with Coventry, the court reasoned that the totality test was more “considerate of the particular individual who has executed the release” and protected “the strong policy concerns to eradicate discrimination in employment.”

The Tenth Circuit varied the Coventry totality test by adding one Employer-Controlled Factor and one Employee-Dependent Factor: (1) whether an employer advises an employee to seek legal counsel and (2) “whether [the employee] knew or should have known his rights upon execution” of the waiver. Applying its totality test, the Tenth Circuit concluded that there was “a material question of fact as to whether Torrez knowingly and voluntarily signed the release.”

While conceding that the waiver was “clear and unambiguous,” the court refused to let this clarity “derail [its] analysis” under the totality test. Instead, the Tenth Circuit focused on the following Employee-Dependent Factors: (1) Torrez supposedly did not know he was waiving possible discrimination claims when he signed the waiver, but instead deemed it “unnecessary to create a distinct federal body of law to interpret plaintiff’s release of federal rights” and to “inquir[e] into the subjective intent of the waiving party” per the totality test.

Rather than applying any totality test, the Seventh Circuit focused on traditional contract principles and concluded that an employee (like Riley) who signs a waiver under the referenced circumstances “must be found to have executed the release or settlement voluntarily and knowingly, unless vitiating circumstances such as fraud or duress existed to nullify [his or her] assent to the settlement.” Finding that Riley’s waiver was knowing and voluntary because she “[did] not assert any fraudulent or coercive behavior”.

In dicta, the court left the door open to the totality test, because it stated that a court “may need to inquire beyond the state law requirements for a valid contract” in certain circumstances, such as where a person “possess[e] a limited education,” “was not represented by counsel,” or “was otherwise unable to appreciate the consequences of the release.” The Seventh Circuit ultimately adopted the totality test in 1995. See infra notes 124-35 and accompanying text.

101. Torrez, 908 F.2d at 690.

102. Id. (quoting Coventry v. U.S. Steel Corp., 856 F.2d 514, 522-23 (3d Cir. 1988)). As in Coventry, the Torrez court minimized the differences between the totality test and the pure contract-based approach by suggesting that courts applying the latter considered other factors (such as an employee’s education and business experience) that fall within the totality test. Id. at 689 n.2 (citing Runyan v. Nat’l Cash Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986) and Pilon v. Univ. of Minn., 710 F.2d 466, 468 (8th Cir. 1983)). But see supra note 59 (explaining that consideration of similar waiver-related facts under the two approaches does not mean that they constitute the same legal test).

103. Torrez, 908 F.2d at 689-90. The Tenth Circuit actually borrowed its version of the totality test from the Third Circuit’s 1988 decision in Cirillo v. Arco Chemical Co., 862 F.2d 448, 451 (3d Cir. 1988). Torrez, 908 F.2d at 689-90. See also supra note 64 (discussing Cirillo).

104. Torrez, 908 F.2d at 690.

105. Id.
believed that he was only releasing other claims, which the court viewed as reasonable “for a high school educated employee, unfamiliar with the law”\(^\text{106}\) and (2) Torrez had not actually consulted with an attorney during the one-month period in which he had the waiver before signing it.\(^\text{107}\)

Like Coventry, the Torrez decision demonstrates how Employee-Dependent Factors (such as whether an employee actually retains legal counsel and whether an employee’s education and personal background leads to an inaccurate belief about the scope of a waiver) can nullify a waiver, notwithstanding an employer’s good-faith steps to ensure the validity of the waiver.

4. 1991: The Fourth Circuit Opted for the Pure Contract-Based Approach

In only a three-year span from 1988 through 1990, five circuits—the Second, Third, Fifth, Ninth, and Tenth—adopted the totality test for determining whether a waiver of federal employment claims was knowing and voluntary. In April 1991, the Fourth Circuit made a different choice by favoring a pure contract-based approach.

In O’Shea v. Commercial Credit Corp.,\(^\text{108}\) the Fourth Circuit recognized that the circuits were split as to “the appropriate source of law to be used in assessing the validity of a particular waiver.”\(^\text{109}\) The court noted that some circuits “have agreed that ordinary contract principles should be applied in determining whether a release was knowingly and voluntarily given,”\(^\text{110}\) whereas other circuits “apply a more stringent federal ‘totality of the circumstances’ test, on the grounds that the congressional purpose of eliminating discrimination in employment is better served thereby.”\(^\text{111}\)

The Fourth Circuit concluded that “the better approach is to analyze waivers of ADEA claims under ordinary contract principles.”\(^\text{112}\) Yet, the court did not explain why it viewed the pure contract-based approach as

\(^{106}.\) Id.

\(^{107}.\) Id.

\(^{108}.\) 930 F.2d 358 (4th Cir. 1991).

\(^{109}.\) Id. at 361. The Fourth Circuit also concluded that ADEA waivers did not require government supervision in order to be valid. Id. (relying on the other circuits that had reached the same conclusion).

\(^{110}.\) Id. at 361, 362 (referencing the Sixth Circuit’s opinion in Runyan v. Nat’l Cash Register Corp., 787 F.2d 1039, 1044 n.10 (6th Cir. 1986), and the Eighth Circuit’s opinion in Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 541 (8th Cir. 1987)).

\(^{111}.\) Id. at 361 (referencing the Second Circuit’s Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989), the Third Circuit’s Coventry v. U.S. Steel Corp., 856 F.2d 514, 523 (3d Cir. 1988), and the Fifth Circuit’s O’Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990), opinions).

\(^{112}.\) Id. at 362. The OWBPA did not apply to O’Shea’s ADEA waiver, because she signed it prior to the OWBPA’s effective date. See id. at 359-60.
better.

Nonetheless, applying Maryland contract law (which viewed a “release to be nothing but an ordinary contract” that can be set aside “for the same reasons that . . . may void [any] contract”), the court found that there was “[no] doubt that O’Shea’s decision to execute the agreement was voluntary, deliberate, and informed.” Relying on traditional contract principles, the Fourth Circuit reasoned that O’Shea’s waiver was clear and unambiguous, was supported by valid consideration, and had not been procured by fraud or duress.

5. 1992: The Eleventh Circuit Adopts the Totality Test

The O’Shea decision was only a temporary hiccup in the rise of the totality test within the federal circuits. By mid-1992, the Eleventh Circuit joined the five other circuits that had adopted the totality test to determine if a waiver was knowing and voluntary. In Gormin v. Brown-Forman Corp., the Eleventh Circuit was asked to “articulate [for the district court on remand] the correct standard for assessing the validity of a release” of ADEA age discrimination claims. The court recognized that some circuits had used a “‘totality of the circumstances test’” while others had applied “ordinary contract principles.”

The Eleventh Circuit opted for the totality test to determine whether a waiver is knowing and voluntary. It reasoned that, despite the “different labels for the standard,” courts have “essentially followed the same process for making that determination.” On remand, the Eleventh Circuit instructed the lower court to consider the factors from Bormann’s totality test, which included the six Coventry factors in addition to whether the

113. See id. at 362 (noting that the contract-based approach was “better” without further elaboration).
114. Id.
115. Id.
116. Id.
117. 963 F.2d 323 (11th Cir. 1992).
118. Id. at 327. The district court had ruled that ADEA waivers required government supervision in order to be valid. Id. at 326-27. Thus, on appeal, Brown-Forman Corp. had requested that, if the Eleventh Circuit disagreed with that ruling, it articulate on remand the proper standard for determining whether the plaintiff’s ADEA waiver was knowing and voluntary. Id. at 327. The Eleventh Circuit concluded that ADEA waivers did not require government supervision in order to be valid. Id. at 326 (relying on the other circuits that had reached the same conclusion).
119. Id. at 327 (quoting O’Shea, 930 F.2d at 361-62).
120. Id.
121. Id.
122. Id. The Eleventh Circuit’s point is similar to that made in Coventry and Torrez—namely, that courts ultimately evaluate similar facts to make the knowing and voluntary determination, whether they use the totality test or a pure contract-based approach. But see supra note 59 (explaining that consideration of similar waiver-related facts under the two approaches does not mean that they constitute the same legal test).
employer encourages (or discourages) an employee to consult with legal
counsel. 123

6. 1995: The First, Sixth, and Seventh Circuits Adopt
   the Totality Test

For three years after Gormin, no new circuits adopted the totality test. However, that lull ended abruptly in 1995 when the First, Sixth, and Seventh Circuits raised the total number of totality test jurisdictions to nine.

In Pierce v. Atchison, Topeka and Santa Fe Railway Co., 124 the Seventh Circuit chose the totality test over a pure contract-based approach for determining whether an ADEA and Title VII waiver was knowing and voluntary. 125 The court noted that the circuits “disagree as to the appropriate source of law to be used in determining whether a release of federal civil rights is knowing and voluntary.” 126 On the one hand, the Seventh Circuit noted that the Fourth, Sixth, and Eighth Circuits applied a “general principles of contract construction” approach whereby a waiver is enforced if it passes “contract law muster.” 127 On the other hand, the court recognized that the Second, Third, Fifth, Tenth, and Eleventh Circuits used a “federal ‘totality of the circumstances’ approach” that “requires a detailed look at the circumstances surrounding execution of the release in addition to, rather than as a replacement for, ordinary contract considerations.” 128

The Seventh Circuit adopted the latter approach. 129 While recognizing

123. Gormin, 963 F.2d at 327. Like the Second Circuit in Bormann, the Eleventh Circuit also considered whether the employee had a “fair opportunity” to actually consult with legal counsel prior to waiver signature. Id. However, this additional consideration is the functional equivalent of the second Coventry factor (the amount of time that the employee had the waiver before signature). See Coventry v. U.S. Steel Corp., 856 F.2d 514, 523-24 (3d Cir. 1988).

124. 65 F.3d 562 (7th Cir. 1995).

125. Id. at 571. The OWBPA did not apply to the ADEA waiver because Pierce signed it before the OWBPA’s effective date. See id. at 567.

126. Id. at 570.

127. Id.; see cases discussed supra Parts II.B, II.C.4.

128. Pierce, 65 F.3d at 570; see cases discussed supra Part II.C. The court omitted the Ninth Circuit from the totality test list, although it referenced the Ninth Circuit’s 1989 Stroman opinion in a string cite of totality test circuit cases. Pierce, 65 F.3d at 570.

129. Pierce, 65 F.3d at 571. The court also stated that the lower courts “need not apply the totality of the circumstances approach” when a plaintiff “never disputes the knowing and voluntary nature of his release” and does not “first raise a challenge to his consent.” Id. at 571-72. The court explained that raising “traditional state law defenses to the validity of the contract” (such as “offer, acceptance or consideration, or . . . duress or fraud”) is distinct from raising a defense based on the knowing and voluntary standard. Id. at 572.

While the Seventh Circuit was theoretically correct that a court will only have to apply the totality test when the knowing and voluntary challenge is made, knowledgeable plaintiff’s counsel
"the critical role that the plain language of the contract plays."

130. Id. at 571.

131. Id.

132. See id. at 570.

133. Id. at 571. In opting for the totality test, the court also highlighted its 1989 decision in Riley v. American Family Mutual Insurance Co., 881 F.2d 368 (7th Cir. 1989), and its 1991 decision in Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991). Pierce, 65 F.3d at 570-71. While the Seventh Circuit did allude to the totality test in both of these cases, it did not adopt it in either case. For a discussion of Riley, see supra note 100.

In Fortino, the Seventh Circuit noted the different approaches for determining whether a waiver is knowing and voluntary—"ordinary principles of contract law" versus a "‘totality of circumstances’ approach." Fortino, 950 F.2d at 394-95. While noting that "[s]ome day we may have to choose" between the approaches, the court concluded that it did not have to make that choice because "[u]nder any approach, Fortino must lose." Id. at 395.

The "some day" came with Pierce, in which the Seventh Circuit noted that "[t]he facts of [the] case require[d] [it]" to choose between the two approaches. 65 F.3d at 571. Even though the court did not explain why the case required the choice, the Seventh Circuit likely believed that, even though Pierce’s Title VII waiver passed muster under traditional contract law defenses, it might not have been knowing and voluntary under the totality test. See id. at 568-71. Thus, the potential for varying results under the approaches prompted the court to choose between the two.

Specifically, Pierce presented three contract law defenses to the waiver, and the Seventh Circuit rejected all of them. Id. at 568-70. As to Pierce’s contractual ambiguity defense, the court ruled that the waiver “clearly encompassed Pierce’s discrimination claims” and that the employer’s statement regarding the scope of the waiver did not create any “extrinsic ambiguity” in the face of unambiguous language. Id. at 568. As to his duress defense, the court concluded that Pierce’s humiliation at being terminated could not, as a matter of law, constitute duress. Id. at 569. As to his fraudulent inducement and misrepresentation defense, the court found that Pierce’s reliance on any alleged misrepresentation regarding the waiver’s limited scope was not reasonable in light of the clear, broad language of the waiver. Id. at 569-70.

While the Seventh Circuit did not explain how or why the totality test might invalidate Pierce’s waiver that had otherwise survived these contract law defenses, the following factors likely led the court to believe that the waiver might not have been knowing and voluntary: (1) the short time Pierce was given to review and sign the waiver (one or two days) and (2) Pierce’s lack of actual legal representation prior to signing the waiver. See id. at 567. Indeed, the test’s remaining factors appeared to point to a knowing and voluntary waiver, as: (1) Pierce had business experience including over twenty years of work at Santa Fe Railway Co., he was familiar with his rights under the discrimination laws, and he had previously rejected a severance package with a full waiver of claims; (2) Pierce had actually requested the severance package and negotiated an extra day to review the agreement; (3) the agreement was clear; (4) Pierce had read the waiver before signing; (5) valid consideration supported the agreement; and (6) Pierce was told that he could consult with
The Seventh Circuit varied its totality test by adding to the six Coventry factors another Employee-Dependent Factor: “whether the employee actually read the release and considered its terms before signing it.” The court then remanded the case to the district court for the trial judge (“and possibly a . . . jury”) to apply the totality test and determine if Pierce had knowingly and voluntarily waived his Title VII and ADEA rights.

Less than two months after Pierce, the Sixth Circuit—which had applied the pure contract-based approach nine years earlier in Runyan—shifted to the totality test in Adams v. Philip Morris, Inc. The Adams court did not acknowledge that it was changing from Runyan’s approach to the totality test, and it did not offer further rationale for its shift.

For its totality test, the Sixth Circuit stated that it would “look to” the following factors:

1. plaintiff’s experience, background, and education;
2. the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer;
3. the clarity of the waiver;
4. consideration for the waiver; as well as
5. the totality of the circumstances.

Applying these factors, the Sixth Circuit concluded that Adams’ waiver was knowing and voluntary, thus barring his ADEA and Title VII

134. Id. at 571. As part of its totality test, the Seventh Circuit also included “whether the employee’s release was induced by improper conduct on the defendant’s part.” Id. This factor would appear to embody the traditional contract defenses of duress, fraudulent inducement, or coercion.

135. Id. at 572.

136. See supra notes 33-42 and accompanying text (discussing Runyan).

137. 67 F.3d 580 (6th Cir. 1995).

138. In fact, between its 1986 Runyan and 1995 Adams decisions, the Sixth Circuit continued to recognize that it used the pure contract-based approach to determine whether a waiver of federal employment claims was knowing and voluntary. See Tura v. Sherwin-Williams Co., Nos. 90-3419, 90-3445, 1991 U.S. App. LEXIS 11792, at *4-6 (6th Cir. May 28, 1991) (stating that “[t]he Sixth Circuit and Eighth Circuit apply ordinary contract principles in determining whether a waiver has been knowingly and voluntarily executed” and rejecting the plaintiff’s argument that the totality test “represents an evolution in the law since Runyan”); Shaheen v. B.F. Goodrich Co., 873 F.2d 105, 107 (6th Cir. 1989) (stating that “[i]f ‘overreaching or exploitation is not inherent in the situation,’ we will examine waivers of employee rights under normal contract principles” and enforce those waivers “absent the typical exceptions for fraud, duress, lack of consideration or mutual mistake” (citations omitted) (quoting Schulte, Inc. v. Gangi, 328 U.S. 108, 121-22 (1946) (Frankfurter, J., dissenting))).

139. Adams, 67 F.3d at 583.
discrimination claims.\textsuperscript{140} The court relied on the following Employee-Dependent and Employer-Controlled Factors: (1) Adams had supervisory experience and was “generally knowledgeable and aware of his rights”; (2) the clear waiver was “easily understandable by someone of Adams’ abilities”; and (3) Adams had five days in which to consider the waiver and consult an attorney before signing it.\textsuperscript{141}

The final circuit to adopt the totality test was the First Circuit in \textit{Smart v. Gillette Co. Long-Term Disability Plan}.\textsuperscript{142} While prior circuits had initially adopted the totality test for ADEA or Title VII waivers, the First Circuit did so for waivers of employee welfare benefit claims under the Employee Retirement Income Security Act (ERISA).\textsuperscript{143}

The \textit{Smart} court concluded that “[o]nly an inquiry into the totality of the circumstances can determine whether there has been a knowing and voluntary relinquishment” of an individual’s ERISA rights.\textsuperscript{144} The First Circuit also noted that “no single fact or circumstance is entitled to talismanic significance on the question of waiver.”\textsuperscript{145} In adopting the totality test, the court reasoned that “courts should scrutinize an ostensible waiver with care” in light of the congressional policy of preserving ERISA-related rights.\textsuperscript{146}

For its totality test, the First Circuit listed “a compendium of six factors”\textsuperscript{147} that were essentially the same as the six \textit{Coventry} factors, except that it added the employee’s “sophistication” to the education and

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 583. The OWBPA did not apply to Adams’ ADEA waiver because he signed it before the OWBPA’s effective date. \textit{See id.} at 582-83.
\item \textsuperscript{141} \textit{Id.} Two years after its \textit{Adams} decision, the Sixth Circuit appeared to return to \textit{Runyan}’s pure contract-based approach in \textit{Mararri v. WCI Steel, Inc.}, 130 F.3d 1180, 1184 (6th Cir. 1997) (citing \textit{Runyan} and \textit{Shaheen} and stating that “waivers of employee rights are to be examined under normal contract principles unless overreaching or exploitation is inherent in the situation”); \textit{see also} \textit{Raczak v. Ameritech Corp.}, 103 F.3d 1257, 1268 (6th Cir. 1997) (noting that the Sixth Circuit has “endorsed the application of common law doctrines to waivers and releases” and that “‘normal contract principles’” should apply to waivers in “the absence of overreaching or exploitation” (quoting \textit{Shaheen}, 873 F.2d at 107 (6th Cir. 1989)). However, subsequent Sixth Circuit opinions followed \textit{Adams} rather than \textit{Mararri}. \textit{See infra} note 155 and accompanying text (discussing Sixth Circuit decisions applying the totality test).
\item \textsuperscript{142} 70 F.3d 173, 181 (1st Cir. 1995); \textit{see supra} Part II.C.
\item \textsuperscript{143} 29 U.S.C. §§ 1001-1461 (2000 & Supp. II 2002); \textit{Smart}, 70 F.3d at 181.
\item \textsuperscript{144} \textit{Smart}, 70 F.3d at 181.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.} The First Circuit also relied on precedent from the Second Circuit that had applied a totality test to waivers of ERISA-related claims. \textit{Id.} (discussing the Second Circuit’s decisions in \textit{Finz v. Schlesinger}, 957 F.2d 78, 82 (2d Cir. 1992), and \textit{Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan}, 935 F.2d 1360, 1368 (2d Cir. 1991)). The Second Circuit decided \textit{Laniok} and \textit{Finz}—both ERISA cases—after its 1989 opinion in \textit{Bormann}, in which it initially adopted the totality test. \textit{Bormann v. AT&T Commc’ns, Inc.}, 875 F.2d 399, 403 (2d Cir. 1989).
\item \textsuperscript{147} \textit{Smart}, 70 F.3d at 181.
business experience factor. 148 Concluding that Smart’s ERISA waiver was knowing and voluntary, the First Circuit significantly relied on the following Employee-Dependent Factors: (1) Smart was “well-educated and commercially sophisticated,” with a college degree and ten years of “professional experience” as a product analyst for Gillette; (2) Smart was represented by legal counsel prior to signing the waiver; and (3) Smart had successfully negotiated certain changes into the severance agreement. 149

In addition, the court noted that Smart had at least twelve days in which to review the severance agreement—a time period that “seem[ed] ample to permit a sophisticated businesswoman and her lawyer carefully to review the terms.” 150

Since Alexander set the knowing and voluntary standard for a waiver of federal employment claims in 1974, 151 the federal circuits have split as to the best method for determining whether a waiver meets that standard. 152 The limited circuits that initially addressed the issue in the 1980s viewed the waiver as a contract and tended to apply traditional contract principles (such as contract clarity, consideration, and the absence of duress, fraud, or mutual mistake) to make the knowing and voluntary determination. 153

By 1995, however, nine circuits—the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh—had adopted their own versions of the totality test to determine whether a waiver of federal employment claims met Alexander’s knowing and voluntary standard. 154 These circuits still adhere to that test when evaluating these waivers, 155 while only two

148. Id. at 181 n.3.
149. Id. at 182.
150. Id.
151. See supra Part II.A.
152. See supra Part II.C.
153. See supra Part II.B.
154. See supra Part II.C.
155. See, e.g., Dorn v. Gen. Motors Corp., 131 F. App’x 462, 468-69 (6th Cir. 2005) (applying the totality test and concluding that the plaintiff had knowingly and voluntarily waived his ADEA claims); Cuchara v. Gai-tronics Corp., 129 F. App’x 728, 730-32 (3d Cir. 2005) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his Title VII, ADA, and ERISA claims); Yablon v. Stroock & Stroock & Lavan Ret. Plan and Trust, 98 F. App’x 55, 57 (2d Cir. 2004) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his ERISA claims); Nicklin v. Henderson, 352 F.3d 1077, 1080-81 (6th Cir. 2003) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his disability discrimination claims under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-718 (2000 & Supp. II 2002)); Smith v. Amedisys Inc., 298 F.3d 434, 441, 443-44 (5th Cir. 2002) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived her Title VII sexual harassment, discrimination, and retaliation claims); Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276-78 (1st Cir. 2002) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived her Title VII sexual harassment and retaliation claims); Bennett
circuits—the Fourth and the Eighth—still apply the pure contract-based approach.  

v. Coors Brewing Co., 189 F.3d 1221, 1228-29 (10th Cir. 1999) (finding that the district court had erred by not applying the totality test to the plaintiffs’ ADEA waivers on the “issue of whether the waivers were knowing and voluntary”); Morais v. Cent. Beverage Corp. Union Employees’ Supp. Ret. Plan, 167 F.3d 709, 712-15 (1st Cir. 1999) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his ERISA claims); Tung v. Texaco Inc., 150 F.3d 206, 208 (2d Cir. 1998) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his Title VII race and national origin discrimination claims); Livingston v. Adirondack Beverage Co., 141 F.3d 434, 438-39 (2d Cir. 1998) (remanding to the district court to evaluate the plaintiffs’ waiver of Title VII race harassment claims under the totality test); Bledsoe v. Palm Beach County Soil & Water Conserv. Dist., 133 F.3d 816, 819-20 (11th Cir. 1998) (applying the totality test and remanding the case for a jury trial on whether the plaintiff knowingly and voluntarily waived his ADA claims); Rivera-Flores v. Bristol-Myers Squibb Caribbean, 112 F.3d 9, 10-14 (1st Cir. 1995) (applying the totality test and concluding that the plaintiff knowingly and voluntarily waived his ADA and ERISA claims); Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 110 F.3d 431, 437, 434-35 (7th Cir. 1997) (justifying its adoption of the totality test over a pure contract-based approach because the latter “does not give sufficient weight to the federal interest in ensuring that the goals of the ADEA are not undermined by private agreements born of circumstances in which employees . . . lack information regarding their legal alternatives”); Wagner v. Nutrasweet Co., 95 F.3d 527, 531-33 (7th Cir. 1996) (applying the totality test and concluding that two plaintiffs had knowingly and voluntarily waived their Title VII sex discrimination and Equal Pay Act pay claims); Puentes v. United Parcel Serv., Inc., 86 F.3d 198, 199-99 (11th Cir. 1996) (applying the totality test and concluding that the plaintiffs waived their Title VII race and national origin discrimination claims); Vaefaga v. Or. Steel Mills, 943 F.2d 862, 866 (9th Cir. 1991) (applying the totality test to conclude that the plaintiff’s Title VII waiver was “voluntary, deliberate, and informed”); Rulledge v. Int’l Bus. Machs. Corp., 91-1385, 92 U.S. App. LEXIS 18501, *4-12 (10th Cir. August 6, 1992) (applying the totality test in a pre-OWBPA case and concluding that the plaintiff had knowingly and voluntarily waived his ADEA age discrimination claim); Wright v. Sw. Bell Tel. Co., 925 F.2d 1288, 1292-93 (10th Cir. 1991) (applying the totality test and concluding that the plaintiff had knowingly and voluntarily waived his Title VII race discrimination and ERISA claims).

156. See, e.g., Warnebold v. Union Pac. R.R., 963 F.2d 222, 223 n.2, 224 (8th Cir. 1992) (comparing, in a pre-OWBPA case, the court’s “ordinary contract principles” approach from Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), to the totality test “used by the other circuits” and finding that plaintiff had knowingly and voluntarily waived his Title VII reverse sex discrimination and ADEA claims); Ulvin v. Nw. Nat’l Life Ins. Co., 943 F.2d 862, 866 (8th Cir. 1991) (rejecting an opt-in class plaintiff’s argument to use the “more stringent” totality test in lieu of the Eighth Circuit’s pure contract-based approach from Lancaster and affirming the district court’s conclusion that the plaintiff’s ADEA waiver was knowing and voluntary, because it contained “clear, simple language,” was supported by consideration, and was signed “of his own free will”); Todd v. Blue Ridge Legal Servs., Inc., 175 F. Supp. 2d 857, 862-65 (W.D. Va. 2001) (after noting that some circuits have used the totality test, finding “no reason to deviate from O’Shea’s approach and then applying Virginia’s “ordinary contract principles” to conclude that the plaintiff knowingly and voluntarily waived her claims under the Equal Pay Act, 29 U.S.C. § 206(d) (2000), because consideration existed and there was no duress); Musgrave v. Conagra, Inc., No. 8:00CV78, 2000 U.S. Dist. LEXIS 15914, *6 (D. Neb. Oct. 30, 2000) (citing Lancaster and noting
III. CONGRESSIONAL ACTIVITY IN THE KNOWING AND VOLUNTARY WAIVER ARENA

In 1990, Congress passed the OWBPA.\textsuperscript{157} Title II of the OWBPA sets forth specific requirements that must be met before an employee’s waiver of ADEA claims can be considered knowing and voluntary.\textsuperscript{158} At the time the OWBPA was enacted, five federal circuits had already adopted the totality test.\textsuperscript{159}

The OWBPA was the culmination of three years of congressional wrangling with the courts and the EEOC regarding ADEA waivers. An understanding of this history lends greater insight into the OWBPA, its requirements, and the sources of those requirements.

A. Act One: The Federal Circuits and EEOC Permit Unsupervised ADEA Waivers

Prior to the OWBPA, a key question before the federal circuits and the EEOC had been whether an ADEA waiver must be supervised by the courts or the EEOC in order to be valid. The circuits and the EEOC agreed on the answer to that question.

From 1986 through 1990, five federal circuits—the Second Circuit in that “the validity and enforceability of [plaintiff’s Title VII waiver] is controlled by principles of state contract law”); Horton v. Norfolk S. Corp., 102 F. Supp. 2d 330, 339-40 (M.D.N.C. 1999) (citing O’Shea v. Comm. Credit Corp., 930 F.2d 358 (4th Cir. 1991), and then applying North Carolina law on contract “execution, validity, and interpretation” to find that the plaintiff validly waived his Title VII race discrimination claim because there was no mutual mistake in the agreement’s execution).

Thus, although the Fourth and Eighth Circuits have not revisited the knowing and voluntary waiver issue since O’Shea (for the Fourth Circuit) and Warnebold and Ulvin (for the Eighth Circuit), the above-referenced district court opinions in Todd and Horton (both within the Fourth Circuit) and Musgrave (within the Eighth Circuit) evidence continued application of the pure contract-based approach within those circuits.


\textsuperscript{158.} 29 U.S.C. § 626(f) (2000). In response to the Supreme Court’s decision in Public Employees Retirement System v. Betts, 492 U.S. 158 (1989), Congress enacted Title I of the OWBPA to clarify that “discrimination on the basis of age in virtually all forms of employee benefits” is unlawful under the ADEA. S. REP. NO. 101-263, at 5 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1510 [hereinafter Senate OWBPA Report]. See also Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (stating that “legislative action is necessary” after Betts to “restore” Congress’s intent that the ADEA prohibit age-based discrimination in “all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations”]). In Betts, the Court had held that the ADEA’s prohibitions did not apply to employee benefits and employee benefit plans, except in limited situations. 492 U.S. at 177-79.

\textsuperscript{159.} See supra Part II.C.
Bormann, the Third Circuit in Coventry, the Fifth Circuit in O’Hare, the Sixth Circuit in Runyan, and the Eighth Circuit in Lancaster—concluded that a person could privately waive an ADEA claim without government supervision. 160 While agreeing on this issue, these federal circuits disagreed as to the appropriate test or approach for determining whether that unsupervised ADEA waiver was knowing and voluntary; some opted for a pure contract-based approach, while others adopted the totality test. 161

The EEOC viewed the ADEA waiver issue similarly to the federal circuits. In late August 1987, the EEOC issued a final rule that permitted unsupervised ADEA waivers as long as they met certain requirements. 162 Entitled “Exemption Allowing Non-EEOC Supervised Waivers Under the ADEA,” the rule permitted an unsupervised ADEA waiver if the following conditions were met: (1) the waiver was “knowing and voluntary”; (2) it did not waive ADEA rights or claims that arose prospectively (in the future); and (3) it was supported by consideration beyond any employee benefits to which the person was already entitled. 163

160. In reaching this conclusion, these circuits rejected the argument that the ADEA’s incorporation of FLSA enforcement procedures meant that ADEA waivers required government supervision just like FLSA waivers. See O’Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1016-17, 1016 n.1 (5th Cir. 1990); Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 401-02 (2d Cir. 1989); Coventry v. U.S. Steel Corp., 856 F.2d 514, 521 n.8 (3d Cir. 1988); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 540 (8th Cir. 1987); Runyan v. Nat’l Cash Register Corp., 787 F.2d 1039, 1041-43 (6th Cir. 1986).

161. While the federal circuits that initially adopted the totality test (such as the Third Circuit in Coventry, the Second Circuit in Bormann, and the Fifth Circuit in O’Hare) did so in ADEA cases, this ADEA link did not reflect any judicial intent to limit the test to ADEA cases only. Instead, this link was the result of timing, because the waiver issue du jour among the federal circuits in the mid-to-late 1980s was whether ADEA waivers required government supervision like waivers of FLSA claims. See supra Part II.C. Indeed, later federal circuits adopted the totality test for non-ADEA waivers. See Smart v. Gillette Co. Long Term Dis. Plan, 70 F.3d 173, 181 (1st Cir. 1995) (ERISA case); Pierce v. Atchison, Topeka, & Santa Fe Ry. Co., 65 F.3d 562, 571 (7th Cir. 1995) (Title VII and ADEA case); Torrez v. Pub. Serv. Co., 908 F.2d 687, 690 (10th Cir. 1990) (Title VII case); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989) (Title VII case).


163. Id. at 32, 293, 32, 296.
In addition to setting forth these requirements, the EEOC’s rule also provided guidance regarding its “knowing and voluntary” waiver requirement. Although the rule did not create any necessary or sufficient criteria, it listed the following factors as “indicative” of a knowing and voluntary waiver: (1) that the waiver was written in understandable language and clearly waived ADEA rights; (2) that the employee had a “reasonable period of time” to deliberate before waiver signature; and (3) that the employee was encouraged to consult with legal counsel before signing the waiver.  

The EEOC’s rule—which preceded the Third Circuit’s totality test in Coventry by one year—can be viewed as an early formulation of that test. Like Coventry’s totality test, the rule considered (1) the time that an employee had the agreement before signing it (the second Coventry factor), (2) the agreement’s clarity (the fourth Coventry factor), and (3) whether valid consideration supported the agreement (the sixth Coventry factor). The rule also considered whether the employer encouraged the employee to consult with legal counsel, which was not in Coventry’s test but which later became a factor within many circuits’ totality tests.

However, the EEOC’s rule was not a complete predecessor to the totality test because it did not include any of the test’s Employee-Dependent Factors, such as the employee’s education, background, and business experience; whether the employee actually consulted with an attorney before signing the waiver; the role that an employee played in deciding the terms of the agreement; whether the employee actually knew or should have known of his or her employment rights upon signing the waiver; and whether the employee actually read the waiver and considered its terms before signing it.

B. Act Two: Congress Suspends the EEOC’s Final Rule

The EEOC’s final rule—which was slated to take effect on September 27, 1987—was received poorly by Congress. Propelled by a “grave concern” that permitting unsupervised ADEA waivers was against public policy and “without legal foundation,” Congress acted quickly to block
the EEOC from enforcing the rule. In October 1987, Congress amended its appropriations bill to prevent the EEOC from using budgeted funds to enforce the rule during fiscal year 1988.\textsuperscript{170} Congress took similar measures in its appropriations bills for fiscal years 1989 and 1990.\textsuperscript{171}

C. Act Three: Congress Introduces the Waiver Protection Act—The Predecessor to the OWBPA

Congress did not stop after blocking the EEOC from enforcing its rule. In early 1989, both the Senate and House of Representatives introduced versions of the Age Discrimination in Employment Waiver Protection Act of 1989 (Waiver Protection Act).\textsuperscript{172} While Congress never passed the Act, it borrowed several of the Act’s provisions for the OWBPA one year later.

Except in limited circumstances, the Waiver Protection Act would have prohibited individuals from waiving ADEA claims “without the supervision of the [EEOC] or a court.”\textsuperscript{173} But, if the following two conditions precedent were met, then unsupervised ADEA waivers were allowed: (1) the ADEA claim must have already been formalized at the time of the waiver and (2) the waiver must satisfy certain requirements indicating that it was knowing and voluntary.\textsuperscript{174}

The first condition precedent was that the unsupervised ADEA waiver must have been “in settlement” of a “bona fide claim” of age discrimination against the employer.\textsuperscript{175} The Act’s definition of “bona fide claim” included only three types of formalized age discrimination claims: (1) an age discrimination charge filed with the EEOC; (2) an age discrimination lawsuit filed in court; or (3) a “specific allegation of age discrimination” that had been communicated to the employer in good faith and in writing.\textsuperscript{176} Because this first condition limited “bona fide” claims to those that had already been pursued, it would have significantly

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restricted (if not precluded) an employer from proactively using waivers as a method to prevent ADEA claims or lawsuits from being initiated in the first place.\textsuperscript{177}

The second condition precedent was that the unsupervised ADEA waiver must meet the following requirements demonstrating that it was knowing and voluntary: (1) the settlement agreement was in writing and “specifically refer[red]” to rights or claims arising under the ADEA; (2) the agreement did not waive ADEA claims that arose prospectively (after the agreement was signed); (3) the waiver was in exchange for consideration to which the employee was not already entitled; (4) the employee was “given a reasonable period” of time to consider the agreement before waiver signature, with the House bill requiring “not less than 14 days”\textsuperscript{178}, and (5) the employee was advised in writing to consult an attorney before waiver signature.\textsuperscript{179}

Somewhat ironically, the Waiver Protection Act paralleled the EEOC’s final rule, which Congress had previously suspended, in two respects. First, the rule appeared to be the source for many of the Act’s “knowing and voluntary” requirements. Four of the Act’s five requirements—namely, requirements (2), (3), (4), and (5)—mirrored waiver requirements and knowing and voluntary criteria from the EEOC’s final rule.\textsuperscript{180} Requirements (3) and (4)—dealing with valid consideration and affording an employee time to review the waiver, respectively—also had appeared in Coventry’s totality test.\textsuperscript{181} Indeed, the Act’s only unique requirement was including a specific reference to ADEA rights in the waiver.\textsuperscript{182} Second, like the EEOC rule, the Waiver Protection Act—introduced six months after the Third Circuit’s Coventry decision—did not include any of the totality test’s Employee-Dependent Factors.\textsuperscript{183}

\begin{thebibliography}{183}
\bibitem{177} See N. Jansen Calamita, Note, The Older Workers Benefit Protection Act of 1990: The End of Ratification and Tender Back in ADEA Waiver Cases, 73 B.U.L. REV. 639, 646-47 (1993) (observing that the Waiver Protection Act “would have virtually eliminated the prophylactic use of waivers by employers” and allowed ADEA waivers to be used only as “settlement tool[s]” in a litigation, post-claim setting); \textit{see also} Gregory C. Parlman, Proposed Congressional Limitations upon the Use of Unsupervised Waivers of ADEA Claims, 15 EMP. REL. L.J. 541, 547 (1990) (observing that, under the Waiver Protection Act, proactive employers could not obtain a valid ADEA waiver “without ‘creating’ claims by encouraging discharged employees to make written claims of age discrimination”).
\bibitem{178} H.R. 1432, 101st Cong. § 2 (1989).
\bibitem{179} S. 54, 101st Cong. § 2 (1989); H.R. 1432, 101st Cong. § 2 (1989). The House bill also required that the person be informed that another individual could accompany him or her to “witness or assist” during negotiation of the ADEA claim. H.R. 1432, 101st Cong. § 2 (1989).
\bibitem{180} \textit{See supra} notes 163-64 and accompanying text.
\bibitem{181} \textit{See supra} Part II.C.1 (discussing Coventry).
\bibitem{182} \textit{See supra} notes 163-64, 177-79 and accompanying text.
\bibitem{183} \textit{See supra} notes 174-79 and accompanying text.
\end{thebibliography}
Despite these similarities to the EEOC’s rule, the Waiver Protection Act differed from the rule (and Coventry’s totality test) by transforming the knowing and voluntary criteria (or factors) into per se waiver requirements.\textsuperscript{184} This feature of the Act—along with the actual five requirements demonstrating a knowing and voluntary waiver—would appear a year later in the OWBPA.\textsuperscript{185} Consequently, even though Congress never brought the Waiver Protection Act to a full vote, much of its work on the Act laid the foundation for the OWBPA.

\section*{D. \textit{The Final Act: Congress Passes the OWBPA}}

On October 16, 1990, Congress enacted the OWBPA.\textsuperscript{186} The OWBPA differs significantly from the Waiver Protection Act by allowing unsupervised ADEA waivers on a much broader scale because there is no requirement that an age discrimination claim be formalized and adversarial at the time of waiver.\textsuperscript{187}

Like the Waiver Protection Act, however, the OWBPA enumerates per se requirements for a knowing and voluntary waiver; it does not merely list (like the EEOC’s final rule and the totality test) the criteria or factors that are relevant in making that determination. Specifically, the OWBPA states that a person “may not waive” an ADEA claim “unless the waiver is knowing and voluntary.”\textsuperscript{188} This ADEA “waiver may not be considered knowing and voluntary unless at a minimum” the following seven per se requirements are met:\textsuperscript{189}

\begin{enumerate}
  \item the waiver is part of an employer-employee agreement that is “written in a manner calculated to be understood” by that employee or “the average individual eligible to participate” in the severance package or program;\textsuperscript{190}
\end{enumerate}

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\begin{itemize}
  \item \textsuperscript{184} See supra notes 174, 178-79 and accompanying text.
  \item \textsuperscript{185} See infra Part III.D.
  \item \textsuperscript{187} See 29 U.S.C. § 626(f) (2000). Because the House version of the OWBPA was based substantially on the Waiver Protection Act, it contained a “bona fide claim” requirement. See H.R. 3200, 101st Cong. § 201 (1990); see also House OWBPA Report, supra note 169, at 4-5, 61-62, 68-70 (setting forth requirements for a bona fide claim). The Senate version, which passed, dropped that requirement. See S. 1511, 101st Cong. § 201 (1990); Senate OWBPA Report, supra note 158, at 42-43.
  \item \textsuperscript{188} 29 U.S.C. § 626(f)(1) (2000).
  \item \textsuperscript{189} Id.
  \item \textsuperscript{190} Id. § 626(f)(1)(A). Congress said that it “expects . . . courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience.” Senate OWBPA Report, supra note 158, at 32-33; House OWBPA Report, supra note 169, at 51.
\end{itemize}
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(2) the waiver “specifically refers to rights or claims arising under” the ADEA;\(^{191}\)
(3) the waiver does not encompass rights or claims that arise after the date the waiver is signed;\(^{192}\)
(4) the waiver is in exchange for consideration that is in addition to anything to which the employee is already entitled;\(^{193}\)
(5) the employee “is advised in writing to consult with an attorney prior to executing the agreement”\(^{194}\);
(6) the employee is given at least twenty-one days in which to consider the agreement;\(^{195}\) and
(7) the agreement affords the employee at least seven days after signing the agreement to revoke it.\(^{196}\)

The OWBPA slightly lessens these seven standard requirements for a waiver of an ADEA claim that has already been filed with the EEOC or in court.\(^{197}\) However, it imposes two additional requirements for an ADEA waiver that an employee signs in conjunction with a larger scale termination program (i.e., a reduction-in-force) offered to a “group or class


\(^{192}\) 29 U.S.C. § 626(f)(1)(C) (2000). Congress stated that “[i]t is a basic principle of fairness that employees should not be permitted to waive rights or claims on a prospective basis.” Senate OWBPA Report, supra note 158, at 33; House OWBPA Report, supra note 169, at 51.


\(^{194}\) Id. § 626(f)(1)(E). Congress said that “it is vitally important that the employee understand the magnitude of what he or she is undertaking” and that “[l]egal counsel is in the best position to help the individual reach that understanding.” House OWBPA Report, supra note 169, at 52. But, Congress also recognized that “[a]n employee cannot be required to hire an attorney before signing a waiver.” Id.


[a]n employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist.

Senate OWBPA Report, supra note 158, at 33; House OWBPA Report, supra note 169, at 51.


\(^{197}\) 29 U.S.C. § 626(f)(2) (2000). In this situation, the OWBPA’s seven requirements still apply, except that an employee (1) need only be provided “a reasonable period of time” (rather than a twenty-one day period) to review the agreement and (2) does not have the seven-day right of revocation. Id. § 626(f)(2)(A)-(B).
of employees.”

The similarities between the OWBPA’s requirements and both the Waiver Protection Act’s requirements and certain totality test factors are apparent. Indeed, five of the OWBPA’s requirements (namely, requirements (2), (3), (4), (5), and (6)) resemble, if not mirror, all of the waiver requirements from the Waiver Protection Act, except that the OWBPA specifies a concrete review period whereas the Senate’s version of the Waiver Protection Act did not. Four of the OWBPA’s requirements (namely, requirements (1), (4), (5), and (6)) had also appeared in the totality test, except that the totality test, unlike the OWBPA, failed to specify the length of the review period.

However, the OWBPA’s requirement (7), which affords a revocation period to the employee, is an altogether new requirement that was contained in neither the Waiver Protection Act nor the totality test. Importantly, the OWBPA—enacted after five federal circuits had adopted the totality test—did not include any of the totality test’s Employee-Dependent Factors.

Congress enacted the OWBPA due to perceived inadequacies in the state of the law on ADEA waivers. Specifically, Congress was aware of the circuit split regarding what test or approach should be used to determine if a waiver was knowing and voluntary. Indeed, Congress discussed the “ordinary contract principles approach”—which it labeled “cursory”—and the “‘totality of circumstances’ approach”—which it labeled “more thorough” and “more protective.” Congress even proceeded to state that it expected courts to “scrutinize carefully the

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198. Id. § 626(f)(1)(F)(ii), (H). In this situation, the OWBPA (1) expands the review period to forty-five days and (2) requires an employer to provide the employee with certain written information regarding the termination program. Id. This information includes: the class or group of employees covered by the program; the program’s eligibility factors and time limit(s); the job titles and ages of all employees selected for the program; and the ages of all employees in the same “job classification or organizational unit” who were not “selected for the program” (i.e., those who remained employed). Id. § 626(f)(1)(H)(i)-(ii).

Congress added these two extra waiver requirements for “group or class” termination programs because they “often involve large numbers of employees, and complex financial arrangements.” Senate OWBPA Report, supra note 158, at 33. Congress felt that (1) the expanded review period provided needed additional time “to review options, understand the program, and consult with an attorney before signing away potentially valid legal claims” and (2) the informational requirements “permit[ed] older workers to make more informed decisions” and “[gave] all eligible employees a better picture” of whether their terminations under the program violated the ADEA. Id. at 33-34.

199. See supra Part III.C.

200. The OWBPA’s two additional requirements for ADEA waivers signed in conjunction with a larger scale termination of a “group or class of employees” are also new. See 29 U.S.C. § 626(f) (2000); supra Part III.C.


202. Id. at 27 (quoting Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988)).
complete circumstances in which [a] waiver was executed” and expressed “support” for the totality test.203

However, Congress did not issue a wholesale endorsement of the totality test. Instead, Congress expressed concern that courts applying the totality test merely scrutinized “many different factors or criteria on a case-by-case basis” rather than going the extra step of requiring that “certain protective factors must be present.”204 As a result, Congress believed that the totality test’s case-by-case approach only served to “promis[e] more litigation in the future.”205 In response, Congress enacted the OWBPA to “spell out clear and ascertainable standards” to govern ADEA waivers, “clarify an unsettled area of the law and reverse a disturbing trend of litigation” concerning those waivers.206

Finally, Congress also recognized that the OWBPA provided heightened, waiver-related protections only for older workers (those forty years old or older), rather than for workers in all protected classes.207 Congress noted that some OWBPA critics had contended that “older workers should be treated no differently from the minority and female workers who are protected against employment discrimination under Title VII.”208

However, Congress justified its heightened waiver requirements for older workers on two grounds. First, it noted that the ADEA itself provided greater procedural protections than Title VII and that this reflected Congress’s prior decision to “treat older workers differently from workers protected under Title VII.”209

Second, Congress viewed older workers as more susceptible to being “manipulated or even coerced into signing away their ADEA protections.”210 The greater susceptibility of older workers is why Congress thought that “the provisions [of the OWBPA] are so important.”211 Congress felt that older workers had this greater susceptibility due to (1) the circumstances that typically led to their

203. House OWBPA Report, supra note 169, at 51; Senate OWBPA Report, supra note 158, at 32.
204. House OWBPA Report, supra note 169, at 27.
205. Id.
206. Id.
207. Id. at 24.
208. Id.
209. Id. Specifically, the House OWBPA Report noted that ADEA plaintiffs: (1) had a right to a jury trial and liquidated damages, unlike Title VII plaintiffs at the time; (2) did not have to wait as long as Title VII plaintiffs to bring a lawsuit after filing an EEOC charge (sixty days versus 180 days); and (3) were entitled to mandatory back pay damages, which were discretionary under Title VII. See id.
210. Id.
211. Id.
terminations and (2) the challenges that they faced after being terminated.\(^{212}\)

As to the former, Congress explained that older workers were often discharged as part of reductions-in-force that were less individualized in nature; as a result, Congress believed that these workers “would not reasonably be expected to know or suspect that age may have played a role in the employer’s decision, or that the program may be designed to remove older workers from the labor force.”\(^{213}\) Indeed, Congress observed that an employer that implements a large scale termination typically “advises [the affected workers] that the termination is not a function of their individual status.”\(^{214}\)

As to the latter, Congress noted that “[a]ge discrimination victims” tended to have a modest annual income (“only $15,000”), had difficulty obtaining a new job (“less than a 50/50 chance of ever finding new employment”), and had “little or no savings.”\(^{215}\) As a result, Congress felt that it was “reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises” of their ADEA claims.\(^{216}\)

IV. THE TOTALITY TEST EVALUATED

Currently, nine federal circuits use the totality test for determining whether waivers of non-ADEA federal employment claims (such as those under Title VII and the ADA) meet Alexander’s knowing and voluntary standard.\(^{217}\) As initially adopted by the Third Circuit in Coventry, the totality test included six factors for making this determination: (1) the employee’s education and business experience; (2) the amount of time the employee had (or had access to) the waiver before signing it; (3) the employee’s role in deciding the terms of the waiver agreement; (4) the

\(^{212}\) Id.

\(^{213}\) Id. at 22-23. See also Senate OWBPA Report, supra note 158, at 32 (stating that “[g]roup termination and reduction programs stand in stark contrast to the individual separation . . . [because] employees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics”).

\(^{214}\) Senate OWBPA Report, supra note 158, at 32.

\(^{215}\) House OWBPA Report, supra note 169, at 23.

\(^{216}\) Id. In contrast, Congress viewed workers in other protected classes to be treated in a more individualized manner, which tended to place them “on notice that they are involved in an arms-length adversarial relationship” with an employer. Id. at 24. As a result, Congress believed these workers—who “[t]ypically . . . recognize and complain about unequal treatment”—to be less susceptible to coercion or manipulation in waiving their non-ADEA rights. Id.

\(^{217}\) The totality test does not apply to an employee’s waiver of claims regarding minimum wage and overtime compensation violations under the FLSA, because a waiver of FLSA claims must be supervised by either the U.S. Department of Labor or a court. See supra notes 40, 160, 169 (discussing the supervised waiver requirement of the FLSA).
waiver’s clarity; (5) whether the employee actually consulted with, or was represented by, legal counsel before signing the waiver; and (6) whether the employee received consideration that exceeded any benefits to which he or she was already entitled. 218

The totality test evolved after Coventry, as several federal circuits adopting the totality test added or varied factors for their respective tests. Examples of these additional or modified factors include the following: (1) whether the employer advised or encouraged the employee to seek legal counsel before waiver signature; 219 (2) whether the employee knew or should have known of his or her rights before waiver signature; 220 (3) whether the employee actually read the waiver and considered its terms before signing it; 221 and (4) the employee’s level of “sophistication” (as part of the inquiry regarding education and business experience). 222

This Part discusses the three significant features of the totality test, the problematic consequences that result from two of those features, and the totality test’s inconsistency with the congressional waiver approach embodied in the OWBPA.

A. The Three Significant Features of the Totality Test

The totality test (regardless of the version) has three significant features: (1) it lacks per se waiver requirements; (2) it includes one set of waiver factors that rest solely within the employer’s control; and (3) it includes another set of waiver factors that depend solely upon the employee. 223

First, the totality test’s factors are mere indicia that a court must consider to determine if a waiver meets the knowing and voluntary standard. 224 These factors do not rise to the level of actual requirements that must be met for a waiver to be knowing and voluntary. 225 Indeed, the courts applying the totality test recognize this feature. For example, the First Circuit has acknowledged that “[i]t is not necessary that each [factor]
be satisfied before a release can be enforced. The essential question is whether, in the totality of the circumstances, the individual’s waiver of her right can be characterized as ‘knowing and voluntary.’” 226 Similarly, the Second Circuit has emphasized that “any attempt to . . . insist on rigid adherence to such a list is foreclosed by the very nature of the inquiry. The essential question is a pragmatic one.” 227

The second significant feature of the totality test is its inclusion of one group of factors that are entirely within the employer’s control and thus independent of an employee’s actions or characteristics. 228 These are the “Employer-Controlled Factors.” The totality test includes four of these factors: (1) whether the waiver language was clear and unambiguous; (2) whether the waiver was supported by valid consideration; (3) whether the employer afforded adequate time to the employee to review the waiver before signing it; and (4) whether the employer advised the employee to consult with an attorney before signing the waiver. 229 The employer—and the employer alone—has the responsibility and the ability to satisfy all of these factors. Without any guesswork or question marks, an employer can complete these four steps of the totality test in attempting to assemble a knowing and voluntary waiver.

The third significant feature of the totality test is its inclusion of another group of factors that are “considerate of the particular individual who has executed the release.” 230 These factors depend solely upon the employee’s actions or personal characteristics and are thus outside of an employer’s control. These are the “Employee-Dependent Factors.” Depending on the version of the totality test, over half of its factors can fall into this group. The Employee-Dependent Factors include the following: (1) the

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226. Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276 (1st Cir. 2002).
227. Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1368 (2d Cir. 1991). A related feature of the totality test is that its factors are not “exclusive” or “exhaustive.” See, e.g., Yablon v. Stroock & Stroock & Lavan Ret. Plan & Trust, 98 F. App’x 55, 57 (2d Cir. 2004) (discussing the “non-exhaustive factors to consider in determining knowledge and voluntariness” of a waiver); Melanson, 281 F.3d at 276 (using a “non-exclusive set of six factors” to determine if a waiver is knowing and voluntary); Morais v. Cent. Beverage Corp. Employees’ Supp. Ret. Plan, 167 F.3d 709, 713 & n.6 (1st Cir. 1999) (stating that the totality test’s factors were “helpful” but “not exclusive”); Gormin v. Brown-Forman Corp., 963 F.2d 323, 327 (11th Cir. 1992) (noting that “[w]hile this list of factors is not exhaustive, it does provide some guidance for determining whether a waiver is knowingly and voluntarily executed”); Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989) (stating that the totality test’s factors are “obviously not exhaustive”). Nonetheless, this feature of the totality test is not as significant as its other features, because the federal circuits typically restrict their evaluation of a waiver to their respective test’s enumerated factors. See supra Part II.C.
228. See, e.g., Coventry, 856 F.2d at 523.
229. See, e.g., id.
230. Id.
employee’s education, business experience, and sophistication; (2) whether the employee actually consulted with, or was represented, by an attorney; (3) the role actually taken by the employee in negotiating the agreement; (4) whether the employee actually knew (or should have known) his or her rights before signing the waiver; and (5) whether the employee actually read and considered the waiver before signing it.\footnote{231}

The employer does not have the ability to satisfy any of these Employee-Dependent Factors—the employee does. All of these factors hinge upon what actions the employee actually takes or does not take and what characteristics he or she actually possesses or does not possess. Indeed, Employee-Dependent Factors (1) and (4) (i.e., adequate education, sophistication, and business experience; and the extent of the employee’s knowledge of his or her legal rights, respectively) are particularly individualized and vary (whether in small or large degrees) for each and every employee along education, experience, and knowledge continuums.

B. The Problematic Consequences Caused by the Totality Test

The totality test’s first and third features—namely, its lack of actual waiver requirements and its Employee-Dependent Factors—represent its shortcomings because they cause several problematic consequences for employers, employees, and the courts.

1. The Totality Test’s Employee-Dependent Factors Penalize Good-Faith Employers

Because the totality test’s Employee-Dependent Factors are outside of an employer’s control, those factors can, and usually do, inject measurable uncertainty into the waiver validity issue. These factors (and the uncertainty that they inherently create) tangibly penalize good-faith employers—those who take all of the “right” steps within their control to ensure that a waiver is valid—by undercutting (if not nullifying) their efforts and forcing them to litigate the waiver issue.

The hypothetical posed in Part I illustrates how the totality test can penalize a good-faith employer. There, an employer (your company) discharged an employee and offered the employee severance pay in exchange for a waiver of federal employment claims. This employer, acting in good-faith, provided the employee with a crystal-clear waiver, gave the employee several weeks in which to review the agreement before signature, advised the employee in writing to consult an attorney before signature, and provided valid consideration for the waiver.

While this good-faith employer did everything by the book, the

\footnote{231. See supra Part II.C.}
employee can nonetheless proceed to the nearest federal courthouse or EEOC office, file one or more of his waived federal employment claims, and rely upon the uncertainty created by the Employee-Dependent Factors to challenge the validity of the waiver. Once the employee has argued that these factors create a material issue of fact so as to avoid summary judgment, the court has three options: (1) reject the argument and grant summary judgment to the employer; (2) accept the argument and permit the waiver issue to proceed to a jury or bench trial; or (3) actually invalidate the waiver at the summary judgment stage and adjudicate the underlying employment law action.

Regardless of the lawsuit’s result, the totality test has penalized this good-faith employer; the result of the lawsuit only varies the degree of the penalty. Under the first option, the good-faith employer wins the case, but the Employee-Dependent Factors still permitted the employee to create a justiciable issue as to waiver validity for purposes of summary judgment. The tangible penalty levied on this employer consists of its legal expenses to defend the merits of a waiver for which it did everything perfectly. These legal expenses for the good-faith employer could easily exceed $30,000.

232. See, e.g., Nicklin v. Henderson, 352 F.3d 1077, 1080-81 (6th Cir. 2003) (affirming summary judgment to the employer, despite the employee’s claim that he “was not offered counsel”); Melanson, 281 F.3d at 277-78 (affirming summary judgment to the employer, despite the employee’s claim that she “lacked the business acumen” and education to understand and negotiate the waiver); Morais, 167 F.3d at 713-15 (affirming summary judgment to the employer, despite the employee’s claims that he “was a common laborer with an eighth grade education” and had not consulted with an attorney prior to signature); Smart v. Gillette Co. Long Term Dis. Plan, 70 F.3d 173, 182 & n.5 (1st Cir. 1995) (affirming the district court’s dismissal of the employee’s ERISA lawsuit, despite her claims that she “did not know what ERISA was when she signed the release; that she did not know that she was releasing any rights under ERISA; and that she did not intend to release any rights under ERISA” (quoting Smart v. Gillette Co. Long Term Dis. Plan, 887 F. Supp. 383, 385 (D. Mass. 1995))); Adams v. Phillip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995) (granting summary judgment to the employer, despite the employee’s claim that his “‘extreme economic distress’ forced him to sign his waiver); Rutledge v. Int’l Bus. Machs. Corp., No. 91-1385, 1992 U.S. App. LEXIS 18501, at *7-12 (10th Cir. Aug. 6, 1992) (affirming summary judgment to the employer, despite the employee’s claim that he lacked knowledge of his rights when he signed the waiver); O’Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1016-17 (5th Cir. 1990) (affirming summary judgment to the employer, despite the employee’s claim that “stress and anxiety . . . led him to sign” his waiver); Cirillo v. Arco Chem. Co., 862 F.2d 448, 452-55 (3d Cir. 1988) (affirming summary judgment to the employer, despite the employee’s claim that he misunderstood the scope of the waiver and did not consult with an attorney prior to signing it).

233. If the lawsuit was settled before the summary judgment stage, then the penalty would also include the settlement costs that the good-faith employer paid in lieu of further litigation. The
Under the second option (i.e., a trial on the waiver issue), the penalty is even stiffer for the good-faith employer. There, the employer not only bears the same legal expenses discussed under the first option but also the significant costs and expenses to litigate the waiver issue through trial. These additional, trial-related legal expenses are also variable, but could easily add another $50,000 (bringing the total expenses to at least $80,000).

Under the third option (i.e., a trial on the federal employment claim, because the waiver was invalidated), the good-faith employer would bear the same legal expenses discussed under the first and second options but also be forced to litigate the “waived” federal employment claim. Even if the good-faith employer prevails on that underlying claim, these additional, trial-related legal expenses (again, perhaps easily exceeding $50,000 and thereby bringing the total expenses to at least $130,000) constitute further tangible penalty to this employer.

The Sixth Circuit’s Coventry case represents a real example of this third option and how the totality test can undercut and tangibly penalize good-faith employers who take the steps within their control to obtain a valid waiver. In Coventry, United States Steel (USS) seemed to do it “right”—it prepared a waiver with “clear, specific language,” did not impose any time limit on Hallas to sign the waiver (and in fact allowed him to have the waiver for the full month prior to his signature), met with Hallas to discuss the waiver and severance-related options, and provided valuable consideration to Hallas in exchange for the waiver.234

Despite USS’s good-faith efforts, however, Hallas successfully used certain Employee-Dependent Factors to undercut and, in fact, nullify the steps taken by USS.235 Finding that the waiver was not knowing and voluntary, the Sixth Circuit relied significantly on factors over which USS had no control, such as (1) Hallas did not in fact consult with an attorney prior to signing the waiver236 and (2) Hallas lacked any “meaningful comprehension of the legal significance” of the waiver because he “believed that despite the language of the release, he had preserved his right to challenge the validity of the form.”237 Thus, the totality test penalized USS more steeply than a typical good-faith employer because USS bore not only the legal expenses to defend (unsuccessfully) the

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235. Id. at 524-25.
236. Id.
237. Id. at 525.
waiver’s validity, but also the expenses to litigate Hallas’s underlying ADEA employment claim.238

2. The Totality Test’s Lack of Per Se Waiver Requirements
   Results in Lessened Waiver Protection for Employees

In addition to penalizing good-faith employers, the totality test provides inadequate waiver protection for employees who sign (or are asked to sign) federal employment waivers. The test affords inadequate protection in two ways.

First, the totality test does not provide any actual waiver-related rights to employees. For example, the test does not mandate any particular, concrete period of time for an employee to review the waiver before signing it, nor does it assure an employee of being advised in writing to consult with an attorney before signing the waiver. Instead, the totality test’s only guarantee for an employee is that a court will weigh numerous factors and decide whether, on the whole, a waiver was knowing and voluntary.239

Second, because “[n]one of the criteria are absolute conditions for enforceability of the release,”240 the totality test creates a “net sum” game of arithmetic that does not force bad-faith employers to “do it by the book.” Under the test, if the factors pointing toward a knowing and voluntary waiver (the “pluses”) outweigh (in quantity or quality) those that do not (the “minuses”), then the net positive sum translates into a valid waiver.241

238. Torrez is another good example of how the totality test’s Employee-Dependent Factors can penalize a good-faith employer by calling into question a waiver’s validity even when the employer had done it “right.” Torrez v. Pub. Serv. Co., 908 F.2d 687, 690 (10th Cir. 1990). There, Public Service Company (the employer) prepared a waiver that was “clear and unambiguous,” provided Torrez (the employee) with a thirty day window in which to review and sign the waiver, and provided several months of severance pay to Torrez in exchange for the signed waiver. Id. at 688-90. However, the Tenth Circuit significantly relied upon the totality test’s Employee-Dependent Factors to find a material issue of fact on the knowing and voluntary standard and thus remanded the case for trial. Id. at 690. These Employee-Dependent Factors included: (1) Torrez was a “high school educated employee, unfamiliar with the law” who did not know he was waiving possible discrimination claims when he signed the waiver, but instead “believed” that he was releasing only other claims and (2) Torrez had not consulted with an attorney before signing the waiver. Id.

239. See supra Part II.C.


241. For examples of how courts perform this “plus-minus” calculation, see Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 403 n.1 (2d Cir. 1989) (noting that plaintiffs “apparently did not have an opportunity to negotiate the terms of the waiver, which is one of the issues relevant to whether the release was signed knowingly and willfully” and concluding that “this fact alone [did not] require[,] a trial” on the knowing and voluntary issue because the “other indicia” made
Because “failures by an employer to satisfy one factor are often overlooked based upon [its] satisfaction of another factor,” 242 however, the net sum game of arithmetic performed under the totality test affords bad-faith employers the opportunity, if not the motivation, to satisfy some, but not all, of the factors that are within their control. After all, these employers understand that the test is a net sum game in which not all of the factors need to be “pluses.” Other commentators have similarly observed that the totality test “provides inadequate incentive for employers to observe high standards of compliance with all the elements recognized to contribute to the knowing and voluntary character of a release. Rather, employers may infer . . . that a series of half measures, weighed together, will be sufficient to sustain a release.” 243

Certainly, the totality test is designed to catch a bad-faith employer that receives the wrong message from the totality test’s net sum game of arithmetic and then takes mere half measures. However, the test can only catch that employer if the employee—who has signed the waiver—sues the employer under a “waived” federal employment claim and seeks to invalidate the waiver. If that employee never sues, then the bad-faith employer may continue to utilize its half-measures, or even reduced quarter-measures, when attempting to obtain waivers from other employees. Thus, the totality test’s use of a net sum game of arithmetic (rather than per se waiver protections) does a particularly poor job of protecting non-litigious employees from bad-faith employers.

3. The Totality Test’s Employee-Dependent Factors Perpetuate Waiver-Related Litigation That Clogs Judicial Dockets

Not only is the totality test problematic for employers and employees, but it also negatively impacts the courts and their dockets because the test’s case-by-case approach encourages waiver litigation. Under the totality test, “no single fact or circumstance is entitled to talismanic significance on the question of waiver.” 244 Instead, each legal challenge to a federal employment waiver under the totality test “is sui generis . . . [and] a fact-intensive exercise” 245 because the test lacks any actual waiver requirements and contains several Employee-Dependent

242. Filippatos & Farhang, supra note 240, at 305.
243. Id. at 305-06.
244. Smart v. Gillette Co. Long-Term Dis. Plan, 70 F.3d 173, 181 (1st Cir. 1995).
245. Id. at 181-82.
Factors. Thus, courts using the totality test apply the “indicia of knowing and voluntary waivers . . . in an ad hoc fashion.”

In enacting the OWBPA, Congress recognized both the totality test’s 

*ad hoc* approach and the problems that this approach created. Specifically, Congress noted that the totality test scrutinized “many different factors or criteria on a case-by-case basis” rather than requiring that “certain protective factors must be present.” In addition, Congress viewed the uncertainty and unpredictability created by the totality test as only “promising more litigation in the future.” In response, Congress designed the OWBPA’s requirements to “spell out clear and ascertainable standards” for ADEA waivers so as to “clarify an unsettled area of the law and reverse a disturbing trend of litigation concerning ADEA waivers.”

While the OWBPA effected solutions to these problems for ADEA waivers, the totality test still perpetuates a similar “disturbing trend of litigation” as to non-ADEA waivers. Its case-by-case approach creates the uncertainty and unpredictability that can permit, if not encourage, employees to mount legal challenges to legitimate knowing and voluntary waivers. Even if these employees lose their waiver challenges, the impact on the judicial systems and their dockets has already been realized because those courts have had to devote resources to adjudicating the waiver challenges.

4. The Totality Test Leads Cost-Conscious Employers to Reduce Severance Benefits for Employees

In addition to burdening the judicial system, the waiver-related litigation stemming from the totality test can also have tangible consequences for employees, as cost-conscious employers will likely reduce the amount of employee severance benefits by anticipated waiver-related legal expenses.

For example, suppose a company has, on separate occasions, terminated two groups of ten employees and offered $10,000 (equal to two months’ pay) to each employee in exchange for a signed waiver of all federal employment claims. All ten employees in each group initially sign the waivers, but one of the employees from each group later decides to challenge the validity of the waiver (relying on the totality test’s Employee-Dependent Factors) and assert an otherwise waived Title VII or ADA discrimination claim against the company. However, both employees

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248. *Id*.
249. *Id*.
250. *Id* at 50.
are unsuccessful in arguing that the waiver was not knowing and voluntary under the totality test, and the district court grants summary judgment in favor of the company in each lawsuit. The legal expenses of the company through summary judgment total $50,000 for each lawsuit.

In this example, the company has two sets of costs for each of the group terminations: (1) the severance benefits provided to each group’s ten employees in exchange for the waivers (totaling $100,000 for each group) and (2) its legal expenses to defend each of the waiver lawsuits ($50,000 for each group). When the company terminates a third group of ten employees (for example), will it provide each of the employees the same $10,000 amount that had been offered to each employee in the prior two groups? Although it might choose to do so, the company, if seeking to keep the costs of a group termination static, is likely to reduce the severance pay offered to those in the third group so as to compensate for the anticipated $50,000 in legal expenses that will result from another waiver-related legal challenge. If the company makes this choice, it would reduce the total group severance benefits to $50,000 (or, $5,000 per employee), which is half of the $100,000 amount that had been provided to each of the prior two groups. Thus, each employee would be offered half of what he or she otherwise would have received.

Of course, the company still must provide an adequate monetary incentive to the third employee group if it wants those employees to sign the waivers. Nonetheless, the example illustrates how the litigation that results from the totality test’s inherent uncertainty likely causes long-term economic loss to employees when employers use waiver-related litigation costs to reduce employee severance benefits.251

C. The Totality Test’s Inconsistency with the Congressional Waiver Approach Embodied in the OWBPA

In addition to creating problematic consequences for employers, employees, and the courts, the totality test’s lack of per se waiver requirements and inclusion of Employee-Dependent Factors are inconsistent with the congressionally-preferred waiver approach contained

251. If the totality test generates enough waiver-related litigation for a cost-conscious employer, then this employer could opt to eliminate severance benefits. In the above example, suppose that five employees in each of the first two groups decide to challenge their respective waivers and sue the company on the basis of waived claims. Even if the company prevails on all of the cases at summary judgment, the legal expenses for the five lawsuits from each group could easily exceed the $100,000 in total severance benefits that were provided to that group. If and when the company terminates a third group of employees, it could rationally conclude that, because it is likely to get sued by several employees and spend more than $100,000 in litigation costs anyway, it will not offer any severance benefits and will just litigate any arising cases.
in the OWBPA. Indeed, Congress enacted the OWBPA to create a waiver approach that excluded these two features.\textsuperscript{252}

While the OWBPA expressly applies only to ADEA waivers, it is the only federal employment waiver legislation ever passed by Congress. As a result, the OWBPA can be helpful in evaluating the totality test because it provides exclusive insight into the waiver approach that Congress preferred and the reasons for that preference.

1. The Two Features of the OWBPA’s Waiver Approach

The OWBPA’s approach to ADEA waivers has two significant features. The first feature is that the OWBPA sets forth “threshold requirements for judicial consideration of a waiver of rights” under the ADEA.\textsuperscript{253} If any one of the seven basic requirements is not satisfied, then the ADEA waiver is not knowing and voluntary.\textsuperscript{254}

The second feature of the OWBPA is that all of its waiver requirements are within the employer’s control rather than dependent upon the employee.\textsuperscript{255} Because the OWBPA’s instruction booklet assigns all waiver-related tasks to the employer,\textsuperscript{256} an OWBPA-compliant waiver is the quintessential do-it-yourself project for an employer. So, if an employer wants a waiver to cover ADEA claims, then the employer—and only the employer—has the responsibility and the ability to meet each of the clear requirements for an OWBPA-compliant waiver: (1) to word the waiver in a clear manner; (2) to include ADEA claims expressly; (3) not to cover prospective ADEA claims in the waiver; (4) to provide severance pay (or other consideration) as valid consideration for the waiver; (5) to advise the employee to consult with a lawyer; and (6) to afford a three week review period and a one week revocation period.\textsuperscript{257} The OWBPA’s

\textsuperscript{252} \textit{See infra} Part IV.C.2.

\textsuperscript{253} \textit{Senate OWBPA Report, supra} note 158, at 6.


\textsuperscript{255} \textit{See id. at} 983-84.

\textsuperscript{256} \textit{See id.}

\textsuperscript{257} \textit{Id.} One could argue that the first OWBPA requirement—that the waiver be “written in a manner calculated to be understood” by the employee or “the average individual eligible to participate” in the severance package or program—is outside of the employer’s control because it depends on whether the employee, or “the average individual,” \textit{actually} understands the waiver. \textit{Id.} at 983. However, this argument reads too much into the first requirement by improperly equating, or at least confusing, the “manner” in which the waiver is written (which is within an employer’s control) with the employee’s actual understanding of the waiver (which is not within an employer’s control).

The OWBPA demands only that the employer use waiver language that is intended and “calculated” to be understood by the average person. \textit{Id.} It does not demand that the person \textit{actually}
instruction booklet does not include any employee-dependent waiver requirements that would partially place the fate of the employer’s waiver project in the hands of an employee.258

These two features of the OWBPA were not coincidence; rather, the OWBPA’s legislative history shows that Congress purposefully opted for waiver requirements (in lieu of mere criteria) and preferred requirements that were “clear and ascertainable” for the employers who would be obliged to satisfy them.259 Although Congress viewed the totality test as being “more thorough” than the “cursory” pure contract-based approach, it also felt that the totality test was problematic because it analyzed “many different factors or criteria on a case-by-case basis, in effect promising more litigation in the future.”260 As a solution to these problems, Congress designed the OWBPA to “spell out clear and ascertainable standards” for ADEA waivers and thus “clarify an unsettled area of the law and reverse a disturbing trend of litigation concerning ADEA waivers.”261

2. The Totality Test’s Failure to Embody the Features of the OWBPA’s Waiver Approach

As discussed in Part IV.A, the totality test has three significant features: (1) its lack of per se waiver requirements; (2) its use of some factors that are solely within the employer’s control; and (3) its use of other factors that solely depend upon the employee. Only the second feature is consistent with the OWBPA’s waiver approach and philosophy; the first and third features contradict it.262

understand the waiver’s language or that a court look at the person’s education, business experience, or sophistication to determine if they understood, or likely understood, the waiver’s language. Indeed, none of the OWBPA requirements hinges on any of an employee’s personal characteristics. See id.

258. The employer-controlled feature of the OWBPA’s main requirements also extends to its modified requirements for ADEA waivers in special contexts. For example, when an ADEA waiver is obtained as a result of a “group or class” termination program, the OWBPA expands the review period to forty-five days and requires certain job title and age information to be provided to the affected employees. Id. These two additional requirements are solely within the employer’s control and are simply extra steps contained in the OWBPA’s instruction booklet.

In addition, the OWBPA lessens slightly the standard requirements for a waiver of an ADEA claim that has already been filed in court or with the EEOC, by eliminating the revocation right and requiring only a “reasonable period of time” for an employee to review the waiver. Id. at 984. Providing this reduced review period remains within the employer’s control.

260. Id.
261. Id. Like the OWBPA, the Waiver Protection Act also used per se waiver requirements that were within an employer’s control. This congressional consistency further contradicts coincidence and evidences actual preference. See supra note 179 and accompanying text (discussing the Waiver Protection Act’s requirements).

262. See House OWBPA Report, supra note 169, at 50, 51; see also supra Part IV.A.
The totality test’s first feature runs counter to the OWBPA’s waiver approach. In enacting the OWBPA, Congress expressly rejected a waiver approach that included “many different factors or criteria” to be analyzed on “a case-by-case basis” and instead intentionally chose one that set forth actual per se waiver requirements. Yet, the totality test makes the opposite choice. It merely sets forth a pool of waiver factors, none of which is necessarily required for a valid waiver but each of which figures into the totality test’s net sum game of arithmetic.

In contrast, the totality test’s second feature—use of employer-controlled criteria—is consistent with the OWBPA’s waiver philosophy. The test’s Employer-Controlled Factors are compatible with Congress’s purposeful choice of waiver requirements that were “clear and ascertainable” to the employers who would have to satisfy them. Indeed, the totality test’s four Employer-Controlled Factors—clear and unambiguous waiver language, valid consideration, advice to consult with legal counsel, and an adequate waiver review period—are essentially the same as the following four OWBPA requirements: (1) that the waiver be written in an understandable manner; (2) that the waiver be supported by valuable consideration; (3) that the employer advise the employee in writing to consult with an attorney before signing the waiver; and (4) that the employer give the employee adequate time—specifically, at least twenty-one days—to review the waiver. These four common waiver criteria will ultimately comprise the new Waiver Certainty Test proposed in Part V.

Like the totality test’s first feature, its third feature—use of employee-dependent criteria—also runs counter to the OWBPA’s waiver approach. The OWBPA contains no waiver requirements that are compatible with the test’s Employee-Dependent Factors. The OWBPA requirements do not take into account whether an employee actually (1) has adequate education, experience, and sophistication; (2) retains an attorney to review the waiver; (3) tries to negotiate, or succeeds in negotiating, the terms of the waiver; (4) knows his or her legal rights; or (5) reads the waiver before signing it. When Congress criticized the totality test by

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264. See id.; supra Part IV.A.
265. See supra Part IV.A.
266. House OWBPA Report, supra note 169, at 50, 51.
267. See supra Parts II.C, IV.A.
268. See supra notes 190-96, 257 and accompanying text.
269. In enacting the OWBPA, Congress even stated that the waiver language should be “readily understandable . . . regardless of [an employee’s] education or business experience.” House OWBPA Report, supra note 169, at 50, 51 (emphasis added).
270. In enacting the OWBPA, Congress acknowledged that an employee “cannot be required to hire an attorney before signing a waiver.” Id.
saying that the test’s analysis of “many different factors or criteria” promoted a “case-by-case” approach that “promis[ed] more litigation in the future.” Congress’s criticism was directed at the test’s Employee-Dependent Factors because those are the factors that create the legal guesswork and uncertainty within the test’s ad hoc approach.

One could argue that, despite its criticism of the totality test, Congress did express “support” for it in the OWBPA’s legislative history. However, this argument incorrectly assumes that relative preference for the whole automatically equals absolute preference for the parts. For example, suppose Robert invites Shirley to a pizza party. Robert serves two pizzas: the first with pepperoni, extra cheese, anchovies, black olives, mushrooms, and sweet peppers; and the second with sausage, green peppers, ham, and pineapple. After eating both pizzas, Shirley tells Robert that she likes and prefers the first pizza over the second.

Does that mean that Shirley likes the first pizza over all other pizzas? Not necessarily. At a minimum, Shirley means what she says—that she liked the first pizza better than the second pizza (relative preference for the whole). But, Shirley’s stated preference does not necessarily mean that she liked the first pizza’s ingredient combination better than all other possible pizza ingredient combinations (absolute preference for the parts).

Similarly, in enacting the OWBPA, Congress commented on the two approaches that the federal circuits had used to determine if a waiver was knowing and voluntary—the “ordinary contract principles approach” and the “‘totality of circumstances’ approach.” In evaluating the two, Congress felt that the former was “cursory” while the latter was “more thorough” and “more protective.” Consequently, it stated that it favored, or “support[ed],” the totality test over the pure contract-based approach.

Like Shirley’s statement that she liked the first pizza better than the second, Congress at a minimum meant what it said: that it preferred the totality test over the pure contract-based approach (relative preference for the whole). But, Congress’s stated preference does not necessarily mean that it preferred the totality test’s “ingredient combination” (its features and factors) over all other possible waiver approach “ingredient combinations” (absolute preference for the parts).

So, how can one tell if Shirley and Congress were expressing absolute preference for the parts? As to Shirley, at least one way is to see what ingredients she uses on her own pizza when she cooks pizza for herself. If Shirley makes a pizza with the same ingredients as Robert’s first pizza,

271. Id. at 26, 51.
272. See supra text accompanying note 203.
274. Id.
275. Id. at 50, 51.
then her relative preference for the whole equaled absolute preference for the parts. But, if Shirley makes her own pizza with only some, but not all, of the ingredients from Robert’s first pizza, then her preference for Robert’s first pizza was relative for the whole but not absolute for the parts.

Similarly, one can look to see what types of waiver approach features and requirements Congress used when it enacted the OWBPA. If Congress had used the same features and factors for the OWBPA as those from the totality test, then its relative preference and “support” for the totality test would have equaled absolute preference for the totality test’s “ingredient combination.” But, in building its own waiver approach, Congress used only some of the totality test’s ingredients. It only included requirements that were within the control of an employer—just like the totality test’s four Employer-Controlled Factors.276 However, Congress excluded the totality test’s other two features—the use of waiver factors in lieu of per se requirements, and the use of waiver criteria that rely solely on the employee and are outside of an employer’s control.277

Thus, while it is true that Congress preferred the totality test over a pure contact-based approach, that relative preference for the whole cannot be viewed as an absolute preference and endorsement of all of the totality test’s parts. If Congress did have that absolute preference, it either would have found it unnecessary to legislate in the area or would have legislated waiver requirements that mirrored the factors of the totality test (which certain courts were using at the time).278 Congress did neither.

In addition, one could argue that Congress’s use of only employer-controlled requirements in the OWBPA does not evidence an intent to exclude employee-dependent criteria altogether, because Congress intended the OWBPA to set forth necessary, but not sufficient, conditions for a knowing and voluntary ADEA waiver. This argument primarily stems from the OWBPA’s language that an ADEA waiver “may not be considered knowing and voluntary unless at a minimum” the specified requirements are met.279 As other commentators have recognized, the “at a minimum” language could “suggest[] that the statutory requirements may be necessary, but not sufficient in every case to establish a knowing and voluntary waiver.”280

276. See supra Parts IV.A, IV.C.
277. See supra Parts IV.A, IV.C.1.
280. Robert A. LaBerge and Thomas G. Eron, Employment Law, 43 SYRACUSE L. REV. 295, 325 (1992); see also Jan W. Henkel, Waiver of Claims Under the Age Discrimination in
The limited number of federal district and circuit courts that have addressed this issue disagree on whether the OWBPA’s requirements are the be-all-end-all for purposes of the knowing and voluntary standard for ADEA waivers. However, interpretation of the “at a minimum”...
language to mean that the OWBPA sets forth only necessary conditions for a knowing and voluntary ADEA waiver (and that the totality test thus still applies to that waiver) is unsound for several reasons.

First, this interpretation significantly frustrates the OWBPA’s goal of reducing ADEA waiver litigation through use of “clear and ascertainable standards.” At least in part, the OWBPA was Congress’s response to the uncertainty that surrounded ADEA waivers and the spike in legal challenges that emanated from that uncertainty. Congress rebuffed the totality test’s “case-by-case” approach because the test involved “many different factors or criteria” that “promis[ed] more litigation in the future.” Consequently, Congress designed the OWBPA with the goal of “spell[ing] out clear and ascertainable standards” that would “clarify” the law on ADEA waivers and “reverse a disturbing trend of litigation.” If the courts in totality test jurisdictions continue to apply that test and its many Employee-Dependent Factors to ADEA waivers (in addition to the OWBPA requirements), then the uncertainty that Congress attempted to eliminate would return. Simply put, the OWBPA could not be the solution that Congress intended, because the waiver waters would once again become muddied by the uncertainty created by the totality test.

Conversely, other courts have concluded that the OWBPA’s requirements are the end of the knowing and voluntary inquiry for ADEA waivers. See Riddell v. Med. Inter-Insurance Exch., 18 F. Supp. 2d 468, 471 (D.N.J. 1998) (stating that the “‘totality of the circumstances’ test” has been “superceded by the OWBPA with respect to releases of ADEA claims”); Reid v. IBM Corp., No. 95 Civ. 1755 (MBM), 1997 WL 357969, at *3-6 (S.D.N.Y. June 26, 1997) (using only the OWBPA to evaluate the plaintiff’s waiver of ADEA claims and the totality test to evaluate his waiver of Title VII and ADA claims); cf. Thomforde v. IBM, 406 F.3d 500, 504, 505 n.2 (8th Cir. 2005) (noting that the court “need not decide the proper test to apply to determine whether the [ADEA] waiver was also knowing and voluntary” (because the waiver had not even met the OWBPA’s requirements) and thus “leav[ing] that discussion for another day”). In Reid, although the district court did not use the totality test to evaluate the plaintiff’s ADEA waiver, it stated that a plaintiff may challenge an ADEA waiver by raising “other defenses to a release, such as duress and incapacity, which might show that he did not enter the release knowingly and voluntarily.” Reid, 1997 WL 357969, at *6.

282. See supra text accompanying note 206.
283. See supra text accompanying notes 204-05.
284. See supra text accompanying note 206.
285. Other OWBPA provisions and certain changes from the language of the Waiver
In addition, language from the Supreme Court’s decision in *Oubre v. Entergy Operations, Inc.* supports the view that the OWBPA displaces (rather than merely supplements) any additional analysis of whether an ADEA waiver is “knowing and voluntary.” While *Oubre* dealt with a different issue, some of the opinions tangentially discussed the role of the OWBPA in determining whether an ADEA waiver is knowing and voluntary.

In a six to three decision, the *Oubre* Court held that the common law contract doctrines of tender back and ratification cannot be used to convert a non-OWBPA-compliant waiver into an effective bar to an ADEA lawsuit. While Justice Thomas dissented because neither the OWBPA nor its legislative history evidenced an intent to displace these common law contract doctrines, his opinion also commented on the OWBPA’s relationship to the “knowing and voluntary” requirement for ADEA waivers:

> The only clear and explicit purpose of the OWBPA is to define “knowing and voluntary” in the context of ADEA waivers. Prior to the statute’s enactment, the Courts of Appeals had disagreed about the proper standard for...
determining whether such waivers were knowing and voluntary. Several courts had adopted a “totality of the circumstances” test as a matter of federal waiver law. . . . [O]thers had relied solely on common-law contract principles . . . . In enacting the OWBPA, Congress adopted neither approach, instead setting certain minimum requirements that every release of ADEA rights and claims must meet in order to be deemed knowing and voluntary. I therefore agree with the Court that the OWBPA abrogates the common-law definition of a “knowing and voluntary” waiver where ADEA claims are involved.288

Although Justice Kennedy’s majority opinion did not address this precise issue with as much clarity as Justice Thomas’s dissent, it also appeared to take a broad, quasi-preemptive view of the OWBPA by noting that the OWBPA “set[] up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law,” “create[d] a series of prerequisites for knowing and voluntary waivers,” and “govern[ed] the effect under federal law of waivers or releases on ADEA claims.”289

Nonetheless, even if Congress had viewed the OWBPA as merely supplementing the totality test (in relevant jurisdictions) to determine whether an ADEA waiver was knowing and voluntary, the resulting “dual test” would serve only to reiterate the need for reform in the ADEA waiver arena as well. For example, suppose an employer meets all of the OWBPA’s requirements for obtaining a valid ADEA waiver from an employee. It words the waiver clearly, expressly mentions the ADEA in a non-prospective waiver section, affords the employee three weeks to review the waiver and seven days to revoke it after it has been signed, advises the employee to consult with an attorney, and provides valid consideration for the waiver. It is difficult to see how that employee’s waiver could be anything other than knowing and voluntary. Nonetheless, a dual test leaves that door open because the OWBPA’s requirements are viewed as insufficient. As a result, the employee would have the opportunity to challenge the waiver under the totality test by focusing only on the Employee-Dependent Factors (because the test’s four Employer-Controlled Factors would have been satisfied via OWBPA compliance).

In this example, the totality test component of the dual test would penalize the good-faith employer by forcing that employer into a costly (albeit likely successful) defense of the waiver’s validity.290 Indeed,

288. Id. at 436 (Thomas, J., dissenting) (emphasis added) (citations omitted).
289. Id. at 427 (majority opinion).
290. For the employer in Wastak v. Lehigh Valley Health Network, 342 F.3d 281 (3d Cir. 2003), this example became a reality. In that case, Wastak signed an ADEA waiver that complied
because the dual test would contain the totality test component, the totality test’s other above-referenced problematic consequences in the non-ADEA waiver area would extend to ADEA waivers as well. These other consequences would include (1) perpetuating ADEA waiver litigation within the federal courts and (2) steering cost-conscious employers to offset severance benefits for employees by anticipated ADEA waiver-related litigation costs.

V. THE WAIVER CERTAINTY TEST PROPOSED

Due to the totality test’s shortcomings and problematic consequences for employers, employees, and the courts, a new and reformed analysis is needed to determine whether a waiver of non-ADEA federal employment claims is knowing and voluntary. The new test proposed in this Article—the Waiver Certainty Test—eliminates the totality test’s two shortcomings, is consistent with the congressional waiver approach embodied in the OWBPA, and avoids the four problematic consequences that result from the totality test.

A. The Waiver Certainty Test’s Requirements and Features

The Waiver Certainty Test contains four requirements for a waiver of non-ADEA federal employment claims to be knowing and voluntary. These four requirements are:

1. The waiver language must be clear and unambiguous;
2. The waiver must be supported by valuable consideration provided to the employee;
3. The employer must advise the employee in writing to consult with an attorney before signing the waiver; and
4. The employer must provide the employee at least twenty-one days in which to review the waiver before signing it.

As a result, the Waiver Certainty Test has two significant features. First, it takes the extra step of providing per se waiver requirements that guarantee employees relevant waiver rights and protections. While “[i]t is
not necessary [under the totality test] that each [factor] be satisfied before a release can be enforced.\footnote{Melanson v. Browning-Ferris Indus., Inc., 281 F.3d 272, 276 (1st Cir. 2002).} A waiver will be deemed knowing and voluntary under this new test if and only if each of the four requirements is satisfied.

Second, each of the Waiver Certainty Test’s requirements is within the control of the employer and not dependent upon the employee. The employer has both the sole responsibility and the ability to meet the four requirements. Unlike many of the totality test’s factors, the new test’s factors involve no guesswork by the employer based on what an employee does or does not do, or based on a characteristic that an employee possesses or does not possess.

Consequently, the Waiver Certainty Test retains only one feature of the totality test—its use of Employer-Controlled Factors (albeit converting them into requirements). Indeed, this new test pulls its requirements directly from the four Employer-Controlled Factors contained in the totality test. However, because the totality test does not specify a precise waiver review period that an employer must provide an employee, the twenty-one day timeframe is borrowed from the OWBPA.\footnote{For a response to the argument that the time period should be less than the OWBPA’s twenty-one day timeframe, see infra note 307.}

While retaining one of the totality test’s features, the new test discards the two features that represent the totality test’s shortcomings: (1) its use of non-mandatory factors, or indicia, of a knowing and voluntary waiver and (2) its use of Employee-Dependent Factors that are “considerate of the particular individual who has executed the release.”\footnote{Coventry v. U.S. Steel Corp., 856 F.2d 514, 523 (3d Cir. 1988).}

B. The Waiver Certainty Test Is Consistent with the Congressional Waiver Approach Embodied in the OWBPA

While the totality test has features inconsistent with those of the congressionally-preferred waiver approach in the OWBPA, the Waiver Certainty Test and the OWBPA share the same two features: (1) imposing per se waiver requirements and rights (albeit not identical) and (2) limiting these requirements to those that are within the control of the employer. Like the OWBPA, this new test purposefully opts for standards that are “clear and ascertainable” for the employers who are charged with satisfying them. Further, it rejects having a pool of “different factors or criteria” that generates an uncertain “case-by-case” approach.\footnote{House OWBPA Report, supra note 169, at 50, 51.}

Because of their shared features, both the Waiver Certainty Test and the OWBPA provide a step-by-step instruction booklet for an employer to
assemble a knowing and voluntary waiver. In contrast to a waiver under the totality test, waivers under both the new test and the OWBPA are do-it-yourself projects for employers that do not involve any step that is employee-dependent or variable.

One could argue that the OWBPA’s requirements, in their entirety, should simply serve as the knowing and voluntary test for non-ADEA waivers, so that the test for all federal employment waivers would be uniform. Other commentators have argued for this reform.\footnote{See Filippatos & Farhang, supra note 240, at 264-65, 297 (arguing that the OWBPA “provide[s] far more robust protection to employee rights than the common law doctrines applied to the release of employment claims outside the age discrimination context” and that “there is no principled reason for providing less protection to individuals asked to release Title VII and ADA claims as compared with ADEA claims. Accordingly, we . . . suggest[] that the regime of employment discrimination law be made consistent by extending application of the OWBPA release requirements to Title VII and ADA claims.”); Henkel, supra note 280, at 420 (stating that “although the [OWBPA] was enacted pursuant to the ADEA, Congress might have intended to define ‘knowing and voluntary’ for all federal employment discrimination statutes or at least those the validity of waivers of which are determined by the same standard. Almost all of the OWBPA requirements are general in nature and could be applied to a waiver of an employment discrimination claim. These requirements, therefore, could be read as a definition of ‘knowing and voluntary’ and not necessarily only as a definition of ‘knowing and voluntary’ for ADEA claims.”); see also Alfred W. Blumrosen et al., Downsizing and Employee Rights, 50 Rutgers L. Rev. 943, 1019-20 (1998) (arguing that the OWBPA’s requirements for ADEA waivers should be used to determine if waivers of non-ADEA claims, such as those under Title VII and the ADA, are knowing and voluntary).}

Of course, use of a uniform OWBPA-based test for all federal employment waivers would embody the two waiver approach features that the totality test currently lacks—namely, per se waiver requirements that also are within an employer’s control. In that respect, a uniform OWBPA-based test and the Waiver Certainty Test would share the same positive attribute.

However, a uniform OWBPA-based test would be inconsistent with the congressional purpose and intent expressed in the OWBPA’s legislative history. Despite criticism that “older workers should be treated no differently from the minority and female workers who are protected against employment discrimination under Title VII,”\footnote{House OWBPA Report, supra note 169, at 24.} Congress purposefully enacted the OWBPA to provide different, more stringent waiver protections for older workers.\footnote{See id.} In support of this disparate treatment, Congress viewed older workers—unlike workers in other protected classes—as uniquely susceptible to “be[ing] manipulated or even coerced” into waiving their rights\footnote{Id.} because, in part, they were often the targets of large scale “group termination programs” in which age
discrimination was more difficult to detect.\textsuperscript{299}

Indeed, courts have expressly rejected the argument for a uniform test, recognizing that Congress did not intend the OWBPA’s requirements to be used to evaluate whether non-ADEA waivers were knowing and voluntary.\textsuperscript{300} Other courts have implicitly acknowledged this intent for different tests, by using the OWBPA to evaluate a waiver of ADEA claims but a non-OWBPA-based test (such as the totality test) to evaluate that same waiver as to non-ADEA claims (such as Title VII, the ADA, or state law employment claims).\textsuperscript{301} Thus, use of a uniform OWBPA-based test has

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\textsuperscript{299} Id. at 22. \textit{See also} Senate OWBPA Report, \textit{supra} note 158, at 32 (stating that “[g]roup termination and reduction programs stand in stark contrast to the individual separation . . . [because] employees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics”).

\textsuperscript{300} \textit{See, e.g.}, Blackwell v. Cole Taylor Bank, 152 F.3d 666, 673 (7th Cir. 1998) (noting that “[t]here is no counterpart in Title VII land to the [OWBPA]” and viewing as “hardly plausible” the notion that “the highly specific requirements of [the] OWBPA . . . codify the general concept of ‘knowing and voluntary’”); Williams v. Phillips Petroleum Co., 23 F.3d 930, 936-37 (5th Cir. 1994) (rejecting the plaintiffs’ argument that the OWBPA’s requirements should be used to evaluate their waivers of claims under the Workers Adjustment Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (2000), which is a federal employment law requiring certain employers to provide sixty days advance notice to employees in the event of “mass layoffs” or terminations, because “their proffered analogy between WARN and the ADEA does not survive scrutiny. The OWBPA . . . is a change from the common law, and there is no similar obligation imposed on employers under WARN.”); Capuano v. Brown, No. CV970339085, 1998 Conn. Super. LEXIS 2087, at *5-7 (July 22, 1998) (rejecting the plaintiff’s argument that the court should use the OWBPA requirements to evaluate her waiver of Title VII and ADA claims, because “it was Congress’ intent to make the OWBPA criteria . . . applicable only to claims brought under the ADEA. The plaintiff has not brought such a claim, and so the court need not apply the specific requirements of [the OWBPA] to the plaintiff’s Title VII and ADA claims.”).

\textsuperscript{301} \textit{See, e.g.}, Wastak v. Leigh Valley Health Network, 342 F.3d 281, 295 (3d Cir. 2003) (noting that “the statutory provisions of the OWBPA apply only to ADEA claims” and then finding a waiver valid as to ADEA claims (because of compliance with the OWBPA) and also valid as to Pennsylvania state employment claims under applicable state contract law); Tung v. Texaco, Inc., 150 F.3d 206, 208-09 (2d Cir. 1998) (finding a waiver invalid as to ADEA claims (because of non-compliance with the OWBPA) but valid as to Title VII claims under the totality test); Am. Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111, 118, 122 (1st Cir. 1998) (finding a waiver invalid as to ADEA claims (because of non-compliance with the OWBPA) but remanding the case for a determination of whether the waiver validly released a Puerto Rico employment discrimination claim); Clark v. Buffalo Wire Works Co., 3 F. Supp. 2d 366, 372 (W.D.N.Y. 1998) (finding a waiver invalid as to ADEA claims (because of non-compliance with the OWBPA) but valid as to state law employment claims pursuant to state law); \textit{see also} Henkel, \textit{supra} note 280, at 417-18 (recognizing that “where courts have found that waivers of ADEA claims are invalid under the OWBPA, they have been willing to find releases effective as to non-ADEA claims”); Eileen Silverstein, \textit{From Statute to Contract: The Law of the Employment Relationship Reconsidered}, 18 \textit{HOFSTRA LAB. & EMP. L.J.} 479, 491 n.67 (2001) (noting that “[t]he majority of the courts addressing the issue have taken the position that waivers of the right to litigate non-ADEA statutory claims need not comply with the OWBPA requirements”).
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neither congressional nor judicial backing.\footnote{302}

While Congress did not intend \textit{all} of the OWBPA’s requirements to apply to non-ADEA waivers, one could also argue that the Waiver Certainty Test should nonetheless include more (or fewer) of those OWBPA requirements.\footnote{303} The response to this argument requires a breakdown of the OWBPA’s requirements into two groups: (1) those that Congress derived from the factors of the totality test and (2) those that Congress newly and purposefully created as part of its more stringent ADEA waiver protections for older workers.

Inclusion of the former group into a test for \textit{non-ADEA waivers} is warranted because Congress borrowed them from a non-ADEA waiver test—the totality test. In enacting the OWBPA, Congress was aware of the totality test and all of its factors; yet, it selected four—and only four—of those factors for conversion into OWBPA waiver requirements. These factors were (1) the clarity and unambiguity of the waiver language, (2) the existence of valid consideration to support the waiver, (3) advising the employee to consult with an attorney, and (4) affording adequate time to

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\footnote{302. Courts and commentators have recognized that use of two different tests (the OWBPA for ADEA waivers and another test—such as the totality test—for non-ADEA waivers) results in a “paradox” whereby the same waiver is invalid for ADEA claims but valid for other federal employment claims. \textit{See} Blackwell, 152 F.3d at 673 (noting that use of different tests “produces the paradox that workers of age 40 and up who quit in response to a group offer receive more legal protection than members of minority groups who quit in response to such offers”); Filippatos & Farhang, \textit{supra} note 240, at 314 (discussing \textit{Blackwell} and arguing that “there is no justification for the ‘paradox’ of limiting the rigorous protections found in the OWBPA to age claims”); Silverstein, \textit{supra} note 301, at 491 n.67 (noting that use of different tests “leads to the odd result that the same waiver may be found ‘voluntary and knowing’ as to some claims of employment discrimination but not others”).

Indeed, because the Waiver Certainty Test is different than the OWBPA, this so-called “paradox” would exist under this new test. But, this paradox does not undermine the Waiver Certainty Test, because the only way to avoid the paradox among federal employment claims is to do that which Congress did not intend—to use a uniform OWBPA-based test for both ADEA and non-ADEA waivers.

While these “paradoxical” situations would still arise under the Waiver Certainty Test, there would be fewer of them because this new test’s waiver requirements (including the twenty-one day review period and advising the employee to consult with an attorney) dovetail with—and, in fact, mirror—four of the OWBPA’s requirements. Thus, the Waiver Certainty Test would “solve” the “paradoxes” that are caused by (1) the totality test validating a waiver that has a shorter review period than the OWBPA’s twenty-one days and (2) the totality test validating a waiver in which the employer did not advise the employee to consult with an attorney before signature (as required by the OWBPA).

\footnote{303. Whether one would endorse more, or fewer, of the OWBPA’s requirements for the Waiver Certainty Test depends, of course, on one’s perspective and preferences. For example, some employers might want fewer of the OWBPA requirements in the new test, while some employees may want more.}
the employee to review the waiver before signature.\textsuperscript{304} The Waiver Certainty Test embodies these congressional preferences because it includes the same four requirements—no more and no less—that Congress borrowed from the totality test.\textsuperscript{305}

In contrast, inclusion of additional requirements from the latter group into a test for non-ADEA waivers is unwarranted because Congress expressly created these new requirements to protect\textit{ only older workers and their ADEA waivers}. The OWBPA requirements that fall into this latter group are the following: (1) that the waiver specifically refer to ADEA claims or rights; (2) that the employee does not waive any prospective rights or claims; and (3) that the waiver agreement affords the employee a seven-day period in which to revoke the agreement after signing it.\textsuperscript{306} None of these requirements was derived from any version of the totality test. Rather, as discussed above, Congress adopted these new, more stringent waiver requirements to protect older workers better because of their greater susceptibility to ADEA waiver-related manipulation. The Waiver Certainty Test for non-ADEA waivers is consistent with this congressional intent and purpose, because it excludes each of these new requirements that Congress uniquely tailored\textit{ only for ADEA waivers and older workers}.\textsuperscript{307}

\footnotesize
\textsuperscript{304} See 29 U.S.C. § 626(f) (2000); supra Part IV.C.2.
\textsuperscript{305} One could argue that the OWBPA’s requirement of referring specifically to ADEA rights and claims in the waiver is, in fact, derived from or related to the totality test factor regarding a clear, unambiguous waiver. However, circuit courts applying the totality test have not required that level of specificity when evaluating the clarity factor under the totality test. See, e.g., Smith v. Amedisys Inc., 298 F.3d 434, 443-44 (5th Cir. 2002) (stating that “[t]here is no obligation . . . 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”); Williams, 23 F.3d at 935-37 (stating that “[t]here is no obligation under WARN or the common law for [an employer] to mention WARN for the release to be valid”); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 461 (9th Cir. 1989) (stating that “an agreement need not specifically recite the particular claims waived in order to be effective”). Consequently, this OWBPA requirement belongs in the latter group of newly created, more stringent requirements, rather than in the former group of requirements that Congress derived from the totality test.

\textsuperscript{306} Similarly, the additional requirements for ADEA waivers that are obtained in larger scale terminations of a “group or class of employees”—namely, an expanded forty-five-day review period and the informational requirements—also belong in the latter group of newly created, more stringent requirements and are inappropriate to include in any non-ADEA waiver test (such as the Waiver Certainty Test) for the same reasons discussed above. See 29 U.S.C. § 626(f)(1)(H).

\textsuperscript{307} Because the totality test does not specify the time period that must be afforded to an employee to review a waiver, one could argue that the OWBPA’s twenty-one day review period was a new, more stringent requirement to protect older workers and that the Waiver Certainty Test’s review period should be less. While this argument has certain theoretical appeal, the practical problem is ascertaining the time period that Congress used as its “reasonable starting point” before expanding to a more stringent twenty-one day period. For example, the Senate OWBPA Report does not discuss any “reasonable starting point” time frame; instead, it just explains that an
C. The Waiver Certainty Test Avoids the Problems Created by the Totality Test

Because the Waiver Certainty Test includes per se waiver requirements that are within an employer’s control, it avoids the four problematic consequences that result from the totality test. As a result, this new test is a better waiver approach for employers, employees, and the courts.

1. The Waiver Certainty Test Safeguards Good-Faith Employers

The totality test and the Waiver Certainty Test treat differently good-faith employers who take the necessary steps within their control to ensure that an employee’s waiver is knowing and voluntary. Under the former, the Employee-Dependent Factors inject elements of uncertainty into that determination for any waiver. As a result, even if an employer does everything “right” in procuring the waiver, the Employee-Dependent Factors nonetheless can undermine and overshadow those efforts and allow the employee to create a justiciable issue as to the waiver’s validity. The good-faith employer is then forced into costly litigation on that issue.

By contrast, the Waiver Certainty Test—like the OWBPA—safeguards employers who embrace their waiver-related responsibilities. Because both tests set forth precise, black-and-white steps that employers employee “needs time” to recover from the “shock” of losing a job, to evaluate any severance benefits, and to consult with an attorney, and it then specifies the twenty-one day period. See Senate OWBPA Report, supra note 158, at 33.

Although one might try to extrapolate a lesser time period from the decisions that have applied the totality test and found the review period to be sufficient, the courts themselves have recognized that “[t]here is no bright-line test for determining what is a sufficient amount of time for an employee to consider a release and consult with an attorney before the employee is considered to have signed the release knowingly and voluntarily.” Puentes v. United Parcel Serv. Inc., 86 F.3d 196, 198-99 (11th Cir. 1996) (nonetheless concluding that “absent some reason for urgency, twenty-four hours is too short a period”). Consequently, the extrapolated time period is likely to be consistent with some jurisdictions but inconsistent with others.

In addition, even if one could identify a lesser time period that was still adequate, use of two different review periods in the same waiver—a twenty-one day requirement for the ADEA waiver and a shorter period (such as seven days) for the non-ADEA waiver—may lead to confusion among employees as to how long they actually have to review the entire document. In an effort to avoid that confusion, employers would likely find it necessary to use two different waiver agreements, which itself could still confuse employees and which places additional administrative burdens on employers.

Finally, the reality is that employees, even when afforded a twenty-one day review period (under the OWBPA, for example), rarely take the entire period and usually accomplish their review, and sign the waiver, within a shorter time period anyway. Thus, the Waiver Certainty Test’s use of a three-week period would likely result in little practical impact on employers who desire more prompt closure of a severance matter.
have the responsibility (and capability) of satisfying, they substitute the definite for the uncertain on the knowing and voluntary issue. When an employer meets its responsibilities under the Waiver Certainty Test (and the OWBPA), those efforts cannot be minimized or eclipsed by actions that the employee alone chooses to take or not take, or by characteristics that the employee has or does not have. Instead, this good-faith employer receives the assurance that the waiver is knowing and voluntary for federal common law purposes. Even if the employee otherwise opts to mount a challenge to the waiver under state common law contract principles (such as duress, fraud, incapacity, or mutual mistake), the employer avoids the litigation cost-related penalty of the totality test, because the employee cannot attempt to use that test’s inherent gray areas to force the employer into litigation on the knowing and voluntary issue.

Thus, unlike the totality test, the Waiver Certainty Test does not hold the good-faith, compliance-minded employer—such as United States Steel in Coventry, Public Service Company in Torrez, or your company in the example in Part I of this article—in a quasi-purgatory in which the employer’s fate is out of its hands and rests upon factors that were never within its control from the beginning. Instead, this new test places that employer in a knowing and voluntary “safe harbor.”

308. Because the knowing and voluntary issue and these state law contract requirements are distinct, the Waiver Certainty Test would not displace the latter. Courts applying the totality test have reached the same result, thereby allowing an employee to contest the knowing and voluntary issue under the totality test but also to claim that the waiver was otherwise invalid under a state law contract theory (such as duress or fraud). See, e.g., Cuchara v. Gai-Tronics Corp., No. 04-2268, 2005 U.S. App. LEXIS 7885, at *4-11 (3d Cir. May 4, 2005) (evaluating separately the plaintiff’s knowing and voluntary argument under the totality test and his state law contract defense of fraudulent inducement); Nicklin v. Henderson, 352 F.3d 1077, 1081 (6th Cir. 2003) (evaluating separately the knowing and voluntary argument under the totality test and the contract defenses of mistake and fraud); Smith v. Amedisys, Inc., 298 F.3d 434, 443 (5th Cir. 2002) (distinguishing between the knowing and voluntary argument under the totality test and state law defense arguments of fraud or duress, but not evaluating the latter defenses because the plaintiff did not assert them); Wagner v. Nutrasweet Co., 95 F.3d 527, 532 (7th Cir. 1996) (evaluating separately a plaintiff’s state law defense of lack of adequate consideration and her knowing and voluntary argument under the totality test); Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 568-72 (7th Cir. 1995) (evaluating separately the plaintiff’s “state contract law” arguments—which included contractual ambiguity, duress, and fraudulent inducement—and the “federal civil rights law” argument regarding knowing and voluntary waiver under the totality test; also stating that a plaintiff’s knowing and voluntary argument is “in addition to any other contentions the plaintiff may or may not make, including challenges to the formation of the contract, such as offer, acceptance or consideration, or other defenses, such as duress or fraud”); see also supra note 88 (discussing the Fifth Circuit’s O’Hare opinion and why the knowing and voluntary determination—and the totality test—do not displace the state contract law defense of duress).


311. See supra Part V.A.
2. The Waiver Certainty Test Affords Concrete Protection for Employees

In addition to safeguarding good-faith employers, the Waiver Certainty Test better protects employees by affording them concrete, waiver-related rights and by minimizing the likelihood that employers will act in bad-faith when obtaining waivers. Under the totality test, courts weigh a pool of factors or criteria and then compute a result from a net sum game of arithmetic.\textsuperscript{312} However, because “[n]one of the criteria are absolute conditions for enforceability of the release,”\textsuperscript{313} employees do not receive any tangible rights under the totality test. Realistically, these employees depend upon their employers for any waiver-related protections.\textsuperscript{314} Yet, the totality test’s lack of requirements affords bad-faith employers the opportunity (if not motivation) to provide protections that are “a series of half measures”\textsuperscript{315} and thus play the net sum game to the detriment of employees.

On the other hand, the Waiver Certainty Test provides per se waiver protections and rights to employees.\textsuperscript{316} Although the waiver clarity and valid consideration protections parallel those that the employee likely already has under traditional contract law, this new test’s additional, OWBPA-like protections (i.e., its mandated twenty-one day review period and required, written advice to the employee to consult with an attorney) extend far beyond any rights that are guaranteed to employees under traditional contract law or the totality test. While the absence of either of these additional criteria would not necessarily doom an employee’s waiver under the totality test, the Waiver Certainty Test automatically renders that same waiver invalid and thus provides a heightened level of protection for employees.\textsuperscript{317}

\textsuperscript{312} See supra Parts II.C, IV.A.
\textsuperscript{313} Filippatos & Farhang, supra note 240, at 305-06.
\textsuperscript{314} See id.
\textsuperscript{315} Id.
\textsuperscript{316} See supra Part V.A.
\textsuperscript{317} One could argue that, under certain circumstances, the Waiver Certainty Test’s definitiveness provides less protection to an employee than the totality test’s uncertainty. For example, suppose an employer terminates an employee because of his national origin. The employer offers severance pay to the employee in exchange for a waiver of all federal employment claims. The waiver is clearly worded, and it advises the employee that he has twenty-one days in which to review it and that he should consult with an attorney before signing it. However, the employee is illiterate, cannot read any part of the waiver, and does not have access to anyone who can read. As a result, the employee signs the waiver immediately without consulting an attorney or any other family member, friend, or advisor.

In that situation, a court applying the Waiver Certainty Test’s four requirements would conclude that this employee knowingly and voluntarily signed the waiver. In contrast, the totality
In addition to providing concrete protections to employees, the Waiver Certainty Test also sends the right message to bad-faith employers: If you do not comply with the test’s waiver requirements, that waiver will not be a bar to any federal employment claim. Unlike the totality test, this new test does not “overlook[] [an employer’s failure in one area] based upon the employer’s satisfaction” of another area.\(^{\text{318}}\) As a result, the Waiver Certainty Test eliminates the bad-faith employer’s motivation to take half-measures and cut corners (i.e., giving a very short review period or not advising the employee to consult with an attorney) just to try to “get one test would at least give the employee the opportunity to argue (whether successfully or not) that certain Employee-Dependent Factors invalidated his waiver.

However, the employee’s waiver would not be doomed in a court that applied the Waiver Certainty Test, because that test would only foreclose a dispute on the knowing and voluntary issue. The employee could still argue that the waiver was invalid under traditional state contract defenses, such as incapacity or fraudulent inducement. See supra notes 88, 308 (observing that a test for the knowing and voluntary determination does not displace other state contract law defenses).

In addition, even though one might criticize the Waiver Certainty Test because it does not permit this employee to make the knowing and voluntary argument, the OWBPA forecloses the same argument. Suppose that this employee was fifty years old, and the employer then satisfied the OWBPA’s requirements for a knowing and voluntary waiver of ADEA claims. Because the waiver is OWBPA-compliant and thus knowing and voluntary, the employee would similarly have to rely on the traditional state contract defenses to invalidate the waiver.

Ultimately, the key point may be that this employee’s set of circumstances is extremely unique—a typical employee is neither illiterate nor so isolated that he or she cannot find someone with whom to discuss the matter. If a court designs a test around a unique set of circumstances in order to achieve a just result in that case, then the test may create unforeseen consequences for the vast majority of cases in which the circumstances are more typical. One commentator has stated that:

[..]the literature is full of cases that resemble the following fact pattern: A court is faced with a problem that arises in the employment context, but the only tool available is contract law. The justice of the servant’s cause is apparent, and the case cries out for the court to solve the problem. However, existing contract law does not solve this particular plaintiff’s problem, so in order to make contract law work, the court must bend or twist the law to fit the situation. The newly bent doctrine saves this particular plaintiff in this particular case. Justice is done. But . . . the new rule does a poor job of solving the problems of many other employees in similar situations but with somewhat different facts.


So, while the totality test may provide more flexibility for this unique set of circumstances, its use for the typical waiver situations generates the problematic consequences discussed in Part IV.B. The Waiver Certainty Test eliminates these problematic consequences and, for the reasons set forth in Part V.C, is better suited for protecting both employees and employers in the typical waiver situations.

\(^{\text{318}}\) Filippatos & Farhang, supra note 240, at 305.
by” the employee.

Of course, under the Waiver Certainty Test, a bad-faith employer might still opt to not meet the new test’s requirements. But, because the consequences of that failure are black-and-white and economically substantial, the bad-faith employer is much less likely to make that choice under the Waiver Certainty Test. While the totality test can lead the bad-faith employer to water, the Waiver Certainty Test creates a greater likelihood of making him drink. As a result, the employee who works for the bad-faith employer—especially the employee who would not have sued that employer anyway—is much more likely to receive waiver-related protections under this new test.

3. The Waiver Certainty Test Eases Court Dockets by Reducing Waiver-Related Litigation

The Waiver Certainty Test is also beneficial to the judicial system by reducing waiver-related lawsuits. Under the totality test, a court’s evaluation of the pool of knowing and voluntary factors is necessarily “a fact-intensive exercise” performed in an “ad hoc fashion.” As Congress recognized in opting for the clear-cut waiver approach in the OWBPA, the totality test’s case-by-case philosophy serves to “promis[e] more litigation in the future.”

On the other hand, the Waiver Certainty Test does for non-ADEA waivers what the OWBPA did for ADEA waivers—it provides a set of “clear and ascertainable standards . . . [that] clarif[ies] an unsettled area of the law and reverse[s] a disturbing trend of litigation” regarding those waivers. Like the OWBPA, the Waiver Certainty Test provides black-and-white waiver requirements that employers either meet or do not meet—there are no employee-dependent variables to create uncertainty. Consequently, both employees and employers would know at a pre-litigation stage whether or not the waiver was knowing and voluntary, and they would be less likely to pursue an exploratory waiver challenge (if an employee) or an unconvincing waiver defense (if an employer).

Of course, court dockets would still contain waiver-related disputes that center on traditional contract law principles and defenses, such as duress, fraud, or incapacity. However, because the Waiver Certainty Test clarifies the law on the knowing and voluntary issue, courts would be less likely to see, and thus have to devote their limited resources to, waiver-related cases

319. Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 181 (1st Cir. 1995).
320. Filippatos & Farhang, supra note 240, at 305.
322. See id.; see also supra Part V.A.
that often include that issue as the main legal dispute.\footnote{323}

4. The Waiver Certainty Test Would Not Reduce Severance Benefits Provided in Exchange for Waivers

Finally, cost-conscious employers likely view waiver-related litigation expenses as a discrete cost of a termination event. These expenses can be significant under the totality test, because its Employee-Dependent Factors inject uncertainty into waivers and can be used to force an employer to litigate a waiver’s validity. Under that test, these cost-conscious employers are likely to reduce the amount of employee severance benefits in order to offset the additional “cost” of the termination—the waiver-related litigation expenses.

By contrast, severance benefits would be more stable under the Waiver Certainty Test. Because this new test eliminates the uncertainty that perpetuates waiver-related litigation under the totality test, a particular employer will be subject to fewer lawsuits (if any at all) that challenge the validity of a waiver. As a result, the cost-conscious employer will not view waiver-related litigation expenses as a cost that needs to be offset from employee severance benefits and—all other costs being the same—will likely maintain the status quo.\footnote{324}

While the Waiver Certainty Test avoids these four problematic consequences of the totality test, one could argue that, as many circuit courts have concluded, the totality test’s heightened scrutiny of waivers is consistent with, and furthers, the “strong congressional purpose . . . to eradicate discrimination in employment.”\footnote{325}

\footnotesize{323. Although the courts would likely see fewer knowing and voluntary cases as a result of the Waiver Certainty Test, they could still see some waiver cases that dispute this issue. For example, an employee could still contend under this new test that the waiver was not supported by valid consideration or that the scope of the waiver is unclear due to ambiguous waiver language. Nonetheless, current waiver-related litigation under the totality test typically revolves around the test’s Employee-Dependent Factors rather than the consideration and contract clarity factors. See \textit{supra} Part II.C (discussing circuit court decisions applying the totality test). Because the Waiver Certainty Test excludes these factors, it would reduce the frequency of legal challenges on the knowing and voluntary issue.

324. If an employer had already built these waiver-related litigation expenses into its severance benefits, then it could either (1) maintain the status quo for severance benefits or (2) actually increase severance benefits under the theory that it no longer needs to offset for waiver-related litigation expenses. The choice would depend upon the employer, but the important point is that, under either choice, the employer does not reduce severance benefits by anticipated waiver-related litigation expenses.

325. \textit{See, e.g.}, Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 571 (7th Cir. 1995); O’Hare v. Global Natural Res., Inc., 898 F.2d 1015, 1017 (5th Cir. 1990); Bormann v. AT&T Commc’ns, Inc., 875 F.2d 399, 403 (2d Cir. 1989); \textit{see also} Torrez v. Pub. Serv. Co., 908 F.2d 687, 690 (10th Cir. 1990) (stating that the totality test better protects “the strong policy concerns to eradicate discrimination in employment”); Coventry v. U.S. Steel Corp., 856 F.2d 514,
elaborate as to how the totality test accomplished this noble purpose, the probable basis for the argument is that bad-faith employers will be more likely to discriminate against employees if they know they can “get away with it” by easily persuading a court that signed waivers (releasing legitimate federal employment claims) are valid.

However, the circuits relied on this conclusion to justify their adoption of the totality test over the pure contract-based approach.\(^\text{326}\) Presumably, these courts viewed a contract-principles-only approach as providing bad-faith employers with an “easier” route to waiver enforcement, which would have allowed them to conceal their discriminatory conduct. But, this article proposes a test that is different from the pure contract-based approach.\(^\text{327}\) Thus, the issue is not whether the totality test is better than the pure contract-based approach in furthering the national anti-discrimination policies, but whether the Waiver Certainty Test furthers those policies at

\[^{522-23}\text{(3d Cir. 1988) (same).}\]

\(^{326}\text{See Coventry, 856 F.2d at 522-23.}\)

\(^{327}\text{See supra Part V.A. Because only a modest minority of the federal circuits still utilize the pure contract-based approach, this article has focused on (1) evaluating and critiquing the totality test that is currently used by nine federal circuits and (2) proposing the Waiver Certainty Test as the replacement for that totality test. However, because the knowing and voluntary standard applies in all of the circuits, the proposed Waiver Certainty Test would also extend to the two circuits that use the pure contract-based approach.}\)

While an in-depth critique of this minority approach is beyond the scope of this article, this approach is problematic for several reasons. First, while Alexander created an independent “knowing and voluntary” waiver requirement, the pure contract-based approach does not necessarily treat it as independent, because courts use the same contract principles (such as duress or fraud) to evaluate that requirement as other contract-invalidating state law defenses. See, e.g., O’Shea v. Comm. Credit Corp., 930 F.2d 358, 362 (4th Cir. 1991) (relying on the principles of contract clarity, duress, and fraud to evaluate the knowing and voluntary requirement). This approach does not use a separately tailored inquiry for the knowing and voluntary requirement.

Second, because state contract principles can vary in form and application among the twelve states within the Fourth and Eighth Circuits, the pure contract-based approach essentially amounts to twelve different state law approaches for determining the knowing and voluntary issue. These various states’ contract laws would result in non-uniform application of the knowing and voluntary standard in roughly one-quarter of the country.

Third, the pure contract-based approach—if it is too lenient and more easily validates waivers—is more likely to keep the judicial system from adjudicating legitimate, underlying federal employment claims (which are covered by the waivers). If bad-faith employers escape legitimate federal employment claims under soft state contract law, then that state’s law frustrates the anti-discrimination policies and protections of federal law. See O’Hare, 898 F.2d at 1017 (stating that “[t]he better rule is to fashion a federal common law to determine this [knowing and voluntary] issue because the policies embedded in the federal statute should not be frustrated by state law”).

Finally, like the totality test, the pure contract-based approach does not impose any per se waiver rights (such as a review period) that serve to protect employees who are asked to sign waivers. Indeed, this approach does not even go as far as the totality test, which forces courts to evaluate a pool of factors as part of a unique, heightened inquiry into the knowing and voluntary issue.
least as much as the totality test. In fact, when compared to the totality test, the Waiver Certainty Test does a better job of promoting anti-discrimination policies. Unlike the totality test, this new test affords four concrete waiver protections that are designed to give employees ample time and opportunity to (1) identify unlawful conduct and (2) take action based on that knowledge. Because these protections include a three-week review period and the guarantee of being advised in writing to consult an attorney before signing a waiver, employees (and their attorneys) have a greater likelihood of spotting discriminatory conduct by a bad-faith employer and then pursuing avenues to hold that employer accountable (i.e., litigation or greater severance benefits through negotiations).

Similarly, the OWBPA was designed to do a better job of furthering the ADEA’s anti-discrimination policies. Openly critical of the totality test’s lack of “clear and ascertainable standards,” Congress opted for per se waiver requirements (including a review period and advising the employee to consult with an attorney) designed to protect older workers from unsuspected age discrimination. Specifically, Congress viewed these two waiver requirements as providing employees “time to learn about the conditions of termination,” “to locate and consult with an attorney,” and “to determine what legal rights may exist.” Just as the OWBPA was better than the totality test in furthering the anti-age discrimination policies of the ADEA, the Waiver Certainty Test—with its similar concrete waiver protections—would also do a better job of furthering the anti-discrimination policies of the other federal employment laws.

VI. CONCLUSION

The totality test experienced a meteoric rise in the late 1980s and early 1990s. Today, a vast majority of the federal circuits embrace that test for determining whether an employee’s non-ADEA waiver meets the knowing and voluntary standard. In adopting the totality test, these circuits considered the two then-available choices—the totality test and the pure contract-based approach. Because the former involved a heightened level of scrutiny, it garnered the accolades and endorsements.

Despite the totality test’s current popularity among the circuits, two of its primary features—its lack of per se waiver requirements and its inclusion of Employee-Dependent Factors—have spawned problematic

329. See id. at 27.
331. Senate OWBPA Report, supra note 158, at 33.
consequences for employees, employers, and the judicial system. These features are also inconsistent with the congressional waiver approach embodied in the OWBPA, which evidences neither a factor-based approach nor employee-dependent variables.

Consequently, this Article proposes the Waiver Certainty Test as a different, but better, choice for determining whether a federal employment waiver is knowing and voluntary. This four-factor test offers a black and white approach that better serves the interests of the three groups affected by the knowing and voluntary issue. The Waiver Certainty Test is more beneficial for: (1) employees, by affording concrete waiver protections and rights (including a three week review period and the right to be advised in writing to consult with an attorney) that the totality test omits; (2) good-faith employers, by setting forth an OWBPA-like, do-it-yourself set of waiver requirements that are within an employer’s control; and (3) the judicial system, by reducing the trend of often unsuccessful waiver-related litigation caused by the uncertainties inherent in the totality test.

Like any shooting star, the totality test was bound to lose its luster. That time has come, and the Waiver Certainty Test points the way to much needed reform in the area of knowing and voluntary federal employment waivers.