Age Discrimination in Employment Act (ADEA) Compliance Guide

An in-depth analysis of the U.S. Equal Employment Opportunity Commission's ADEA regulations. This plain language guidebook takes a close look at the clarifications made by new regulations and how it affects your business decisions.

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EMPLOYER KNOWLEDGE SERIES

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Chapter 1

Introduction

About this Manual / Disclaimer

The Age Discrimination in Employment Act (ADEA) is a federal law enforced by the U.S. Equal Employment Opportunity Commission. It provides specific employment protections to individuals over the age of 40. These protections include a prohibition against age-based discrimination involving applicants and employees.

Although federal law requires at least 20 employees on staff to file an age discrimination claim, individual state law may allow an age discrimination claim with as little as one employee. Therefore, even if a company has less than 20 employees, an age discrimination claim can still be filed with either the state's administrative agency, in court or both. Employers can abide by the federal laws outlined by the EEOC to ensure that they are in compliance with their state laws.

The EEOC has released final regulations addressing "Reasonable Factors Other than Age" and disparate impact under the ADEA. The regulation explains that the Reason Factors Other than Age (RFOA) defense applies only if the challenged practice is not based on age and that a neutral practice that disproportionately affects older workers can be justified only by showing that the practice is objectively reasonable when viewed from the perspective of a reasonable employer under like circumstances. In addition, it provides a list of factors relevant to determining whether an employment practice is "reasonable."

This regulation follows up on a March 2008 Notice of Proposed Rulemaking (NPRM) that the EEOC issued in light of the Supreme Court decision in *Smith v. City of Jackson, 544 U.S. 228* (2005). The *Smith* decision held that an employment practice that has a disparate impact on older workers is discriminatory unless the practice is justified by a reasonable factor other than age. The 2008 NPRM set forth the Smith rule and, in addition to asking for public comments on that proposed rule, asked whether the regulations should provide more information on the meaning of "reasonable factors other than age." Most commenters said that the Commission should provide such information. Accordingly, before finalizing its regulations concerning disparate impact under the ADEA, the EEOC published an NPRM concerning "RFOA." The results of both NPRMs were combined to generate the final regulations effective April 30, 2012.

Under the regulation, a "reasonable" factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances, both in its design and in the way it is administered. To aid in assessing whether an employment practice is based on reasonable factors other than age, the final rule provides a list of factors relevant to whether a factor is reasonable including:

(i) The extent to which the factor is related to the employer's stated business purpose;

(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

(iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

It is not necessary that all factors be present in every case; the importance of various factors will vary according to the facts and circumstances of each situation. In addition, both lists are non-exhaustive, which means that an employer may present other factors relevant to whether an employment practice is "reasonable" or "other than age."

In addition to the employment practice's design, the way in which it is administered affects its reasonableness. For example, for purposes of the RFOA defense, it may be reasonable to consider factors such as job performance and skill sets when deciding whom to discharge during a reduction in force. It also may be reasonable to consider the extent to which an employee possesses a critical skill

(i.e., one that is key to the employer's operations), or is flexible (i.e., has skills that can be used in various assignments or has the ability to acquire new skills). Use of such factors is reasonable under the ADEA if the employer has made reasonable efforts to administer its employment practice accurately and fairly and has assessed the age-based impact of the practice and taken steps to ameliorate unnecessary and avoidable harm. Steps such as training its managers to avoid age-based stereotyping, identifying specific knowledge or skills the employer wants to retain (e.g., familiarity with the company's filing system or ability to integrate different computer networks), and providing guidance on how to measure flexibility (e.g., whether an employee performs a variety of tasks or willingly accepts new assignments) are evidence of reasonableness.

Employers who apply the considerations delineated in the regulations on the front end will likely find that they are better able to mitigate risk, make more sound decisions, and challenges are more likely to be resolved in their favor. The purpose of this guidebook and related kit components is to provide covered employers with information on the new regulations as well as existing requirements to ensure compliance with the ADEA.

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Compliance Kit Implementation Procedures

The following implementation procedures are intended to provide specific instructions for correctly utilizing the various components of our ADEA Compliance Kit. If you have additional questions about this guidebook or other kit components, please contact Personnel Concepts at 800-333-3795.

1. Post the enclosed Age Discrimination Poster conspicuously in the workplace where notices to employees are customarily posted. The purpose of this poster is to acknowledge your coverage under the Act and to notify affected workers that age discrimination is strictly prohibited in the workplace.
2. Review the overview of the ADEA in Chapter 2 of this guidebook. This overview is intended to ensure that you understand your establishment's obligations under current age discrimination law.
3. Review Chapter 3, "Summary of New Regulations Effective April 30, 2012" with the individuals in your business who are responsible for recruiting, hiring, and help wanted advertisements.
4. Distribute the enclosed Age Discrimination Training Handouts to supervisors, managers, and other affected individuals to ensure that your workforce understands what constitutes unlawful age discrimination.
5. Review Chapter 4, "Recent ADEA Case Settlements" to determine if recent cases have involved situations, decisions, or issues that are currently present in your workplace.
6. Refer to the EEOC Enforcement Guidance and Regulatory Text contained in Chapter 5 and 6 on an as-needed basis when making employment decisions about individuals over the age of 40 or when receiving a complaint from a protected individual.
7. Use the enclosed EEO Incident Report to document complaints from individuals over the age of 40 involving any form of age-based harassment or employment discrimination.
8. Upon completing the EEO Incident Report for an alleged discriminatory act or incident, contact your legal counsel for specific advice on how to proceed. Do not attempt to resolve the issue without consulting an attorney.
9. Contact a Compliance Specialist at 800-333-3795 to inquire about other products pertaining to employment discrimination, including the EEO Compliance Program and the Harassment in the Workplace Program.

The ADEA A Legal Opinion

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What is the ADEA?

The Age Discrimination in Employment Act ("ADEA" or "Act") of 1967[1] was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[2]

Beginning at age 40, the ADEA makes it generally unlawful for an employer with more than 20 employees "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[3] In addition to the prohibition against discriminatory practices by employers directly, the ADEA also applies to employment agencies and other staffing methods affiliated with an employer, and to labor unions engaged in representing employees.[4] Moreover, in addition to current employees, the Act also protects applicants and former employees from discrimination.

Since its enactment in 1967, the ADEA has gone through a series of amendments to broaden its coverage of aging employees. Although the ADEA originally applied only to employees between the ages of 40 and 65, subsequent amendments have made it applicable to all workers over the age of 40. As discussed in more detail herein, recently finalized regulatory changes also intend on placing a heavier burden on employers to prove that age is not a determining factor in adverse employment decisions, even if decisions appear age neutral on their faces (so-called "Disparate Impact" claims).[5] Since 1978, the Equal Employment Opportunity Commission ("EEOC") has been responsible for enforcing the Act.[6]

Who Is Subject to ADEA Enforcement?

The ADEA generally applies to all government and private employers in the United States who employ "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[7] In addition to domestic employers, the Act also applies to employers incorporated in other nations, if such foreign employers are controlled by a United States employer.[8] Control will be discerned by considering, among other factors, common ownership of the businesses, common or centralized management,

1 29 U.S.C. §§ 621, et seq.
2 29 U.S.C. § 621.
3 29 U.S.C. § 623.
4 29 U.S.C. § 630(c)-(d).
5 75 Fed. Reg. 7212-7218 (Feb. 18, 2010) (to be codified at 26 C.F.R. pt.1625).
6 29 U.S.C. § 626(a). Prior to 1978, the duty to enforce the Act was given to the Department of Labor.
7 29 U.S.C. § 630(b).
8 29 U.S.C. § 623(f).

and financial control.[9] The Act also extends to U.S. citizens employed by U.S. employers to undertake work abroad, unless the laws of the hosting country forbid such enforcement.[10]

Lastly, in addition to direct employers, most labor organizations and employment agencies are also subject to the ADEA. A labor organization is covered by the Act if it "exists for the purpose ... of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment."[11] An employment agency is considered "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person."[12]

What Does the ADEA Prohibit?

As mentioned previously, the ADEA generally prohibits age discrimination against anyone over the age of 40 in relation to any hiring, firing, promotion or demotion, transfer, compensation, or benefits decision. In addition, the Act also prohibits discrimination in referrals by employment agencies, actions by unions, and retaliation against employees for filing or participating in an ADEA claim or for opposing an employer's discriminatory practices.[13]

1. General Application. In sum, unless one of the hereinafter mentioned exemptions is applicable, it is generally unlawful for an employer to make any detrimental labor-related decision based on an employee's age, if the employee in question is 40 years old or older.

However, because the Act only covers individuals who are 40 or older, employees who are 39 and under are not protected. Moreover, the Supreme Court has held that the Act never prohibits employers from favoring an older employee over a younger employee, even if both employees are over the age of 40.[14] Conversely, the Court has held in a separate case that the Act does prohibit discrimination against an older employee in favor of a younger employee, even if both are older than 40 years old.[15]

2. Advertising Discrimination. Advertisements for job openings are subject to the ADEA, which broadly prohibits language indicating an age preference, unless age is a bona fide occupational qualification for the position advertised.[16] According to the EEOC, advertisements that contain phrases such as, "young," "college student," "recent college graduate," "boy," "girl," or similar terms are prohibited under the Act, unless an exception applies.[17] Moreover, phrases that favor some over the age of 40, but discriminate against others (such as "age 40 to 45," "age over 65," or "retired person") is also prohibited.[18] Despite the preceding, requesting an applicant's age or date of birth in an application is not necessarily a violation because there may be legitimate reasons for an employer to require such information.[19] However, if an applicant's age or date of birth is requested, the EEOC will closely monitor the application "to assure that the request is for a permissible purpose and not for purposes proscribed by the Act."[20]

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9 Id.
10 Id.
11 29 U.S.C. § 630(d). The ADEA defines a labor organization as an entity that either: maintains a hiring office for the procurement of workers; is a certified employee representative; or holds itself out as the employee's collective bargaining representative.
12 29 U.S.C. § 630(c).
13 29 U.S.C. § 623(d). In Robinson v. Shell Oil Co., a case involving Title VII of the Civil Rights Act, the Supreme Court held that ex-employees may sue for retaliation. 519 U.S. 337 (1997). Because the ADEA is closely modeled after Title VII, former employees appear to be protected from retaliation under the ADEA as well.
14 Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004).
15 O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).
16 29 U.S.C. § 623(e).
17 29 C.F.R. § 1625.4(a).
18 Id.
19 Id. at '§ 1625.4(b), 1625.5
20 Id. at § 1625.5.

Exceptions & Defenses to the ADEA

Although some defenses have undergone decisive narrowing, the EEOC continues to realize several instances where age may be a legitimate concern in making an employment decision.

1. Bona Fide Occupational Qualification ("BFOQ"). An employer will not be in violation of the Act if an employment action is taken against an employee due to a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[21] According to the Supreme Court, the BFOQ must be more than "convenient" or "reasonable," but must instead be "reasonably necessary ... to the particular business."[22]

Under the Court's interpretation, an employer must justify an age-based requirement or preference by demonstrating: (1) that the requirement is reasonably necessary to the essence of its business, and (2) that an individualized approach would be pointless or impractical. The second prong of this test can be established in one of two ways. First, the employer may show that it had a factual basis for believing that persons over a certain age would be unable to perform the job safely. Alternatively, the employer may show that "age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis."[23] Although employers have attempted to use the BFOQ defense in a wide variety of occupations, job-related age requirements have tended to be more successful when the position in question may affect public safety, such as airline pilot or law enforcement officer.

2. Reasonable Factors Other Than Age ("RFOA") or Demonstrated Cause. Another defense to a charge of age discrimination may apply if "the differentiation is based on reasonable factors other than age."[24] Similarly, disciplining or discharging an employee for reasonable cause also constitutes a defense to the act.[25] In both instances, an employer asserts that its employment action did not involve age discrimination, but instead was based on some other factor.

While the RFOA defense has historically been incredibly popular, recently finalized changes in regulations may greatly narrow the exception's applicability. In response to two separate Supreme Court cases on the issue,[26] the EEOC has approved the following criteria in order to permit an employer to successfully assert the RFOA defense.[27] First, to test whether the alternative factor in an employment decision is indeed reasonable, the agency will look at the extent to which the factor is related to the employer's stated business purpose; the extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination; the extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes; the extent to which the employer assessed the adverse impact of its employment practice on older workers; and the degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.[28]

In sum, these recently finalized regulations shift the burden significantly to the employer to prove that age was not the determining factor in the employment decision. As a result, the new regulations, make it significantly more difficult to assert the RFOA defense.

3. Seniority & Benefit Equality. Under the ADEA, it is also permissible for an employer to take action pursuant to

21 29 U.S.C. § 623(f)(1).
22 W. Air Lines v. Criswell, 472 U.S. 400, 414 (1985).
23 Id.
24 29 U.S.C. § 623(f)(1).
25 Id. at § 623(f)(3).
26 Smith v. City of Jackson, 544 U.S. 228 (2005); Meacham v. Knolls Atomic Power Labs, 128 S.Ct. 2395 (2008).
27 As of January 23, 2012, the approved changes have not been officially enacted as they await review and approval by the Office of Management and Budget ("OMB").
28 77 FR 19080 (March 30, 2012) 26 C.F.R. pt.1625.7.

a legitimate seniority system or employee benefit plan, although neither the seniority system nor the benefit plan can require mandatory retirement because of age. [29] However, the ADEA explicitly allows voluntary early retirement as an incentive of employee benefit plans. To qualify, an employee benefit plan must satisfy the "equal cost equal benefit" principle that provides equality between the amount employers spend on benefits for older and younger employees.[30] If it costs more to provide the same benefit to employees over the age of 40, the employer has the option of paying the same amount for benefits of the over-40 class as it does for employees under 40. This is so, even if it results in workers in the over-40 class receiving fewer benefits. However, employers cannot pay less for benefits of members of the over-40 class than they pay for younger employees.

In recent years, there has been a debate over the extent to which the "equal benefits or equal costs" principle should be applied to retired employees. In order to cut costs, some employers have sought to provide one level of health benefits to retirees under age 65 to cover them until they are eligible for Medicare and then reduce or eliminate the benefit when the retiree becomes Medicare eligible. Fearing that employers might reduce or eliminate benefits for all retirees in the future, rather than increase benefits for older, Medicare-eligible retirees, the EEOC promulgated a rule stating that it is not a violation of the Act to alter, reduce, or eliminate health benefits for retirees when he or she becomes eligible for Medicare or comparable state health benefits.[31]

4. Permitted Mandatory Retirement for Some Groups. Finally, the ADEA permits employers to impose mandatory retirement with respect to certain narrow categories of employees. For example, although mandatory retirement policies generally constitute a violation of the ADEA, the Act permits employers to establish retirement policies for bona fide executives or high policymakers who have 1) reached age 65; and 2) are entitled to a pension benefit of at least $44,000.[32] Under certain circumstances, state and local governments may establish mandatory retirement requirements for their firefighters or law enforcement officers as well.[33]

Disparate Treatment & Disparate Impact

There are two different types of claims that employees may bring under the ADEA: disparate treatment and disparate impact. Disparate treatment occurs when an employer intentionally discriminates against an employee or enacts a policy with the intent to treat the employee differently from others because of the employee's age. These claims require proof that the employer intended to discriminate against employees over the age of 40 when it took the challenged employment action. Intent, the critical element of a disparate treatment claim, may be shown directly or by circumstantial evidence.

Meanwhile, disparate impact occurs when the employer's acts or policies are facially neutral, but have an adverse impact on a class of employees and are not otherwise reasonable. Unlike disparate treatment claims, disparate impact claims may be established without proof of discriminatory intent. Although the ADEA clearly allows disparate treatment claims, it was, for many years, unclear whether an employee may recover under a disparate impact theory, which led to confusion for litigants and lower courts alike.[34]

However, in 2005, the Supreme Court held that the ADEA does permit disparate impact claims.[35] Over the years, the courts have developed a complicated set of rules and procedures that govern how disparate treatment and disparate impact claims are adjudicated. Many of the cases in which these rules have evolved are general civil rights cases, but their reasoning typically applies in the ADEA context as well. These rules, which differ depending on the type of claim involved, are discussed below.

1. Disparate Treatment. In general, the courts evaluate individual disparate treatment claims under the ADEA

29 29 U.S.C. § 631(f)(2)
30 Id. at § 623(f)(2)(B).
31 72 FR 72938.
32 29 U.S.C. § 631(c)(1)
33 Id. at § 623(j).
34 Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
35 Smith v. City of Jackson, 544 U.S. 228 (2005).

in one of two ways. [36] When direct evidence of discrimination is lacking, plaintiffs are generally subject to theburden-shifting framework established by the *Supreme Court in McDonnell Douglas v. Green and Texas Dept. of Community Affairs v. Burdine.*[37]

When the plaintiff has direct evidence of age discrimination, use of the McDonnell Douglas burden-shifting model may be unnecessary.[38] Under the McDonnell Douglas burden-shifting framework, an employee must first establish that an employment decision disproportionately affected workers over the age of 40. Once an employee has established his or her claim by a preponderance of the evidence, the burden shifts to the employer to "articulate some legitimate [and] nondiscriminatory reason" for the action taken.[39]

If the employer successfully rebuts the employee's prima facie case by articulating such a reason, then the employee may still prevail if he or she can show that the employer's defense is merely an ancillary reason and that the employer's behavior was actually motivated by discrimination.[40] While the burden of production shifts to the employer to rebut the employee's prima facie case, the burden of persuasion remains on the plaintiff at all times.[41] Because the McDonnell Douglas framework was originally established in a civil rights case involving failure to hire, there has been some confusion among the courts when applying this model to ADEA claims, particularly when it comes to defining what constitutes a prima facie case of age discrimination. Under the facts in the McDonnell Douglas case, a prima facie case would be established if the employee showed: "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[42] As adapted to the ADEA context, therefore, a plaintiff generally must show that he or she is over the age of 40, that he or she was adversely affected by an employment action, and that such action was taken because of the employee's age in order to establish a prima facie case of age discrimination.[43]

However, because the elements of a prima facie case may vary somewhat depending on the type of employment action that was taken (e.g., failure to hire, discharge, demotion, compensation, etc.), an employee may have to make additional—or more specific—showings in order to establish a prima facie case.[44]

As noted above, if an employer rebuts the plaintiff's prima facie case by offering a legitimate nondiscriminatory reason for its employment action, the employee must establish that the employer's reason is a pretext for discrimination. A plaintiff may show pretext in a variety of ways, such as offering statistical evidence, proof of discriminatory statements by an employer, or evidence of harassment, although presentation of such evidence does not guarantee that the plaintiff will be successful. In addition, a plaintiff may, in some cases, demonstrate pretext by offering evidence of discrimination against other employees. Indeed, in one Supreme Court case,[45] the employee attempted to introduce testimony by several former employees who claimed they had suffered age discrimination at the hands of their supervisors; even though those supervisors worked in another part of the company and were not involved in any discriminatory action taken against the plaintiff. Noting that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors," the Supreme Court held that such evidence is neither per se admissible nor per se inadmissible and therefore the district court should determine the admissibility of such evidence on a case by case basis.[46] Because many lower courts had been excluding such evidence, the Court's decision is expected to

36 See, e.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
37 411 U.S. 792 (1973); 450 U.S. 248 (1981).
38 See, e.g., Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).
39 McDonnell Douglas, 411 U.S. 792, 802 (1973).
40 St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).
41 Burdine, 450 U.S. 248, 255-256 (1981).
42 McDonnell Douglas, 411 U.S. at 802.
43 Kralman v. Illinois Dept. of Veteran's Affairs, 23 F.3d 150 (7th Cir. 1994), cert. denied, 13 U.S. 948 (1994).
44 O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).
45 Sprint/United Management Company v. Mendelsohn, 552 U.S. 379 (2008).
46 Id. at 388.

benefit employees who want to introduce co-worker evidence in future cases.

2. Disparate Impact. As noted above, the Supreme Court has clarified that plaintiffs may bring disparate impact claims under the ADEA, reasoning that the ADEA is analogous to Title VII, which authorizes disparate impact claims.[47] However, the process for bringing disparate impact claims differs from the process for proving a disparate treatment claim. In addition, because of differences between the ADEA and Title VII, employees who decide to pursue disparate impact claims under the ADEA must comply with rules of proof that differ from the rules that govern disparate impact claims under Title VII. In order to bring a disparate impact claim under the ADEA, an employee must first establish that the employment decision at issue disproportionately affected employees over the age of 40.[48] The employer may then rebut the prima facie case by showing that the decision was attributable to a reasonable factor other than age. Until recently, there was confusion among the federal courts regarding the question of whether it is the employee or employer who bears the burden of demonstrating that the challenged employment practice is reasonable or unreasonable. In *Meacham v. Knolls Atomic Power Laboratory*, the Supreme Court ruled that the employer is responsible for proving that its action was in fact reasonable.[49] In response to this decision, the EEOC has finalized new regulations which clearly outline the processes for the employer to successfully assert a reasonable factor other than age defense.[50] Ultimately, the result in the Meacham case and the recently finalized EEOC regulations appear to make it much easier for plaintiffs to prevail in disparate impact cases.

EEOC Enforcement Procedures

The EEOC is responsible for enforcing the provisions of the ADEA.[51] In order to encourage informal resolution of age discrimination disputes, the Act requires employees to file administrative complaints with the EEOC before they are allowed to sue in federal court. The deadline for filing an ADEA charge varies depending on several factors.[52] Generally, a private sector employee must file a complaint with the EEOC within 180 days of the alleged discriminatory act. However, if the state where the alleged unlawful practice took place has an age discrimination law and a corresponding enforcement agency, the time by which an employee must file with the EEOC is extended to within 300 days of the alleged unlawful practice.[53]

After receiving a charge of unlawful discrimination, the EEOC conducts an investigation, and, if the claim is found to have merit, the agency may seek compliance with the statute through methods such as conciliation, conference, or persuasion.[54] Once 60 days have elapsed following the filing of a discrimination charge, an employee may file suit in federal court.[55] If the employee decides to wait for a final determination from the EEOC, then he or she has 90 days to file suit in federal court once notified of the agency's final action.[56] It is important to note, however, that the EEOC has the authority to sue on behalf of an employee, in which case the individual employee's right to bring suit is eliminated.[57] Over the years, there has been some confusion over what constitutes a charge for purposes of triggering EEOC enforcement action. Under EEOC regulations, an ADEA complaint must, at a minimum: (1) be in writing, (2) name the employer at issue, and (3) generally allege the

47 Smith v. City of Jackson, 544 U.S. 228 (2005).
48 Id.
49 554 U.S. 84 (2008).
50 See 77 FD 19080 (March 30, 2012) 26 C.F.R. pt 1625.7
51 29 U.S.C. § 626(a).
52 The filing procedures for federal employees vary somewhat from the filing procedures for private sector employees. Most notably, federal employees are required to seek resolution with the equal employment opportunity office at their respective agency prior to filing a charge of discrimination with the EEOC. 29 C.F.R. § 1614.105.
53 29 U.S.C. § 626(d).
54 29 U.S.C. § 626(b).
55 Id. at § 626(d).
56 29 U.S.C. § 626(e).
57 Id. at § 626(c).

discriminatory acts.[58] In addition to these regulatory requirements, EEOC policy states that a filing must contain a request for agency action to remedy the alleged age discrimination. The agency's position has been validated by the Supreme Court,[59] which held that a claimant's submission of an improper form was not fatal to her claim. According to the Court, "[i]n addition to the information required by the regulations ... if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."[60] Although this permissive standard may lead to a higher number of filings being deemed to be charges, the Court reasoned that giving inexperienced litigants the benefit of the doubt is more consistent with the remedial purpose of the ADEA.

Waiver & Arbitration

An employee may waive his or her rights under the ADEA if such waiver is knowing and voluntary.[61] In order to be considered knowing and voluntary, a waiver must comply with detailed requirements set forth in the statute.[62] A waiver given in settlement of a charge filed with the EEOC or in a civil action is not considered knowing and voluntary unless the general requirements for a waiver are met and the individual has a reasonable opportunity to consider the settlement.[63] The person asserting validity of the waiver has the burden of proving that the waiver was knowing and voluntary. In addition, the waiver provision does not apply to the EEOC, nor may a waiver be used to interfere with an employee's right to file an age discrimination charge or participate in an EEOC investigation or proceeding.

On occasion, employers may, either deliberately or inadvertently, fail to comply with the ADEA's waiver requirements. In such cases, the courts must determine what effect the employee's acceptance of the statutorily deficient waiver has on the waiver's validity. In *Oubre v. Entergy Operations, Inc.*,[64] the employee received severance pay in return for waiving any claims against the employer, but the waiver did not fully comply with the ADEA's waiver requirements. The Supreme Court, reasoning that retention of severance benefits does not ratify a statutorily invalid waiver, held that the plaintiff did not have to return the money before bringing suit.[65] A related issue is the effect of arbitration clauses on ADEA claims. The Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that the ADEA does not preclude enforcement of a compulsory arbitration clause.[66] The plaintiff in Gilmer signed a registration application with the New York Stock Exchange (NYSE), as required by his employer. The application provided that the plaintiff would agree to arbitrate any claim or dispute that arose between him and Interstate. Gilmer filed an ADEA claim with the EEOC upon being fired at age 62. Interstate filed a motion to compel arbitration based on the application and the Federal Arbitration Act (FAA),[67] which was enacted to change the "longstanding judicial hostility to arbitration...."[68] Ultimately, the Court held that an ADEA claim may be subject to compulsory arbitration in accordance with an arbitration agreement contained in an employment contract.[69] Similarly, in 2009, the Court held that collective bargaining agreements that contain provisions requiring arbitration of ADEA claims are enforceable.[70]

Penalties for ADEA Violations

58 29 C.F.R. § 1626.6.
59 Federal Express Corp. v. Holowecki, 52 U.S. 389.
60 Id. at 402.
61 29 U.S.C. § 626(f).
62 Id. at § 626(f)(1).
63 Id. at § 626(f)(2).
64 522 U.S. 422 (1998).
65 Id. at 428. An employer, however, may be entitled to deduct the original settlement amount from any damages awarded in a subsequent lawsuit.
66 500 U.S. 20 (1990).
67 9 U.S.C. §§ 1, *et seq*.
68 Gilmer, 500 U.S. at 24
69 Id. at 23
70 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009)

The remedies available under the ADEA are patterned on the Fair Labor Standards Act,[71] and may include injunctions, compelled employment, reinstatement, promotion, and back pay.[72]

In addition, a willful violation of the act gives rise to liquidated damages, which are generally computed by doubling the amount awarded to the plaintiff.[73] According to the Supreme Court in *Trans World Air Lines v. Thurston*, "a violation of the Act [is] 'willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[74] Upon proving a claim of age discrimination, a plaintiff is entitled to reasonable attorney's fees and costs.[75]

In addition, anyone who interferes with the EEOC's performance of its duties under the ADEA is subject to criminal penalties amounting to a fine or up to one year of prison, or both.[76]

71 29 U.S.C. § 626(b).
72 Id. at § 216(b).
73 Id. at § 626(b). Compensatory and punitive damages are not available under the ADEA.
74 469 U.S. 111, 126 (1985).
75 29 U.S.C. § 216(b).
76 Id. at § 629.

Quick Reference of Common Issues: ADEA

Employers May	Employers May Not
-Prefer employees over the age of 40 over employees under the age of 40. -Generally give preference to older employees, regardless of their respective ages. -Ask for an applicant's date of birth on an application if there is a reasonable reason to do so (e.g. to determine employment eligibility, etc.). -Prefer younger employees if there is a bona fide reason for doing so (however the reason must not be related to generic stereotypes). -Make decisions that adversely affect older employees as long as age was not a determining factor in making the decision. -Terminate employees over 40 for cause, as long as reasonable cause can be shown.	-Give preference based on age to any employee (even those over 40) to the detriment of an older employee over the age of 40. -Use an applicant's date of birth in a discriminatory manner if the applicant is over 40. -Make decisions that adversely and disproportionately affect employees over the age of 40 without demonstrating that age was not the determining factor.

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Frequently Asked Questions About the ADEA

Q: What is the Age Discrimination in Employment Act of 1967 (ADEA)?

A: The Age Discrimination in Employment Act of 1967 prohibits employers of 20 or more employees from discriminating against employees or job applicants, over the age of 40.

Q: What discriminatory practices are prohibited by the ADEA?

A: Under the ADEA, it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Discriminatory practices also include:

- harassment on the basis of age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices; and
- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain age.

The ADEA's broad ban against age discrimination also specifically prohibits:

- statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
- discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Q: May an employer ask an applicant's age during the interview process?

A: The ADEA does not specifically prohibit asking an applicant's age. However, it may give an applicant cause to believe that age discrimination played a part in their not receiving a job or promotion so before inquiring about age an employer needs to make sure that it is for a lawful reason and does not violate the rules set forth by the ADEA.

Q: What is the Older Workers Benefit Protection Act of 1990 (OWBPA)?

A: The Older Workers Benefit Protection Act of 1990 amended the ADEA to prohibit employers from denying older workers benefits since providing benefits to older workers can be more costly that of younger employees. In limited circumstances, an employer can offer reduced benefits to an older worker as long as the cost of the reduced benefits is equal to what they pay for younger employees.

Q: Can an employer ask an employee to waive their rights under ADEA?

A: Yes. An employer can ask an employee to waive his/her rights if it is a part of an exit incentive program or employment termination program. However, according to the EEOC, the following rules must be followed for the waiver to be valid: 1. In writing 2. Easy to understand 3. Specifically refer to ADEA rights 4. Not waive rights or claims that may occur in the future 5. Be in exchange for valuable consideration 6. Advise the employee to consult an attorney before signing the waiver 7. Allow the employee 21 days to consider the waiver and 7 days to revoke it.

Q: What are the basic elements of a prima facie case of age discrimination in hiring?

A: The elements are 1. The plaintiff was in the ADEA protected age range 2. They were qualified for the job 3. They were rejected despite their qualifications 4. After they were disqualified, the position remained open and the employer continued to search for someone with the plaintiff's qualifications.

Q: Is it legal to require a certain level of fitness as an essential job qualification?

A: Yes, when an employer uses age as a limiting factor in criteria then the defense that any other differentiation based on reasonable factors is not permissible. If a level of fitness is necessary to perform a particular job function, then the applicants must be based on their level of fitness alone with no attention paid to age.

Q: Can an employer specify an age or age group when posting or advertising the qualifications for a particular job?

A: If an employer can prove that an occupational qualification is specific to a particular job and is necessary for normal operation of the business, then the qualification may be classified as a Bona Fide Occupational Qualification (BFOQ) and acceptable to implement. However, the Employer has the burden of proving that 1. The age limit is reasonably necessary for the job that is in question 2. The individuals that are excluded are in fact disqualified 3. The individuals that are disqualified possess some trait that cannot be ascertained except by reference to age.

Q: Can an employer force an executive to retire at the age of 65?

A: Yes. Under the ADEA, an employer can force retirement of a "bona fide executive" who had held an executive position for at least a 2-year period prior to retirement holds an executive, policy-making position and who's yearly retirement will total at least $44,000. According to the EEOC, a bona fide executive is an employee who "exercises substantial authority over a significant number of employees and large volume of business." This exemption does not apply to middle managers or federal employees.

Q: What happens if a company is found in violation of age discrimination?

A: The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- back pay,
- hiring,
- promotion,
- reinstatement,
- front pay,
- reasonable accommodation, or
- other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

- attorneys' fees,
- expert witness fees, and
- court costs.

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

Frequently Asked Questions Regarding the New Regulations

Frequently Asked Questions Regarding EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the ADEA

Q: What is the purpose of the rule?

A: The rule responds to two Supreme Court decision[1] in which the Court criticized one part of the Commission's existing ADEA regulations. The Court upheld EEOC's longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the regulations which said that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a "business necessity."[2] The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA. The Court also said that the RFOA defense is easier to prove than the business necessity defense but did not otherwise explain RFOA.

The rule does two things:

- It makes the existing regulation consistent with the Supreme Court's holding that the defense to an ADEA disparate impact claim is RFOA, and not business necessity; and
- It explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

Q: Who is required to follow the rule?

A: The rule applies to all private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations. Although the ADEA applies to the federal government as an employer, the rule does not apply to federal employers by virtue of section 633a(f) of the ADEA.

Q: Does the rule apply to all employment practices?

A: No. The rule applies to only a few kinds of employment practices. Specifically, it applies only to practices that are **neutral** on their face, that **might harm older workers** more than younger workers, and that apply to **groups** of people. For instance, it applies to tests used to screen employees or to some procedures used to identify persons to be laid off in a broad reduction-in-force ("RIF").

Q: When does an employer have to show that its practice was based on an RFOA?

A: An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and established that the practice harmed older workers substantially more than younger workers.

Q: Do other statutory defenses apply to disparate impact claims?

A: RFOA is the standard defense to ADEA impact claims. The final rule revises section 1625.7 of the regulations, which only addresses the RFOA defense, and does not change other regulatory sections that apply to the ADEA's other affirmative defenses.[3] However, the rule does not preclude an employer from asserting another statutory provision in response to a particular claim. For example, if an employee alleged that a practice required by a seniority system had a disparate impact, the employer could defend the claim by relying on section 4(f)(2) of the ADEA, which precludes using disparate impact analysis to challenge the provisions of a seniority system.

Q: What determines whether an employment practice is based on Reasonable Factors Other than Age?

A: An employment practice is based on an RFOA when it was **reasonably designed and administered to achieve a legitimate business purpose** in light of the circumstances, including its potential harm to older workers.

Example 1:

If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department's actions would

likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.

The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It includes the following list of **considerations relevant to assessing reasonableness:**

- The extent to which the factor is related to the employer's **stated business purpose;**
- The extent to which the employer **defined the factor accurately and applied the factor fairly and accurately**, including the extent to which managers and supervisors were **given guidance or training** about how to apply the factor and avoid discrimination;
- The extent to which the employer **limited supervisors' discretion** to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer **assessed the adverse impact** of its employment practice on older workers; and
- The **degree of the harm to individuals within the protected age group**, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer **took steps to reduce the harm**, in light of the burden of undertaking such steps.

Q: Must employers show that they used each of the considerations listed in the EEOC's regulation to establish the defense?

A: No. The considerations merely describe the most common characteristics of reasonable practices. The rule makes clear that the defense could be established absent one or more of the considerations, and that there could even be a situation in which the defense is met absent any of the considerations. Similarly, the defense is not automatically established merely because one or more of the considerations are present.

Q: Consideration 1625.7(e)(2)(i) refers to the extent to which the factor is related to the employer's stated business purpose. What is a "stated business purpose"?

A: The "stated business purpose" is the business reason articulated by the employer for adopting, or implementing, the employment practice in question. "Stated" does not mean that the purpose must be written.

Note that consideration 1625.7(e)(2)(i) focuses on the method that the employer used to achieve its purpose, rather than the purpose itself. For example, if a police department is concerned about losing its employees to neighboring departments and decides to raise police officer salaries to match those in surrounding communities, the goal of retaining officers is not relevant to the determination of reasonableness. On the other hand, the extent to which the chosen method (raising salaries for certain employees) relates to the purpose (retaining staff) is relevant to the determination of reasonableness.

Q: Consideration 1625.7(e)(2)(ii) is "[t]he extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination." How would an employer show that it defined and applied the factor fairly and accurately?

A: The extent to which the employer defined and applied the factor fairly and accurately refers to the steps the employer took to make sure that the practice was designed and applied to achieve the employer's intended goal while taking into account potential harm to older workers. The following examples illustrate the point:

Example 2:

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably

designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

Example 3:

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer's stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in Example 2, above.

Q: Does considering the extent to which the employer defined and applied the factor fairly and accurately mean that an employer must validate a test or other selection criterion as it would under Title VII?

A: No. If a particular employment practice disproportionately harms applicants or employees based on race, color, religion, sex, or national origin, Title VII requires the employer to demonstrate that the practice is "job related for the position in question" and "consistent with business necessity." For example:

- Title VII's business necessity defense would typically require an employer that gave a physical fitness test that disproportionately excluded women to produce a validation study in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, showing that the test accurately measures safe and efficient job performance.
- In contrast, the ADEA's RFOA defense does not require employers to formally validate tests or other selection criteria. Instead, **employers are required to demonstrate only that their choices were reasonable.** The extent to which a practice measures skills related to a job informs the reasonableness of the practice.

Q: Does the reference in consideration 1625.7(e)(2)(ii) to "the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination" require employers to train their supervisors or provide a certain type of training?

A: No. As noted, the considerations are not requirements, and many employer practices will necessitate little, if any, guidance. However, showing that it provided guidance or training in appropriate circumstances will help the employer establish that its actions were reasonable.

Moreover, the rule's reference to "guidance or training" recognizes that the manner in which employers convey their expectations to managers will vary depending on the circumstances. For example, a smaller employer might reasonably rely entirely on brief, informal, oral instruction.

Q: Consideration 1625.7(e)(2)(iii) is "[t]he extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes." Does this consideration mean that it is unreasonable to use subjective decision-making?

A: No. In many cases, it may be crucial for an employer to assess employee or applicant qualities such as flexibility and willingness to learn -- qualities that are often assessed subjectively. The rule does not say that employers may not seek these qualities in its workforce, or that they are not valuable.

However, consideration 1625.7(e)(2)(iii) does recognize that giving supervisors unconstrained discretion to evaluate employees or applicants using subjective criteria may result in disproportionate harm to older workers, because it allows supervisors' biases and stereotypes to infect the decision-making. Therefore, it is particularly useful to provide guidance when asking supervisors to evaluate subjective criteria that are subject to age-based stereotypes, such as productivity, flexibility, willingness to learn, and technological skills. For example, an employer that wants its supervisors to evaluate technological skills might attempt to reduce possible harm to older workers by instructing managers to look specifically at objective measures of the specific skills that are actually used on the job.

Q: Consideration 1625.7(e)(2)(iv) is "[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers." Does this consideration require an employer to perform an

adverse impact analysis of its employment practices?

A: No. The extent to which the employer assessed the adverse impact of its employment practice on older workers is simply one way of determining whether the employer considered the potential harm to older workers.

In many cases, the employer will not need to assess whether the practice disproportionately harmed older workers, because the practice is not a neutral practice that affects more than one person. For example, terminations for cause and voluntary separations generally are not the kinds of neutral practices that could have a disparate impact.

Where an **assessment of impact** is warranted, **the appropriate method will depend on the circumstances**, including the **employer's resources and the number of employees affected** by the practice. For example, a large employer that routinely uses sophisticated software to monitor its practices for race- and sex-based disparate impact may be acting unreasonably if it does not similarly monitor for age-based impact. Other employers, lacking the resources or expertise to perform sophisticated monitoring, may show that they acted reasonably by using informal methods of assessing impact.

Q: Consideration 1625.7(e)(2)(v) is "[t]he degree of harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps." What does the consideration require?

A: Again, this is a consideration, not a requirement. The consideration reflects the fact that an employer can increase its ability to defend against a claim of age-based disparate impact if it can show that it **balanced the potential harm to older workers** against the **cost and difficulty** of taking steps that would still accomplish its business goal but reduce the harm on older workers.

For instance, where the impact of an employment practice on older workers is minimal, the fact that an employer failed to take multiple steps to reduce harm would not mean that its chosen method is unreasonable. However, the greater the potential harm, the more likely that an employer would be expected to avail itself of available options that would reduce the harm without unduly burdening the business.

Q: Does consideration 1625.7(e)(2)(v) require an employer to search for and use the least discriminatory method for achieving its purpose?

A: No. The rule does not require an employer to search for options and use the one that has the least severe impact on older individuals. However, an employer's efforts to reduce the harm to older individuals are not irrelevant. There may be circumstances in which the employer knew, or should have known, of a way to noticeably reduce harm to older workers without sacrificing cost or effectiveness; in these circumstances, it could be unreasonable for the employer to fail to use such an option.

Q: Must an employer keep special documentation to prove that it reasonably designed and administered the practice to achieve a legitimate business purpose in light of potential harm to older workers?

A: No. If disparate impact is established, the employer can support an RFOA defense with evidence that would be admissible in court, including testimony. The rule does not change existing recordkeeping requirements under the ADEA (see 29 C.F.R. Part 1627); it does not require, and should not prompt, documentation other than that which an employer would make as part of its normal business operations. However, being able to document the reasons for the design and administration of a practice can help an employer establish the RFOA defense.

[1] Smith v. City of Jackson, 544 U.S. 228 (2005); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008).

[2] "Business necessity" is the defense to a claim of disparate impact under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[3] *See, e.g.*, 29 C.F.R. §§ 1625.6 (BFOQ), 1625.8 (seniority systems), 1625.10 (employee benefit plans).

Chapter 2

Understanding the ADEA

Overview of the ADEA

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. At a federal level, it applies to employers with 20 or more employees but state law may allow an age discrimination claim with as few as one employee. It also applies to employment agencies and labor organizations, as well as to the federal, state and local government. The law states that:

> It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

The ADEA does not apply to independent contractors or elected officials. It does not usually cover police and fire personnel, certain federal employees in air traffic control or law enforcement, or certain highly paid executives. While persons in these positions could be retired on a mandatory basis, they cannot be denied a promotion or training based on age.

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. As a narrow exception to that general rule, a job notice or advertisement may specify an age limit in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the essence of the business.

When advertising a job opening, employers may violate the provisions of the ADEA by using such terms as "younger persons wanted", "girl", "boy" or "excellent first job". Even statements of "recent college grad" could send up a red flag. The ADEA makes it unlawful, unless a specific exemption applies (such as age requirements for law enforcement and fire personnel) for an employer to utilize job advertising that discriminates on account of age against persons because of their age.

A court will examine not only the language used in the advertisement but the context in which it is used in order to determine whether persons in the protected age group would be discouraged from applying. Consider the following ad:

> Looking for a young, energetic person who has strong selling skills. Applicants who are selected would be required to stand for long periods of time and lift 25-35 pounds.

If a charge was brought against the company advertising this position, the EEOC would find them in violation. The use of the word "young" specifically indicates a preference, limitation, specification or discrimination based on age. If the company ran that same ad but eliminated the word "young", it would likely be acceptable since people of all ages could be energetic and have strong selling skills. Furthermore, being able to stand for long periods of time and lift 25-35 pounds are not age related criteria and could be legitimate requirements for the job in question.

The next contact with a prospective employee is at the application stage. The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA. Employers should therefore be sensitive about not asking unnecessary questions that reveal age. The Act states:

> A request on the part of an employer for information such as "date of birth" or "state age" on an application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise discriminate based on age, employment application forms which request such information

> will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act (29 CFR 1625.5).

The purpose of this statement is to insure that older applicants are judged on their ability to do the job and not on their age. If employers have a valid reason for inquiring about age, it would be advisable that they include a statement on the form saying that the employer does not discriminate based on age and explain why information concerning age is being requested.

Once an applicant is called in for an interview, the same rules apply when asking questions as they do on applications. Employers shouldn't ask someone their age, date of birth, or even what year they graduated from school unless there is a valid reason for it. If there is a minimum age for a job position (have to be at least 21 to tend bar) then only ask the general question of "are you over the age of 21?"

When deciding to promote an employee, the decision should always be made on merit alone. Age should never be a factor. It is always best to communicate and document business decisions and discussions in case the decision is ever called into question.

The same is true about letting an employee go. The decision should always be based on performance in the workplace and not factors based on age. Clearly communicating with an employee helps avoid misunderstandings. If an employer sees an employee's performance declining, they should discuss it with them to give the employee a chance to improve. Then, if the employee continues to demonstrate poor performance, they will not be shocked if it is necessary that they are terminated. There will be no misunderstanding as to the employer's reasoning. Consider the following examples of terminating Mr. Smith:

> Mr. Smith, we are sorry that we have to let you go. You have been a loyal employee that has worked hard for this company, but we have to cut our staff. Thank you for all your contributions to our company and best of luck to you in your new endeavors.

While this tactic may soften the blow of being terminated, it is misleading if Mr. Smith was actually let go for performance issues. If Mr. Smith then sees a job ad seeking new employees at the company in the position he just vacated he may come to the conclusion that he was terminated because of his age. After all, he was told that he was a good employee so why else would they be terminating him?

Now look at the same conversation done in a truthful manner:

> We are sorry Mr. Smith but you have failed to improve your performance since our last meeting in which we talked to you about poor demeanor with customers. You have also failed to show up to work 6 days in the last month and the days you are here, you consistently fail to meet your quota for calls. Based on this, we are going to have to let you go.

In this circumstance, Mr. Smith should be very clear about the reasons for being let go and will be less likely to jump to the conclusion that his age played a role. Even if he filed a claim, the employer in the second example would have detailed reasons that supported their decision.

Another issue that arises in the workplace with regard to age is when companies reduce their workforce or "trim the fat". Although some companies base the decision on who to keep and who to let go based on seniority, keeping their "seasoned" employees, others take the opposite approach. There is a tendency in some companies to keep the most recently hired employees and get rid of the ones that have been around for a while. The rationale is that the older employees will be retiring soon anyway and they want to keep the employees that will be around for 10 or 20 years to come. There is also the thinking that younger employees bring in some "new blood" and with it, new ideas.

Employers should always think through their decision carefully and decide on the criteria (performance, experience, knowledge, closing one whole division) that will be used to evaluate who will be cut. If that criteria results in a disproportionate number of older employees being fired, then less discriminatory methods should be considered. If using performance evaluations, it is wise to take into consideration a whole history of evaluations rather than just the latest one. A court may be suspicious if someone had 10 straight evaluations with an "excellent" rating and then a "poor" rating just before the layoff. It could be an attempt to disguise an age-based action.

Employee Benefits and the ADEA

The ADEA also prohibits discrimination on the basis of age in connection with employee benefits. However, it permits employers to provide different benefits to older than to younger workers in some circumstances. The ADEA permits employers to provide lower life, health, and disability benefits to older workers if the employers pay an equal amount for those benefits for the older and younger employees. The ADEA also authorizes employers to offset, from certain benefits, other benefits older workers receive. There are also special rules that apply to early retirement incentive programs.

To receive equal benefits, older and younger workers must receive all of the following:

- **The same payment options**

EXAMPLE - Benefits are not equal if 55 year olds can choose between lump-sum pension distributions and annuities but 65 year olds must take pension benefits in an annuity.

- **The same types of benefits**

EXAMPLE - Benefits are not equal if laid-off 55 year olds get severance pay and job retraining, while laid-off 65 year olds get severance pay and life insurance -- even if the monetary value of the benefits paid to each is the same.

- **The same amount of benefits**

EXAMPLE - Severance benefits are equal if 50 year olds and 70 year olds both get $500 per month (or the same percentage of their salaries, even if the salaries are different) for the same period of time after they are laid off.

EXAMPLE - Severance benefits are equal if, for all employees, they are calculated based on years of service, even if a younger employee with more years of service then gets a higher benefit than an older employee with fewer years of service.

Benefits will also be equal if the employer's plan provides that older and younger employees will be paid the same monthly amounts until their deaths - even if the older employee has a shorter life expectancy and is thus likely to receive less in total benefits.

EXAMPLE - Employer A pays $2,000 per month in pension benefits to a retiree who is 75 years old and to a retiree who is 65 years old. Both retirees were making the same salary, had worked for the employer for the same number of years before their retirement, and are entitled to receive the pension benefits until the date of their deaths. The pension benefit to each is the same even though the 65 year old is likely ultimately to receive a greater total amount because he has a longer life expectancy.

Benefits will not be equal, on the other hand, where a plan sets a specific, age-based cutoff for the length of time employees can receive payments.

Equal Cost/Equal Benefit

The "equal cost or equal benefit" rule gives employers a choice: they will avoid violating the law if they either provide **equal benefits** to their older and younger workers or spend an equal cost to purchase those benefits, even if the benefits are not equal. In some cases - for example, life insurance benefits, disability benefits, and health insurance benefits - the cost of benefits may increase as people get older and as the likelihood of death, disability, or illness increases. Congress recognized that these greater costs might discourage employers from hiring older workers. The equal cost defense addresses this problem.

In order to meet the requirements for the equal cost defense an employer must show several things. First, the benefit must be one that becomes more expensive as people get older - the equal cost defense does not apply to benefits, like severance pay, which cost the same amount no matter what the age of the employee may be. Second, the benefit must be part of a benefit plan that requires the reduction of benefits as employees age. Third, the employer must show that it has spent an equal amount for each of its employees, regardless of age, to purchase the benefit. Finally, the employer must show that it has reduced the benefits for older workers only as much as is necessary to equalize the cost of the benefit for each worker.

The application of the equal cost defense may not always be the same. There may be differences depending on the benefit. Special rules apply to health insurance benefits, for example, as well as to long-term disability benefits. Under Medicare law, employers must offer current employees who are aged 65 or over, the same health benefits that they offer to any current employee under the age of 65.

As long as employers follow this rule, they will have provided an equal benefit and no inquiry about equal cost will be necessary.

With regard to health benefits offered to retirees, employers may take Medicare benefits into account in determining whether equal benefits have been provided. There is no violation of the ADEA as long as older retirees receive the same total health benefits -- including both Medicare and employer-provided benefits -- as younger retirees get from the employer. However, if an employer reduces the health benefits it provides to older retirees by more than the amount provided by Medicare, it must meet the equal cost defense. Otherwise, it will be in violation of the ADEA.

When it comes to long-term disability benefits, the EEOC regulations provide a "safe harbor" under which employers may set specified age-based time limits for the receipt of long-term disability benefits. As long as employers follow these rules, which depend on the age at which the person becomes disabled, they will not run afoul of the ADEA.

Benefit "packaging"

The previous sections deal with a benefit-by-benefit analysis. Employers are also permitted to offer certain benefits in a "benefit package." By packaging benefits, employers may decrease one benefit more than would be justified by the cost data, if they maintain or increase other benefits within the package by a corresponding amount. Only certain benefits may be packaged, and the overall result must be (1) no lesser cost to the employer, and (2) a package that is no less favorable in the aggregate than the benefits would have been to the employee under a benefit-by-benefit approach.

There are certain restrictions on benefit packaging.

- A benefit package may include **only those benefits that become more costly to provide with increasing age.** An employer may not, for example, package life insurance and paid vacation. Service retirement benefits also may not be part of a package.
- If health benefits are made part of a package, **they may not be reduced more than would be permitted if the health benefits stood alone and were not part of a package.**
- A benefit reduction greater than would be permitted under a benefit-by-benefit approach must be offset by another benefit available to the same employees.
- Employers who wish to justify reductions under the benefit package approach must be prepared to **produce data to show that those reductions are fully cost-justified.**

Benefit plans funded solely or in part by employees

The following equal cost rules apply where an employer requires that employees contribute to the funding of available benefits and where the premium for those benefits increases with age.

- An older employee may not be required to pay more for the benefit ***as a condition of employment.*** Where the premium has increased for an older employee, the employer must offer the employee the option of withdrawing from the benefit plan altogether. The employer can alternatively offer the employee the option of reducing his/her benefit coverage in order to keep his/her premium cost the same.
- An older employee who chooses to participate in a voluntary plan ***can*** be required to pay more for the benefit, but only if the employee does not pay a greater percentage of his/her premium cost than younger employees do.
- An older employee may be offered the ***option*** of paying - or paying more -- for the benefit in order to avoid otherwise justified reductions in coverage. Where the employee does choose to pay more, s/he can be charged no more than the amount that is necessary to maintain full coverage.

EXAMPLE - Employer K requires that each of its employees enroll in the company's health plan and pays for 40% of the premium cost for each employee. When employee John turns 60, K's insurer notifies K that it will increase the premium for John's health insurance by 10%. K tells John that it can no longer afford to pay 40% of the cost for his health insurance, and that he will be required to pay the additional charge himself. K says that because all of its employees must have the same health insurance, it will be forced to terminate John if he fails to pay the additional premium cost. Because John is now being forced to pay more for his insurance as a condition of employment, this violates the ADEA.

EXAMPLE - Employer Z offers its employees the option to enroll in its disability benefits plan, but requires that they pay 100% of the premium cost. The premium cost rises as employees grow older; 60 year old employees thus must pay more for the disability benefits coverage offered by Z than 55 year old employees do. As long as the premium increases do not exceed the amount necessary to maintain the same level of coverage for older and younger workers, this is permissible. Enrollment in the plan is voluntary, and employees of all ages bear the same percentage -- here 100% -- of the cost of coverage for their age.

Offsets

An employer takes an offset when it deducts from a worker's benefits amounts that the worker receives in other benefits. For example, an employer may deduct retiree health benefits, or extra pension benefits that are offered because of the termination from employment, from severance packages it pays to older employees.

The ADEA permits three types of offsets: (1) the deduction of certain pension benefits from long-term disability benefits; (2) the deduction of certain retiree health benefits or extra pension benefits from severance pay; and (3) the deduction of certain amounts from pension benefit accruals.

Long-term disability benefits

An employer may reduce long-term disability benefits by the amount of a worker's pension benefits in two cases: where the worker chooses to receive the pension, or where s/he has reached the later of age 62 or the normal retirement age under the plan and can get an unreduced pension. The employer may deduct only those portions of the worker's pension benefit that are based on the employer's contributions to the pension plan. In other words, the employer may not deduct pension benefits resulting from the employee's contributions, if any, to the pension plan.

Severance pay

An employer may not deny severance benefits to its employees because they are eligible to receive a pension from the employer. However, under certain circumstances, the employer may deduct from severance benefits any retiree health benefits the older employees receive, as well as any extra pension benefits that the employer provides because of the employee's separation from employment.

Pension benefit accruals

Employers may offset certain amounts from employee pension accruals if the employee either works past normal retirement age or begins to receive pension payments while s/he is still working.

Early Retirement Incentive Programs

In early retirement incentive programs, employers offer employees additional benefits to which they would not otherwise be entitled if they retire before they reach normal retirement age. For example, an employer might offer to eliminate the reduction in pension it would normally make if a person retired early. Under such a program, eligible employees could then get full pensions before normal retirement age.

The ADEA permits employers to offer early retirement incentive programs to their employees as long as participation is voluntary and as long as the plan is otherwise non-discriminatory. Older workers may not be forced to retire.

An employer doesn't necessarily have to provide equal early retirement benefits to all employees, regardless of their age. Under certain circumstances, employers may provide higher benefits to younger employees. For example, an employer may, as an early retirement incentive, eliminate the reduction that it would normally make if employees retired before normal retirement age. This benefits younger workers more since the reduction which would otherwise apply to them would be greater.

The ADEA also permits employers to offer Social Security supplements to employees who retire before they are eligible for Social Security, and allows age-based reductions in early retirement benefits provided to tenured faculty by colleges and universities. Otherwise, the ADEA does not permit employers to reduce or terminate early retirement benefits to older workers based on their age.

Providing Better Benefits to Older Workers

The ADEA permits employers to provide additional benefits to older workers where the employer has a reasonable basis to conclude that the benefits will counteract problems related to age discrimination.

EXAMPLE - Employer Y terminates 30 employees in

a reduction-in-force. Eight of the laid-off workers are between 40 and 50 years old, and two are 55 years old. Y gives a severance benefit of $1,000 to each of the employees who are 50 or under, and provides a $2,000 severance benefit to each of the 55 year olds. When challenged, Y states that it gave the older workers a higher benefit based on a government study stating that unskilled workers over the age of 50 have a much harder time regaining employment after a lay-off than their younger counterparts. Employer Y has acted to address problems older workers have in obtaining employment and has not violated the ADEA.

Filing a Charge

Under the ADEA, a charge is not required in order for the EEOC to investigate an employer's fringe benefit practices.

Where an employer has engaged in discrimination during the term of an employee's employment, charging parties will typically be current employees. Where an individual is eligible for benefits by virtue of his/her employment, however, s/he may file a charge even if s/he is no longer employed. In some cases, for instance, a charging party will claim that an employer has discriminatorily changed retirement or other post-employment benefits since the termination of his/her employment.

Some employers may try to defend benefit disparities on the ground that the plan meets the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), which governs the establishment, coverage, and management of employee benefit plans, or the Internal Revenue Code. Neither of these laws is a defense to conduct that is unlawful under the ADEA, however, because neither requires an employer to discriminate on the basis of age. Thus, the fact that a benefit plan meets the standards of ERISA or the Internal Revenue Code is typically irrelevant in determining whether the plan is in compliance with the ADEA.

Where a charge is filed, the relevant questions that an investigator will examine are the following:

Has the employer provided equal benefits to all of its employees?

If not,

- Are the benefits subject to the equal cost defense? If so, has the employer spent equal amounts on, or incurred equal costs for, its younger and older workers? Has the employer used those amounts to provide a benefit commensurate with the cost?

or

- Does the ADEA permit an offset? If so, and accounting for benefits available from other sources, is the older employee's total benefit no less favorable than the total benefit provided to a similarly situated younger employee?

or

- Are the benefits part of a valid early retirement incentive plan?

Waivers of Discrimination Claims in Employee Severance Agreements

Employee reductions and terminations have been an unfortunate result of the current economic downturn. Even in good economic times, however, businesses of every size carefully assess their operational structures and may sometimes decide to reduce their workforce. Often, employers terminate older employees who are eligible for retirement, or nearly so, because they generally have been with the company the longest and are paid the highest salaries. Other employers evaluate individual employees on criteria such as performance or experience, or decide to lay off all employees in a particular position, division, or department. An employer's decision to terminate or lay off certain employees, while retaining others, may lead discharged workers to believe that they were discriminated against based on their age.

To minimize the risk of potential litigation, many employers offer departing employees money or benefits in exchange for a release (or "waiver") of liability for all claims connected with the employment relationship, including discrimination claims under ADEA. While it is common for senior-level executives to negotiate severance provisions when initially hired, other employees typically are offered severance agreements and asked to sign a waiver at the time of termination. When presented with a severance agreement, many employees wonder: Is this legal? Should I sign it?

Severance Agreements and Release of Claims

A severance agreement is a contract, or legal agreement, between an employer and an employee that specifies the terms of an employment termination, such as a layoff. Sometimes this agreement is called a "separation" or "termination" agreement or "separation agreement general release and covenant not to sue." Like any contract, a severance agreement must be supported by "**consideration**." Consideration is something of value to which a person is not already entitled that is given in exchange for an agreement to do, or refrain from doing, something.

The consideration offered for the waiver of the right to sue cannot simply be a pension benefit or payment for earned vacation or sick leave to which the employee is already entitled but, rather, must be something of value *in addition* to any of the employee's existing entitlements. An example of consideration would be a lump sum payment of a percentage of the employee's annual salary or periodic payments of the employee's salary for a specified period of time after termination. The employee's signature and retention of the consideration generally indicates acceptance of the terms of the agreement.

A severance agreement often is written like a contract or letter and generally includes a list of numbered paragraphs setting forth specific terms regarding the date of termination, severance payments, benefits, references, return of company property, and release of claims against the employer. If your employer decides to terminate you, it may give you a severance agreement similar to the one that follows:

Example 1:

This letter sets forth our agreement with respect to all matters that pertain to your employment and separation from employment by [your organization] ("the Company").

Termination of Employment. You will cease to be employed by the Company on X date.

Severance Payments. The Company agrees to pay you X weeks of severance pay. The severance pay will be in addition to the payment of unused accrued vacation pay to which you are entitled. You may elect to receive this severance pay in the form of a lump sum payment, or spread it over a number of weeks, less applicable deductions for taxes.

General Release. You agree that the consideration set forth above, which is in addition to anything of value to which you are or might otherwise be entitled, shall constitute a complete and final settlement of any and all causes of actions or claims you have had, now have or may have up to the date of this agreement including, without limitation, those arising out of or in connection with your employment and/or termination by the Company pursuant to any federal, state, or local employment laws, statutes, public policies, orders

or regulations, including without limitation, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, and [certain state] laws.

Agreements that specifically cover the release of age claims will also include additional information intended to comply with OWBPA requirements.

Example 2:

This agreement is intended to comply with the Older Workers Benefit Protection Act. You acknowledge and agree that you specifically are waiving rights and claims under the Age Discrimination in Employment Act.

Validity of Waivers – In General

Most employees who sign waivers in severance agreements never attempt to challenge them. Some discharged employees, however, may feel that they have no choice but to sign the waiver, even though they suspect discrimination, or they may learn something after signing the waiver that leads them to believe they were discriminated against during employment or wrongfully terminated.

If an employee who signed a waiver later files a lawsuit alleging discrimination, the employer will argue that the court should dismiss the case because the employee waived the right to sue, and the employee will respond that the waiver should not bind her because it is legally invalid. Before looking at the employee's discrimination claim, a court first will decide whether the waiver is valid. If a court concludes that the waiver is invalid, it will decide the employee's discrimination claim, but it will dismiss the claim if it finds that the waiver is valid.

A waiver in a severance agreement generally is valid when an employee **knowingly and voluntarily** consents to the waiver. The rules regarding whether a waiver is knowing and voluntary depend on the statute under which suit has been, or may be, brought. The rules for waivers under the Age Discrimination in Employment Act are defined by statute – the Older Workers Benefit Protection Act (OWBPA). Under other laws, such as Title VII, the rules are derived from case law. In addition to being knowingly and voluntarily signed, a valid agreement also must: (1) offer some sort of consideration, such as additional compensation, in exchange for the employee's waiver of the right to sue; (2) not require the employee to waive future rights; and (3) comply with applicable state and federal laws.

To determine whether an employee knowingly and voluntarily waived his discrimination claims, some courts rely on traditional contract principles and focus primarily on whether the language in the waiver is clear. Most courts, however, look beyond the contract language and consider all relevant factors – or the totality of the circumstances -- to determine whether the employee knowingly and voluntarily waived the right to sue. These courts consider the following circumstances and conditions under which the waiver was signed:

- whether it was written in a manner that was clear and specific enough for the employee to understand based on his education and business experience;
- whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer;
- whether the employee had enough time to read and think about the advantages and disadvantages of the agreement before signing it;
- whether the employee consulted with an attorney or was encouraged or discouraged by the employer from doing so;
- whether the employee had any input in negotiating the terms of the agreement; and
- whether the employer offered the employee consideration (e.g., severance pay, additional benefits) that exceeded what the employee already was entitled to by law or contract and the employee accepted the offered consideration.

Although a severance agreement may use broad language to describe the claims that the employee is releasing, that employee can still file a charge with the EEOC if they believe they were discriminated against during employment or wrongfully terminated. In addition, no agreement between the employer and employee can limit an employee's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable.

Waivers of ADEA Claims

In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees.

OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary." At a **minimum**:

- **A waiver must be written in a manner that can be clearly understood.** EEOC regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of *technical jargon* and *long, complex sentences*. In addition, the waiver must not have the effect of *misleading, misinforming,* or *failing to inform* participants and must present any advantages or disadvantages without either *exaggerating the benefits* or *minimizing the limitations*.
- **A waiver must specifically refer to rights or claims arising under the ADEA.** EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.
- **A waiver must advise the employee in writing to consult an attorney before accepting the agreement.**
- **A waiver must provide the employee with at least 21 days to consider the offer.** The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. If material changes to the final offer are made, the 21-day period starts over.
- **A waiver must give an employee seven days to revoke his or her signature.** The seven-day revocation period cannot be changed or waived by either party for any reason.
- **A waiver must not include rights and claims that may arise after the date on which the waiver is executed.** This provision bars waiving rights regarding new acts of discrimination that occur *after* the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer.
- **A waiver must be supported by consideration in addition to that to which the employee already is entitled.**

If a waiver of age claims fails to meet any of these seven requirements, it is invalid and unenforceable. In addition, an employer cannot attempt to "cure" a defective waiver by issuing a subsequent letter containing OWBPA-required information that was omitted from the original agreement.

Even when a waiver complies with OWBPA's requirements, a waiver of age claims, like waivers of Title VII and other discrimination claims, will be invalid and unenforceable if an employer used fraud, undue influence, or other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement.

> **Example:** An employee who was told that his termination resulted from "reorganization" signed a waiver in exchange for severance pay. After a younger person was hired to do his former job, he filed a lawsuit alleging age discrimination. The company then changed its position and claimed that the real reason for the employee's discharge was his poor performance. The employee argued that his waiver was invalid due to fraud and that if he had known that he was being terminated because of alleged poor performance, he would have suspected age discrimination and would not have signed the waiver. The court held that fraud was a sufficient reason for finding the waiver invalid.

Furthermore, EEOC regulations state that an employer cannot "abrogate," or avoid, its duties under an ADEA waiver even if an employee challenges it. Because employees have a right under OWBPA to have a court determine a waiver's validity, it is unlawful for an employer to stop making promised severance payments or to withhold any other benefits it agreed to provide.

Sample Waiver

Sample Waiver and General Release: Group Layoffs of Employees Age 40 and Over

The following example illustrates one way in which the required OWBPA information could be presented to employees as part of a waiver agreement and is not intended to suggest that employers must follow this format. Rather, each waiver agreement should be individualized based on an employer's particular organizational structure and the average comprehension and education of the employees in the decisional unit subject to termination. For another example of how the required information might be presented, see 29 C.F.R. § 1625.22(f)(vii) in Chapter 6 of this guidebook.

Although this sample addresses only OWBPA issues, most severance agreements also ask employees to waive all claims against the employer, including claims arising under any federal, state, and local laws. See paragraph 6 below.

Dear [Employee]:

This letter will constitute the agreement between you and [your employer]("the Company") on the terms of your separation from the Company (hereinafter the "Agreement"). **The Agreement will be effective on the date specified in paragraph 7, below.**

1. Your employment will terminate on _____X_____ date.

or

You have agreed to resign on _____X_____ date. Your last day of work will be _____X_____ date.

2. In consideration of your acceptance of this Agreement, the Company will pay you an extra _____ [week's] [month's] salary at your current rate of $_____ per [week][month], less customary payroll deductions, to be paid within five (5) business days after the effective date of this Agreement as defined in paragraph 7 below. This severance pay will be in addition to your earned salary and accrued vacation pay or leave to which you are entitled.

***

[Paragraphs 3, 4, and 5 may address benefits, unemployment compensation, references, return of property, confidentiality, etc.]

6. Except as to claims that cannot be released under applicable law, you waive and release any and all claims you have or might have against the Company. . . .These claims include, but are not limited to claims for discrimination arising under federal, state, and local statutory or common law, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information and Discrimination Act, and [state law].

***

7. The following information is required by OWBPA:

   You acknowledge that on _____, you were given 45 days to consider and accept the terms of this Agreement and that you were advised to consult with an attorney about the Agreement before signing it. To accept the Agreement, please date and sign this letter and return it to me. Once you do so, you will still have seven (7) additional days from the date you sign to revoke your acceptance ("revocation period"). If you decide to revoke this Agreement after signing and returning it, you must give me a written statement of revocation or send it to me by fax, electronic mail, or registered mail. If you do not revoke during the seven-day revocation period, this Agreement will take effect on the eighth (8th) day after the date you the sign the Agreement.

The class, unit, or group of individuals covered by the program includes all employees in the _____ [plant, location, area, etc.] whose employment is being terminated in the reduction in force during the following period :_____. All employees in ___[plant, location, area, etc.] whose employment is being terminated are eligible for the program.

The following is a listing of the ages and job titles of employees who were and were not selected for layoff [or termination] and offered consideration for signing the waiver. Except for those employees selected for layoff [or termination], no other employee is eligible or offered consideration in exchange for signing the waiver:

Job Title	Age	# Selected	# Not Selected
(1) Bookkeepers	25	2	4
	28	1	7
	45	6	2
	Etc. for all ages		
(2) Accountants	63	1	0
	24	3	5
	Etc. for all ages		
(3) Retail Sales Clerks	29	1	7
	40	2	1
	Etc. for all ages		
(4) Wholesale Clerks	33	0	3
	51	2	1

Sincerely,

_____

On Behalf [the Company]

By signing this letter, I acknowledge that I have had the opportunity to consult with an attorney of my choice; that I have carefully reviewed and considered this Agreement; that I understand the terms of the Agreement; and that I voluntarily agree to them.

_____ _____

Date Employee Signature

Sample EEO Policy

This company is committed to ensuring equal employment opportunity (EEO) and promoting workforce diversity to maintain a strong, effective, high-performing public service organization. We support and vigorously enforce all applicable Federal EEO laws, regulations, Executive Orders, and management directives to ensure that all individuals are afforded an equal opportunity for success. The relevant laws include Title VII of the Civil Rights Act of 1964; the Rehabilitation Act of 1973, as amended; the Age Discrimination in Employment Act of 1975; and the Equal Pay Act of 1963. This company will not tolerate discrimination or harassment on the basis of race, color, religion, national origin, sex, sexual orientation, age, genetic information or disability; or retaliation for opposing discriminatory practices or participating in discrimination complaint proceedings. This applies to all personnel practices and terms and conditions of employment, including recruitment, hiring, promotions, transfers, reassignments, training, career development, benefits, and separation. In addition, this company will provide reasonable accommodation to qualified individuals with disabilities and for religious practices, as provided by the applicable laws and procedures.

To enforce this policy, this company is empowered to administer an impartial and effective complaint management process to address and resolve complaints of discrimination at the earliest possible stage. Employees may report allegations of discrimination to their immediate supervisor, another management official, their collective bargaining unit or Human Resources, as appropriate. Please note that employees must report such allegations within 45 calendar days of the date of the alleged incident in order for a complaint to be investigated. Allegations of discrimination and harassment will be immediately addressed and appropriate corrective action, up to and including termination, will be taken if allegations are substantiated.

This company is firmly committed to ensuring that all its employees, applicants, contract employees, clients, customers, and anyone doing business with this company is not subjected to discrimination. Harassment is a form of prohibited discrimination and will not be tolerated. The following defines what constitutes harassment:

Harassment is any unwelcome, hostile, or offensive conduct taken on the basis of race, color, religion, national origin, sex, sexual orientation, age, genetic information or disability that interferes with an individual's performance or creates an intimidating, hostile or offensive environment.

Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of one's employment, or (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or (3) such conduct interferes with an individual's performance or creates an intimidating, hostile or offensive environment.

Retaliation against individuals for opposition to discrimination or participation in the discrimination complaint process is unlawful and will not be tolerated. This company supports the rights of all employees to engage in protected activity under civil rights statutes, Executive Orders, and whistleblower protection laws. We will work aggressively to protect employees from reprisal for participation in such protected activity. Information and training is available to all employees.

Both supervisors and employees bear responsibility to maintain a work environment free from discrimination and harassment. Employees must not engage in harassing conduct and should report such conduct to their supervisor, another management official, their collective bargaining unit, and/or Human Resources, as appropriate. If an employee brings an issue of harassment to a supervisor's attention, the supervisor must promptly investigate the matter and take appropriate and effective corrective action. Supervisors are encouraged to seek guidance from Human Resources when addressing issues of discrimination or harassment. Both employees and supervisors are encouraged to resolve such issues at the earliest stage and participate in the alternative dispute resolution. It is every supervisor's responsibility to inform his/her staff of this policy and to ensure that discrimination and workplace harassment of any type will not be tolerated.

Each of us bears the responsibility to ensure that

discrimination in the workplace is not tolerated and that diversity is valued. Supervisors and managers serve as agents of this company and bear a special responsibility to ensure that the work environment is free from discrimination and harassment. Promoting the complementary principles of equity and diversity in the workplace is a pivotal element in building a strong company. We remain committed to these principles as it pursues its critical mission of protecting and promoting America's health.

Chapter 3

Summary of the New Regulations Effective April 30, 2012

On March 31, 2008, EEOC published in the Federal Register a Notice of Proposed Rulemaking ("NPRM") to address issues related to the United States Supreme Court's decision in Smith v. City of Jackson. The Court ruled that disparate-impact claims are cognizable under the ADEA but that liability is precluded when the impact is attributable to a reasonable factor other than age. The NPRM proposed to revise 29 CFR 1625.7(d) to state that an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age" and that the individual challenging the allegedly unlawful employment practice bears the burden of isolating and identifying the specific employment practice responsible for the adverse impact. The Commission also proposed to revise 29 CFR 1625.7(e) to state that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually.

Subsequently, on February 18, 2010, EEOC published in the Federal Register a second NPRM to address the meaning of "reasonable factors other than age." The Commission noted that, given public comments and the Supreme Court decisions in Smith and Meacham, it was issuing the NPRM "before finalizing its regulations concerning disparate impact under the ADEA." The NPRM proposed to revise 29 CFR 1625.7(b) to state that the RFOA determination depends on the facts and circumstances of each specific situation. It defined a reasonable factor as one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances. It provided that the RFOA defense applies only if the challenged practice is not based on age. In addition, the NPRM provided non-exhaustive lists of factors relevant to whether an employment practice is reasonable and whether a factor is "other than age."

The ADEA and disparate-impact analysis by definition require some scrutiny of employer practices that disproportionately harm older workers. As the Supreme Court held, employers must prove that such practices are based on reasonable factors other than age once plaintiffs have identified a specific employment practice that has a significant disparate impact. In holding that the RFOA is an affirmative defense, the Supreme Court recognized that scrutiny of employer decisions that cause an adverse impact is warranted, as employers must persuade "fact finders that their choices are reasonable" and that "this will sometimes affect the way employers do business with their employees."

The Commission considered all comments received in response to both notices of proposed rulemaking and made the appropriate changes to the proposed rules in response to those comments. On March 30, 2012, the EEOC published the final rule in the Federal Register with an effective date of April 30, 2012.

Section 1625.7(b)

Under the final regulations, the new text reads:

(b) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

Former section 1625.7(c) has been redesignated 1625.7(b). The text of the paragraph remains unchanged.

Section 1625.7(c)

Under the final regulations, the new text reads:

(c) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.

Section 1625.7(c) revises current section 1625.7(d). The 2008 proposed rule stated that any employment practice that has an age-based adverse impact on individuals within the protected age group is discriminatory unless the practice is justified by a reasonable factor other than age. The term "justified" designates the party who bears the burden of proof, not the content of the defense. It also stated that the individual challenging the practice is responsible for isolating and identifying the specific employment practice responsible for the adverse impact.

The final rule, which has been redesignated 1625.7(c), retains the proposed language. The Supreme Court relied on the RFOA provision to conclude that the

ADEA prohibits disparate-impact discrimination. The Court's determination that ADEA disparate-impact claims are cognizable because of the RFOA provision logically leads to the conclusion that RFOA is the defense to such claims. As the Court explained in Meacham, the RFOA defense fits as the appropriate defense to a disparate-impact claim because the age-neutral employment practice causing the unlawful impact is "other than age" and "otherwise prohibited."

The Commission has simplified the language in the second sentence of paragraph 1625.7(c). The sentence now refers to the employment practice "that allegedly causes" statistical disparities rather than the employment practice "that is allegedly responsible for" the disparities.

Paragraph 1625.7(c) reflects the Supreme Court's conclusions that disparate-impact claims are cognizable under the ADEA, that the individual alleging disparate impact bears the burden of identifying the specific employment practice causing the alleged impact, and that the RFOA defense is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older workers.

Section 1625.7(d)

Under the final regulations, the new text reads:

(d) Whenever the "reasonable factors other than age" defense is raised, the employer bears the burdens of production and persuasion to demonstrate the defense. The "reasonable factors other than age" provision is not available as a defense to a claim of disparate treatment.

Section 1625.7(d) revises current section 1625.7(e). The proposed rule stated that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually.

In Meacham v. Knolls Atomic Power Laboratory, the Supreme Court confirmed that the employer defending an ADEA claim of disparate impact has the RFOA burden of proof, i.e., the burden of persuasion as well as production. The Commission has revised the paragraph, which has been redesignated 1625.7(d), to reflect the Supreme Court's holding that the RFOA provision is an affirmative defense in disparate-impact cases for which the employer bears the burdens of production and persuasion. To avoid confusion, the Commission has deleted the phrase "exists factually."

The Commission also has revised the rule to clarify that the RFOA affirmative defense is unavailable in disparate-treatment cases. In Smith, the Court rejected the argument that the RFOA exemption acted simply as a "safe harbor" in disparate-treatment cases. As the Supreme Court explained in Smith, the "other than age" element of the RFOA provision makes the defense inapplicable to a claim conditioned on an age-based intent to discriminate.

Section 1625.7(e)

Under the final regulations, the new text reads:

(e)(1) A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. Whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

(2) Considerations that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to: (Editor's Note: see below for discussion of list of factors)

Section 1625.7(e) revises current section 1625.7(b). The proposed rule noted that whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. The final rule retains this language, which emphasizes that the RFOA determination involves a fact-intensive inquiry. For organizational purposes, the Commission has changed the order of the sentences in the paragraph.

The proposed rule divided the discussion of

"reasonable factors other than age" into two paragraphs, "reasonable" and "factors other than age," and listed factors relevant to each paragraph. The "reasonable" paragraph noted that a reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances. It stated that an employer must show that an employment practice was reasonably designed to achieve a legitimate business purpose and was administered in a way that reasonably achieves that purpose in light of the facts that were known or should have been known to the employer. It included a non-exhaustive list of factors relevant to whether an employment practice is reasonable.

The "factors other than age" paragraph noted that the RFOA defense applies only if the practice was not based on age. It stated that, in the typical disparate-impact case, the practice is based on an objective non-age factor and the only question is whether the practice is reasonable. The paragraph noted, however, that a disparate impact may be based on age when decision makers are given unchecked discretion to engage in subjective decision making and, as a result, act on the basis of conscious or unconscious age-based stereotypes. It included a non-exhaustive list of factors relevant to whether a factor is other than age.

Factors Other Than Age

Some commenters argued that the "other than age" paragraph conflated disparate treatment and disparate impact and improperly shifted the burden of proof by requiring the employer to prove that the challenged employment action was not based on age. They also argued that the paragraph conflicted with Meacham's statement that the RFOA defense assumes that a non-age factor is at work.

In response to comments, and to ensure that the rule is not misconstrued as placing a disparate-treatment burden of proof on employers, the Commission has revised the discussion into a subsection, which has been redesignated 1625.7(e)(1)-(3), addressing the term "reasonable factors other than age." The Commission also has revised the lists into a single, non-exhaustive description of considerations relevant to the RFOA defense.

The final rule states that a reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. The reference to "non-age factor" recognizes that "other than age" is an express part of the statutory RFOA defense.

Prudent Employer

The Commission continues to believe that a prudent employer mindful of its ADEA responsibilities should know that the law prohibits the use of neutral practices that disproportionately affect older workers and are not based on reasonable factors other than age. A reasonable factor other than age is one that an employer exercising reasonable care would use to avoid limiting the opportunities of older workers, in light of all the surrounding facts and circumstances.

Reference to Tort Law

The final rule continues to refer to tort principles. Employment discrimination law includes little discussion of reasonableness whereas tort law extensively analyzes the concept. Indeed, the Supreme Court recently made clear that federal nondiscrimination laws are torts and that "when Congress creates a federal tort [we presume that] it adopts the background of general tort law."

The fundamental objective of employment discrimination statutes, "like that of any statute meant to influence primary conduct, is * * * to avoid harm." Tort law, too, focuses on the duty to avoid harm and provides guiding principles to help understand reasonableness in this context. Under the ADEA, employers are required to avoid the harm of using facially neutral practices that impair employment opportunities for older workers and are not reasonable. Whether a factor is reasonable can be determined only in light of all of the surrounding facts and circumstances, including the employer's duty to be cognizant of the consequences of its choices.

Design and Administration of Employment Practice

The proposed rule looked at "reasonable" from the position of a prudent employer and considered how the challenged employment practice is designed and administered.

The final rule continues to focus on how the employment practice is designed and administered. The RFOA defense arises after an employment practice has been shown to have an age-based

disparate impact. In that context, the concept of "reasonable factor" necessarily includes consideration of the reasonableness of the factor's application.

The way in which an employer applies the factor is probative of whether it is reasonable; a practice that seems reasonable in the abstract might not be reasonable in its application. For example, an employer might require candidates for jobs in its meat-processing plant to pass a physical strength test. It would be reasonable for the employer to design a test that accurately measures the ability to perform the job successfully. It would be manifestly unreasonable, however, for the employer to administer the test inconsistently, evaluate results unevenly, or judge test takers unreliably. Similarly, although it might well be reasonable for an employer to conduct a reduction-in-force (RIF) to save money, if an identified employment practice caused older workers to be disparately impacted, the cost-cutting goal alone would not be sufficient to establish the RFOA defense. The employer would have to show that the practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

"Reasonable" and "Rational Basis"

The preamble to the proposed rule noted that the RFOA defense requires that a practice be reasonable, which is different from requiring only that it be rational.

The Commission continues to believe that the RFOA defense is more stringent than a rational-basis or non-arbitrary standard for several reasons. First, the Supreme Court has held that the RFOA provision "confirms that Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny." In other words, the Supreme Court has previously recognized that the RFOA reflects a standard of proof higher than a rational-basis standard.

Second, proof that an action was rational or non-arbitrary focuses on whether an articulated reason is a pretext for intentional discrimination. Thus, equating the RFOA defense with a rational-basis standard would improperly conflate ADEA disparate-treatment and disparate-impact standards of proof. If an employer attempting to establish the RFOA defense were only required to show that it had acted rationally, then the employer would merely be required to show that it had not engaged in intentional age discrimination. In Smith, the Supreme Court bluntly held that the RFOA provision is not a statutory safe harbor from liability for disparate treatment when the employer merely had a rational justification for its actions.

Thus, the Supreme Court concluded that the ADEA prohibits more than intentional discrimination; it also prohibits employers from adopting facially neutral practices that disproportionately exclude older workers unless the employer can prove that its actions were based on reasonable factors other than age. In holding that the RFOA provision is the defense to disparate-impact claims, the Supreme Court recognized that the RFOA defense is distinguishable in form and substance from the "legitimate, nondiscriminatory reason" evidence that the employer must produce in individual disparate-treatment cases. The RFOA defense necessarily requires more than merely a showing that the employer's action was not irrational or not arbitrary.

Third, a rational basis standard would also undercut the Court's recognition of the RFOA as an affirmative defense. Under a rational-basis standard, an action "may be based on rational speculation unsupported by evidence or empirical data." The decision maker is not required "to articulate at any time the purpose or rationale supporting its classification," and an action will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." By that measure, the "reasonable" requirement would afford no protection against practices that have an age-based disparate impact.

Finally, equating the RFOA reasonableness requirement with a rational-basis standard would contradict the Smith Court's holding that the "reasonable" requirement shows that the RFOA provision is more stringent than the Equal Pay Act's ("EPA") "any other factor" defense. Indeed, applying the rational-basis test to the RFOA defense would actually make it less stringent than the EPA's "any other factor" defense as the latter has been construed by the EEOC and some courts, which have taken the position that, even under the Equal Pay Act, an employer asserting an "any other factor other than sex" defense must show that the factor is related to job requirements or otherwise is beneficial to the

employer's business.

"Reasonable" and "Business Necessity"

The rule sets forth a non-exhaustive description of relevant considerations, rather than a list of duties to be met. Because the RFOA determination involves a fact-intensive inquiry, the importance of a consideration depends on the facts of the particular situation. Based on the specific facts raised, one or two considerations may be sufficient to establish the RFOA defense.

In addition, the rule expressly states that no specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age and that the presence of one consideration does not automatically establish the defense. Just as the absence of a consideration does not automatically defeat the RFOA defense, so too the presence of one consideration does not necessarily prove that a differentiation is based on reasonable factors other than age. Rather, as the rule makes clear, the RFOA determination depends on all of the facts and circumstances in each particular situation.

There may be circumstances in which the availability of a measure that would noticeably reduce harm was or should have been so readily apparent that it would be manifestly unreasonable for the employer to fail to use it. The removal of the factor does, however, make clear that an employer need not search for alternatives and use the one that is least discriminatory.

Under Title VII, if a particular employment practice has a disparate impact based on race, color, religion, sex, or national origin, then the employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." An employer could meet the Title VII standard by proving, for example, that a test has been validated to show that it is "predictive of * * * important elements of work behavior which comprise * * * the job." In contrast, the RFOA defense involves the less demanding standard of reasonableness.

Application of the rule's considerations to a physical fitness test illustrates the difference between the RFOA and business-necessity standards. For example, suppose a security company mandated that all applicants for security guard positions must be able to run a half mile in three minutes and do 35 pushups in a row. The company's stated purpose is to ensure that guards are physically able to pursue and apprehend. The test defines and measures the factors of speed and strength and provides clear guidance on how the test is to be applied accurately and fairly. The employer performs a disparate-impact analysis and finds that large percentages of older workers and women cannot pass the test. The employer changes the test so that performance standards vary based on age and gender, when it learns that a successful competitor firm uses such standards and is attracting a large pool of qualified candidates. Although the test continues to disproportionately exclude older and female applicants, it excludes fewer of them and still produces qualified hires.

The security company would not need to perform a validation study to establish the RFOA defense. In contrast, to establish a Title VII business-necessity defense, the employer would need to validate the test to show that it accurately measured safe and efficient performance. In addition, even if the employer could show that the test was validated, proof by female applicants that there were less discriminatory alternatives that the employer refused to adopt would impose liability under Title VII. This is just one example of how the RFOA standard is less stringent than Title VII's business-necessity standard.

Relevant Considerations

The proposed rule set forth non-exhaustive lists of factors relevant to whether an employment practice is reasonable and is based on factors other than age.

Given the context-specific nature of the RFOA inquiry, it is not possible to specify every type of relevant evidence. All relevant evidence should be considered, and such evidence necessarily will vary according to the facts of each particular situation. Depending on the circumstances, relevant evidence might include documents describing the business purpose underlying the challenged practice, copies of any written guidance that the employer provided to decision makers, explanations of how the employer implemented the practice, and impact-related studies that the employer may have conducted. Objective evidence that was in existence prior to litigation will carry more weight than mere self-serving statements or after-the-fact rationales.

The first "reasonable" factor listed in the proposed

rule concerned whether the employment practice and its implementation were common business practices. In light of the variety of concerns from responders to the NPRM about this factor, the Commission deleted it from the relevant considerations.

Section 1625.7(e)(2)(i)

Under the final regulations, the new text reads:

(i) The extent to which the factor is related to the employer's stated business purpose;

The second item in the proposed rule's list of factors relevant to "reasonableness" concerned the extent to which the factor is related to the employer's stated business goal.

The Commission has revised the provision, which has been redesignated 1625.7(e)(2)(i), to refer to an employer's "stated business purpose," which is the legitimate business purpose that the employer had at the time of the challenged employment practice. This approach is consistent with Smith, which expressly noted that the City's "stated purpose * * * was to `attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.' " The City reasonably achieved this purpose by raising the salaries of junior officers to make them competitive with those of comparable positions in the region. Similarly, an employer whose stated purpose is to hire qualified candidates could reasonably achieve this purpose by ensuring that its hiring criteria accurately reflect job requirements.

Section 1625.7(e)(2)(ii)

Under the final regulations, the new text reads:

(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

The proposed rule said that the extent to which the employer took steps to define and apply the factor accurately and provided training, guidance, and instruction to managers was relevant to reasonableness.

The proposed rule also included consideration of the extent to which supervisors were given guidance or training in the "other than age" section.

The Commission eliminated the "other than age" section and combined the factors relating to guidance and instruction of managers into a single consideration, which has been designated 1625.7(e)(2)(ii). The Commission deleted the reference to "took steps" to make clear that the consideration focuses on how the employer actually defined and applied its criteria. Through this consideration, the final rule recognizes the importance of defining an employment criterion carefully and educating managers and supervisors on how to apply it fairly.

It is in the employer's interest to define and apply accurately the criteria on which it relies. Ensuring that decision makers understand and know how to apply the employer's standard will help to ensure that the employer has the work force it wants. For example, research demonstrates that older workers are commonly perceived to be less productive than younger workers but that such stereotypes are inaccurate. In fact, studies show a nonexistent or slightly positive relationship between job performance and older age. The output of older workers is equal to that of younger workers; older workers are better in terms of accuracy and steadiness of work output and output level; and they outperform younger workers in the area of sales. Thus, educating decision makers to be aware of, and avoid, age-based stereotypes can help to ensure that they apply the employer's standard accurately and do not unfairly limit the opportunities of older workers.

For example, an employer seeking to hire individuals with technological skills could instruct decision makers on the particular skills (e.g., experience using specific software or developing certain types of programs) that it needs. Similarly, rather than simply asking managers to assess an employee's training potential, an employer could instruct managers to identify the times the employee has received or sought training. Using objective criteria as much as possible and providing decision makers with specific job-related information can help to overcome age-based stereotypes.

The rule does not require employers to train their managers. First, by referring not just to training but to "guidance or training," it recognizes that

employers use a wide range of measures to convey their expectations to managers, depending on the circumstances. For example, a small employer might reasonably rely entirely on brief, informal, verbal instruction. Second, as with all of the considerations in section 1625.7(e), this consideration is a not a required duty. Instead, its importance depends on the particular facts raised. Thus, an employer's RFOA defense will not necessarily fail because, for example, the employer did not train managers on how to apply its standard. On the other hand, steps such as carefully defining a standard and instructing managers on how to apply it are evidence that the employer's actions were based on reasonable factors other than age and will support the employer's defense.

Section 1625.7(e)(2)(iii)

Under the final regulations, the new text reads:

(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

Paragraph 1625.7(b)(2) of the proposed rule noted that, in the typical disparate-impact case, an employer has used an objective, non-age factor and the inquiry focuses on reasonableness. Relying on Watson v. Fort Worth Bank and Trust, however, it also said that employers are subject to liability under disparate-impact analysis for granting supervisors unchecked discretion to engage in subjective decision making because the unchecked discretion allows conscious or unconscious age-based stereotypes to infect the decision-making process and, as such, is not "other than age." It listed three factors relevant to whether an employment practice was "other than age": the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively, the extent to which supervisors evaluated employees based on factors known to be subject to age-based stereotypes, and the extent to which supervisors were given guidance or training.

The rule continues to recognize that giving supervisors unchecked discretion to engage in subjective decision making may result in disparate impact and that employers should take reasonable steps to ensure supervisors exercise their discretion in a manner that does not violate the ADEA. To prevent misunderstanding, however, the Commission has revised the rule. First, as noted above, the rule no longer addresses "reasonable" and "other than age" in separate paragraphs, but discusses "reasonable factor other than age" in a single paragraph. Second, the factors listed under "other than age" in the NPRM have been integrated into 1625.7(e)(2)(ii) and (e)(2)(iii). Section 1625.7(e)(2)(ii) addresses the extent to which the employer defined the employment criterion—such as a subjective factor—and provided supervisors with guidance on how to apply it. The Commission also has combined two "other than age" factors into a single consideration addressing subjective decision making and the use of criteria susceptible to age-based stereotypes. Section 1625.7(e)(2)(iii) makes clear that the extent to which the employer attempts to minimize subjectivity and avoid age-based stereotyping is relevant to whether or not it acted reasonably, particularly where the criteria are known to be subject to age-based stereotypes.

The final rule expressly states that the individual challenging the practice is responsible for isolating and identifying the specific employment practice causing the adverse impact. As courts have recognized, however, plaintiffs may challenge an overall decision-making process "if the employer utilizes an `undisciplined system of subjective decision making.' " If an individual establishes that an employer's use of subjective decision making had an age-based disparate impact, then the burden shifts to the employer to prove that the practice is a reasonable factor other than age. The extent to which the employer limited supervisors' discretion in a manner that minimized the likelihood that age-based stereotypes would infect the process is one of a number of factors relevant to whether the employer's practice is a reasonable, non-age factor.

Sections 1625.7(e)(2)(iv) and (v)

Under the final regulations, the new text reads:

(iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to

reduce the harm, in light of the burden of undertaking such steps.

The proposed rule listed three factors that some commenters interpreted as imposing Title VII's business-necessity test on ADEA disparate-impact claims. One factor addressed the extent to which an employer assessed the impact of its practice on older workers, and another factor concerned the severity of harm to individuals in the protected age group and the extent to which the employer took steps to minimize the harm. The remaining factor looked at whether other options were available and the reasons the employer chose the option it did. Quoting the Smith statement that the RFOA inquiry does not require employers to adopt a less discriminatory alternative, a footnote explained that the factor did not mean that an employer must adopt a practice that has the least severe age-based impact. The footnote also quoted a Restatement of Torts (Second) comment concerning unreasonable risk.

In response to comments, and to emphasize that the rule reflects a standard that is less stringent than Title VII's business-necessity test, the Commission has revised the rule to make clear that none of the considerations is a required element of the RFOA defense. As noted above, the rule now refers to a non-exhaustive description of "relevant considerations" and expressly states that no specific consideration need be present for a differentiation to be based on reasonable factors other than age. The importance of each consideration will necessarily vary according to the facts of each particular situation.

The final rule retains the impact-assessment and harm considerations, which have been redesignated 1625.7(e)(2)(iv) and 1625.7(e)(2)(v). The Commission has deleted the reference to "took steps" from 1625.7(e)(2)(iv) to make clear that the consideration focuses on the extent to which the employer actually assessed the impact rather than on the steps the employer took to do so. What an employer reasonably should do to assess impact depends on the facts of the particular situation. For example, an employer that assesses the race- and sex-based impact of an employment practice would appear to act unreasonably if it does not similarly assess the age-based impact. A small employer that does not generally conduct impact analyses on any basis, however, may well be able to show that its RIF decisions were reasonable even if it did not conduct a formal disparate-impact analysis during the RIF.

Similarly, evidence that a policy was not the type normally subject to disparate-impact analysis would support an employer's argument that it should not reasonably be expected to conduct such analysis. Whether or not a formal disparate-impact analysis is done, if the impact is sufficiently large that the employer was or should have been aware of it, a failure to have taken reasonable steps to avoid or mitigate the impact is relevant to whether the employer's actions were based on reasonable factors other than age.

For purposes of clarity, section 1625.7(e)(2)(v) now refers to the "degree" rather than "severity" of the harm and the "extent" of injury. The final rule also changes the term "minimize" to "reduce" with respect to the assessment of the harm caused by different options to make clear that the rule does not require the adoption of the least discriminatory alternative.

Consideration of the degree of harm on individuals is measured both in terms of the scope of the injury to the individual and the scope of the impact, i.e., the number of persons affected. Smith exemplifies negligible harm in terms of injury and impact. In Smith, the injury was relatively minor as the raises affecting older workers were actually higher in dollar terms, although lower in percentage terms. The number of older workers affected was also relatively small.

In contrast, the more severe the harm, the greater the care that ought to be exercised. The Meacham case exemplifies significant injury and impact from the loss of jobs affecting a "startlingly skewed" group of older workers. In light of such significant injury and impact, it would be reasonable for an employer to investigate the reasons for such results and attempt to reduce the impact as appropriate.

The extent to which the employer took steps to reduce the harm to older workers in light of the burden of undertaking such steps is relevant to reasonableness. Whether an employer knew or reasonably should have known of measures that would reduce harm informs the reasonableness of the employer's choices. Thus, the RFOA includes consideration of the availability of measures to reduce harm, and the extent to which the employer weighed the harm to older workers against both the costs and efficiencies of using other measures that will achieve the employer's stated business purpose.

Given the relevance of the availability of measures

to reduce harm contemplated by this consideration, the Commission has deleted the last factor concerning the availability of options. In addition, commenters misconstrued the consideration of options as requiring employers to search out every possible alternative and use the least discriminatory alternative, comparable to the Title VII's requirement, which the Supreme Court in Smith reasoned is not mandated by the RFOA defense.

As previously explained, the availability of options is manifestly relevant to the issue of reasonableness. A chosen practice might not be reasonable if an employer knew of and ignored an equally effective option that would have had a significantly less severe impact on older workers. Whereas Title VII requires an employer to adopt an equally effective, even marginally less discriminatory alternative, an employer's choice not to use an alternative that only marginally reduces the impact might be reasonable under the ADEA.

The changes to 1625.7(e) clarify that the RFOA standard is lower than Title VII's "business necessity" standard. They also clarify that the considerations relevant to the RFOA determination are not required elements of the RFOA defense. These changes ensure that employers may continue to make reasonable business decisions that do not arbitrarily limit the employment opportunities of older workers.

Chapter 4

Recent ADEA Settlements

Hiring Practices

Telecommunications giant AT&T agreed to cease discriminatory policies to settle an age discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission, the agency announced.

The EEOC had charged that AT&T, Inc. and a number of its subsidiaries discriminated against a class of retired AT&T workers by denying them the opportunity for reemployment solely because they retired under certain early retirement or enhanced severance programs. This practice violated the Age Discrimination in Employment Act (ADEA), the EEOC said. According to the EEOC's lawsuit, individuals who participated in the Voluntary Early Retirement Incentive Program (VRIP – an AT&T Corp. program from 1998-1999, before its merger with SBC Communications from 2005 to 2007), the Enhanced Pension and Retirement Program (EPR – a pre-merger SBC program from 2000 to 2001), and the Change-in-Control Program (CIC – a pre-merger AT&T Corp. program conducted in connection with the merger) were restricted from being reemployed or engaged as contractors because they took one of these retirement packages.

The EEOC filed suit (*EEOC v. AT&T Inc., AT&T Corp., AT&T Services, Inc. and Pacific Bell Telephone Company, d/b/a/ AT&T California, Case No. 09-CIV-7323*) in U.S. District Court for the Southern District of New York on Aug. 20, 2009, after first trying to reach a pre-litigation settlement through its conciliation process. AT&T denied the allegations in the lawsuit, but agreed to change its policies related to the reemployment of retirees.

The consent decree settling the suit, entered on October 25, 2011 by U.S. District Judge J. Paul Oetken, prohibits AT&T from maintaining any policy that excludes from reemployment employees who left AT&T under one of the early retirement plans. The decree also prohibits AT&T from requiring a different process for selecting retirees than any other former employees.

"Many former employees who took an early retirement package years ago still need work, and will now have an equal opportunity to apply for new jobs at AT&T," said Anna M. Pohl, a trial attorney in the EEOC's New York District Office. "AT&T is to be commended for changing its policies and working with the EEOC to resolve this case."

Elizabeth Grossman, regional attorney for the EEOC's New York District Office, added, "All employees, regardless of their age, should be permitted to compete for jobs equally. That is the fundamental right the ADEA grants to older workers."

Source: EEOC Press Release 10/26/11

Refusal to Hire

A Charlotte-area scrap metal processing company agreed to settle an age discrimination lawsuit filed by the EEOC. The EEOC had charged that Southern Metals Company unlawfully refused to hire a 76-year-old man for a position because of his age.

Southern Metals Company recycles and processes different types of metals in the Charlotte Metro area. According to the EEOC's complaint, Junior Revels applied for the position of diesel mechanic, for which he was fully qualified and able to perform the duties. In spite of his qualifications, Revels was told that Southern Metals had decided to hire someone "younger." Thereafter, Southern Metals continued to seek applicants for the position and eventually hired an individual who was substantially younger and less qualified than Revels.

The EEOC filed suit (EEOC v. Southern Metals Company, Civil Action No. 3:09cv00410, filed in U.S. District Court for the Western District of North Carolina) after first attempting to reach a voluntary settlement out of court through its conciliation process.

In addition to monetary damages of $10,000 for Revels, the 24-month consent decree resolving the case includes injunctive relief enjoining the company from engaging in further age discrimination or retaliation against those who complain about discrimination; requires the posting of a notice about the settlement; and requires the company to report information about discrimination complaints to the EEOC for monitoring.

"The EEOC is pleased to have resolved this case on behalf of Mr. Revels," said Lynette A. Barnes, regional attorney for the EEOC's Charlotte District Office. "Employers must remember that older applicants are a valuable asset to the workforce, and they cannot be denied consideration for jobs because of their age. The EEOC, as part of its mission, will continue to enforce the rights of people age 40 and older under the ADEA."

Source: EEOC Press Release 06/17/10

Harassment and Retaliation

Kmart Corporation, which operates several stores in Hawaii, violated federal law by subjecting a 73-year-old female pharmacist to age harassment, retaliation and forcing her out of her job, the EEOC charged in a lawsuit.

The EEOC charged in its suit that the pharmacy manager of a Kmart on North Nimitz Highway in Honolulu subjected the woman to age-based insults, such as telling her she was "too old to work," that she "should retire," should "retire from pharmacy work now," and other discriminatory conduct. Although Kmart received notice of the harassment, the company failed to take appropriate action to investigate and correct the hostile workplace, as the law requires.

Instead, the EEOC said, Kmart subjected the woman to a hostile work environment by berating her for lack of competence, making discriminatory comments in performance evaluations, telling her again to retire, and wrongfully accusing her of regulatory violations. Finally, the pharmacist was forced to resign to escape the discriminatory conduct.

Age discrimination and retaliation for complaining about it violate the ADEA. The EEOC filed suit (EEOC v. Kmart Corporation, CV-09- 00300 in U.S. District Court for the District of Hawaii) after first attempting to reach a voluntary settlement. The federal agency sought lost wages and liquidated relief to prevent and correct any future workplace discrimination.

"The EEOC is committed to preventing age harassment against workers," said Regional Attorney Anna Park of the EEOC's Los Angeles District Office, which has jurisdiction for Hawaii. "The EEOC is also committed to protecting employees from retaliation for exercising their rights against discrimination. All workers, regardless of age, have the right to work in an environment free of harassment and retaliation."

EEOC Honolulu Local Director Timothy Riera added, "No one should have to endure being harassed because of their age. Every employee, regardless of age, has the right to earn a paycheck or keep her employment. The EEOC will continue to rigorously defend people against age bias to ensure equal job opportunity for older workers."

Source: EEOC Press Release 7/1/09

Mandatory Retirement

The EEOC announced that the Asian World of Martial Arts, Inc., a leading mail and retail distributor of martial arts supplies based in Philadelphia, were ordered to pay $100,000 and provide other relief to settle a federal age discrimination lawsuit.

The EEOC charged that Asian World of Martial Arts, Inc. fired its controller, Morris Pashko, because of his age, 74, pursuant to a newly implemented retirement policy which mandated that all employees age 67 and over be terminated. Pashko had a good performance record during his 26 years of employment with the company prior to the forced retirement.

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. That protection includes, with narrow exceptions not applicable in this case, prohibiting mandatory retirement based on age. The EEOC filed suit in U.S. District Court for the Eastern District of Pennsylvania (Civil Action No 10-5062) after first attempting to reach a pre-litigation settlement.

In addition to the $100,000 in monetary relief, the two-year consent decree resolving the lawsuit contains other important relief, including enjoining Asian World of Martial Arts from further engaging in age discrimination or retaliation and requiring the company to provide annual training on the ADEA and to post a notice on the settlement. The company no longer has a mandatory retirement policy.

"As our national workforce gets older, it is vital that employers know they cannot impose unlawful mandatory retirement schemes or make employment decisions based on stereotypes about older workers," said Spencer H. Lewis, Jr., district director for the EEOC's Philadelphia District, which has jurisdiction over Pennsylvania, Delaware, Maryland, West Virginia and parts of New Jersey and Ohio.

EEOC Philadelphia Regional Attorney Debra M. Lawrence added, "We are pleased that Asian World cooperated with the EEOC to change its retirement policy and to resolve this lawsuit. The settlement is designed to protect all workers there from unlawful age discrimination."

Source: EEOC Press Release 05/24/11

Companywide Reorganization

The EEOC announced a major settlement of an age discrimination class lawsuit against Allstate Insurance Company, one of the nation's largest insurers, for $4,500,000 to be paid to approximately 90 older former employees, in addition to significant remedial relief.

In its lawsuit, filed in October 2004 under the ADEA, the EEOC charged that in the year 2000, Allstate adopted a hiring moratorium for a period of one year, while severance benefits were being received, that applied to all its employee-sales agents who were part of its *Preparing For The Future Reorganization Program*. The program was part of Allstate's reorganization from employee agents to what the company considered independent contractors. The EEOC alleged that the policy had a disproportionate impact on Allstate's employees over the age of 40 because more than 90 percent of the agents subjected to the hiring moratorium were 40 years of age or older. Allstate denies that its hiring moratorium violated the ADEA.

"Discrimination against older workers is counterproductive and wrong, and the EEOC has been taking a close look at ways to increase our law enforcement efforts in this area," said EEOC Acting Chairman Stuart J. Ishimaru. "Corporate America must be more vigilant in guarding against job bias affecting older workers, or risk action by the EEOC. This settlement shows there is a high price to pay for discriminatory employment policies and practices that adversely impact older workers."

In 2005, the U.S. Supreme Court held in *Smith v. City of Jackson* that a facially neutral policy, such as Allstate's hiring moratorium, which disproportionately affected those age 40 and over, violated the ADEA unless the policy was based on a reasonable factor other than age.

As provided in the Stipulated Order resolving the litigation, pending approval by U.S. District Judge E. Richard Webber in U.S. District Court for the Eastern District of Missouri (Civil Action No. 4:04CV01359 ERW), Allstate will pay former employees who sought employment -- or would have sought employment with the company in the absence of its policy -- a total of $4.5 million to be divided among the class via a settlement fund. The order, in effect for three years, also provides for discrimination prevention training, posting of notices, reporting and monitoring, and other relief designed to educate Allstate managers in order to prevent future violations of the ADEA.

In 2007, the parties settled claims of disparate treatment which were asserted for two individuals. Those claims were settled for $250,000 and are not covered by this settlement.

EEOC Regional Attorney Barbara A. Seely of the agency's St. Louis District Office, which handled the litigation, said, "This settlement should go far in educating Allstate's managers about their responsibilities under the Age Discrimination in Employment Act. The training and other injunctive remedies provided will reinforce these prohibitions and help the company effectively prevent inadvertent violations of the ADEA going forward."

Source: EEOC Press Release 9/11/09

Reduction in Force

The EEOC announced that Global technology giant 3M (NYSE: MMM) agreed to pay $3 million to a class of former employees and implement preventive measures to resolve a nationwide age discrimination lawsuit filed by the EEOC.

The EEOC's suit charged that 3M unlawfully laid off hundreds of employees over the age of 45 during a series of reductions in force (RIFs) from July 1, 2003 through Dec. 31, 2006. 3M laid off many highly paid older employees, among others, apparently to save money and cut workers in salaried positions up to the level of director, the agency said. The EEOC also asserted that older employees were denied leadership training and laid off to make way for younger leaders. The agency's investigation found an employee e-mail describing then-CEO Jim McNerney's "vision for leadership development" as "we should be developing 30 year olds with General Manager potential" and "He wants us to tap into the youth as participants in the leadership development."

The consent decree provided that 3M will pay $3 million in monetary relief to approximately 290 former employees. In addition, 3M agreed to implement a review process for termination decisions and training on how to prevent age bias. The company was also required to post openings for positions it had not advertised previously, to enable older employees to apply. 3M was also required to report on its compliance, provide RIF information to the EEOC over the next three years, and post a notice about the settlement.

"The law requires employers to base employment decisions upon each person's strengths and talents instead of relying upon generalized assumptions calculated around an employee's age," said Michael Baldonado, district director of the EEOC's San Francisco office, which spearheaded the investigation.

EEOC San Francisco Regional Attorney William R. Tamayo said, "This consent decree is the result of productive and thoughtful negotiations with 3M. In addition to providing meaningful monetary relief for hundreds of former 3M employees, the settlement contains important preventive measures, including company policy changes and training designed to provide older people equal opportunities in the workplace."

Tamayo noted that this case was developed cooperatively with the law firm of Sprenger + Lang of Washington, D.C., which earlier filed age discrimination suits covering additional issues against 3M in Minnesota state and federal courts. In the state court case, *Whitaker et al. v. 3M,* the parties filed a settlement agreement in March of 2011, which is pending final court approval, on behalf of about 7,000 current and former employees. The federal case was filed on behalf of about 135 people, most of whom are ex-employees. The 290 ex-employees eligible for relief in the EEOC case are not eligible for relief under either of the private suits.

Source: EEOC Press Release 08/22/11

Replacing Older Workers with a Younger One

Red Rock Western Jeep Tours, Inc. violated the Age Discrimination in Employment Act (ADEA) by terminating Gloria N. Rose, who was 75 years of age at the time, and replacing her with a significantly younger worker, the EEOC charged in a lawsuit filed.

The EEOC alleges in its suit (Case No. 3:09-CV-8147-DKD), in the U.S. District Court for the District of Arizona, that Red Rock Western Jeep Tours, Inc. (Red Rock) fired Rose because of her age after only two days of employment. The complaint further alleges that after terminating Rose, Red Rock hired an 18-year-old worker with less experience to replace her. Such alleged conduct violates the ADEA, which prohibits age-based discrimination by employers against individuals age 40 or older.

EEOC Phoenix Regional Attorney Mary Jo O'Neill said, "Employers must not rely on age-based stereotypes about older workers, many of whom are highly qualified with significant experience that can benefit a company's bottom line. Older people deserve equal opportunities to participate and succeed in the workplace."

As part of its suit, the EEOC sought monetary relief for Rose, an end to any discriminatory employment practices by Red Rock Western Jeep Tours and other remedial relief. The EEOC filed suit only after exhausting its conciliation efforts to reach a voluntary settlement.

EEOC's Acting Phoenix District Director Rayford Irvin said, "With the graying of the U.S. workforce, companies must be vigilant in ensuring that age discrimination does not occur. Employers must understand that it is illegal to terminate older employees without just cause and replace them with younger workers."

Source: EEOC Press Release 9/3/09

Benefits

The Bayville Fire Company on Long Island agreed to settle a class age discrimination lawsuit brought by the EEOC. The fire company, as well as the Villages of Bayville, Mill Neck, and Centre Island, were required to pay a group of about 15-18 firefighters lost pension money and provide increased monthly pension amounts going forward to several firefighters. Depending on how many class members were finally definitively identified and the exact damages established for each one, the final total damages was $180,000 to $240,000.

The EEOC's suit had alleged that the fire company and villages had refused to let volunteer firefighters over age 65 accrue credit toward a "length of service award" (LOSAP), the equivalent of a retirement pension, because of their age. As a result, senior firefighters lost pension amounts after they turned 65, in violation of the ADEA. The EEOC filed suit, Civ. No. 07-4472, after first attempting to reach a pre-litigation settlement.

Under the terms of the agreement, the fire company agreed to provide the EEOC with contact information for affected firefighters, and the EEOC surveyed the group to ascertain each firefighter's lost pension. U.S. Magistrate Judge Cheryl Pollack, in Brooklyn, oversaw the process.

All three villages are located in the Town of Oyster Bay on the North Shore of Long Island, New York, and each village approved amending the pension plan.

"The system in effect penalized older firefighters because of their age, and that was simply illegal," said EEOC Chair Jacqueline A. Berrien. "We welcome the decision to settle this case in a way that ensures that these brave firefighters, who do heroic work, do not receive different retirement benefits simply because of their age."

Spencer H. Lewis, Jr., the EEOC's district director in New York, added, "This case should remind all employers, including municipal employers, that federal law prohibits targeting older workers for discriminatory treatment, including in relation to pensions or retirement benefits."

Source: EEOC Press Release 04/12/10

Bias in Apprentice Program

The EEOC announced a litigation settlement for $625,000 and comprehensive injunctive relief in an employment discrimination case against the Paul Hall Center for Maritime Training and Education (Paul Hall Center) and Seafarers International (SIU) due to age bias in an apprenticeship program.

The apprenticeship program, which was based in Piney Point, Maryland, trained individuals wishing to become mariners in the U.S. Merchant Marine. Upon completion of the apprenticeship program, graduates were guaranteed jobs as unlicensed seamen onboard a SIU contracted vessel. EEOC asserted in the lawsuit that the Paul Hall Center and SIU refused to admit individuals at least 40 years old into the apprenticeship program in violation of the ADEA. EEOC charged that applicants who were at least 40 were sent letters advising them that they "must be between the ages of 18 and 25" to apply. In addition, admissions representatives coded the applications of many of the individuals over 40, specifically noting they were "too old."

The lawsuit was resolved following an interlocutory appeal to the U.S. Court of Appeals for the Fourth Circuit, which challenged the validity of an EEOC regulation stating that apprenticeship programs are covered by the ADEA. On January 7, 2005, the U.S. Court of Appeals ruled that EEOC's regulation was a valid extension of the ADEA. EEOC initially filed the suit (Civil Action MJG-02-3192) on September 30, 2002, in U.S. District Court for the District of Maryland, after first attempting to reach a voluntary pre-litigation settlement.

Under the terms of a consent decree resolving the matter, entered by U.S. District Judge Marvin J. Garbis on November 14, 2005, the Paul Hall Center and SIU agreed to pay a total of $625,000 which was distributed to a class of individuals who were denied the opportunity to attend the apprenticeship program due to ageism.

In addition to the monetary relief, the Paul Hall Center and SIU agreed to comply with the ADEA, which included not imposing any upper age limit; posting a notice concerning prohibitions against discrimination; and training employees responsible for recruiting, screening and admitting new apprentice program participants in federal laws which prohibit discrimination. The Paul Hall Center and SIU also agreed that its admission practices would be under continued monitoring by the EEOC for a period of five years.

"Employers must heighten their awareness to age discrimination and refrain from making age-based employment decisions," said Gerald S. Kiel, Regional Attorney for the EEOC's Baltimore District Office. "The age restriction in this case appears to have been based upon the stereotype that older individuals would not succeed in a physically and mentally demanding apprenticeship program. We are pleased that the age restriction has been lifted and that those individuals who were affected by this unlawful practice will be compensated."

Source: EEOC Press Release 11/15/05

Exit Incentive Program

The EEOC and BNSF Railway Company (BNSF) settled an age discrimination lawsuit brought by the Commission on behalf of 137 present and former employees who were allegedly denied benefits under exit incentive programs offered by the railroad because they were eligible to retire.

In its lawsuit (Case No. 2:06-CV-2069) filed in U.S. District Court for the District of Kansas under the ADEA, the EEOC asserted that BNSF discriminated against employees eligible for Railroad Retirement by denying them benefits under exit incentive plans offered to clerical employees in certain of its facilities. The lawsuit also alleged that BNSF and the Transportation Communications International Union (TCU), a union representing the railway's clerical employees, discriminated against older employees in their labor contract by eliminating their "protected" status, which afforded them certain benefits when they became eligible to retire and reached age 70. The latter allegations were settled by the filing of a partial consent decree with the court on August 28, 2006, in which BNSF and TCU agreed to remove the provision at issue from the contract. TCU was then dismissed from the case.

The EEOC alleged that between 2002 and 2005, BNSF, in an attempt to reduce its clerical workforce, offered exit incentive plans to clerical employees in Topeka and Kansas City, Kansas, Fort Worth, Texas, and Alliance, Nebraska, but excluded any employee who was eligible for retirement. BNSF employees could retire at age 60 with 30 years of service. Under the exit incentive plans, participating employees ceased working and received $2,500 per month for three years or a lump sum of $90,000. The Commission argued that thirty-five employees over the age of 60 were denied the opportunity to participate in the exit incentive plans offered by the railroad because they were eligible to retire and receive federal Railroad Retirement benefits.

The EEOC also alleged that when their clerical jobs were abolished, many older workers were forced to bump into less desirable jobs and some retired as a result. The EEOC identified 102 other employees whom it alleged participated in the plans but their benefits were cut off at the point they became eligible to retire.

The EEOC said that one affected employee, Ellen Foste, age 72, retired when her clerical job was abolished rather than bump into a job driving a van at night. She had 27 years of service and retired with less than the 30 years of service which would have maximized her retirement benefit.

The Commission also pointed to Erma Gossage, age 63, who was also denied the opportunity to participate in an exit incentive plan offered to younger workers because she had 30 years of service and was eligible to retire and receive Railroad Retirement benefits. Younger employees could receive payments under the exit incentive plan for three years, retire with three additional years of service credit, and receive higher pension benefits.

BNSF denied that its retirement incentive program discriminated against any employees on the basis of age. The railroad argued that the program – which was strictly voluntary – was designed to allow employees to choose to retire before they became eligible for government-supplied retirement benefits. The employees who were already eligible for the government benefit were excluded not because of age, but because they had access to an equivalent (or greater) stream of retirement income. BNSF noted that the program allowed anyone who was not yet eligible for the government benefits to participate, regardless of age. It said that there were more than 100 persons over the age of 60 who qualified for the voluntary program.

As provided in the consent decree submitted for approval to U.S. District Judge Julie A. Robinson in Kansas City, Kansas, BNSF agreed to pay a total of $800,000 to be distributed among the 137 affected employees. The railroad also agreed that any retirement incentive programs it offers in the future will comply with the Age Discrimination in Employment Act (ADEA), but denied any liability for discrimination.

Barbara Seely, Supervisory Trial Attorney in the EEOC's St. Louis District Office and lead counsel on the case, said, "Under Railroad Retirement Board rules, retirement eligibility is directly tied to age. Denying employees benefits because they are eligible to retire is age discrimination. Employees who are old enough to retire don't necessarily want to stop working; they are entitled to receive the same benefits as younger workers."

Donald Munro, lead counsel for BNSF, responded by stating, “BNSF is committed to a discrimination-free workplace and has always maintained that its voluntary early retirement programs do not discriminate in any way on the basis of age. The railroad decided to settle to avoid the substantial cost of further litigation, but in doing so insisted on an express statement that there is no admission of liability.”

A subsidiary of Burlington Northern Santa Fe Corporation, BNSF Railway Company operates one of the largest North American rail networks, with about 32,000 route miles in 28 states and two Canadian provinces.

Source: EEOC Press Release 03/30/07

Chapter 5

Enforcement Guidance

Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.

EOC NOTICE

Number 915.002

Date 9-18-96

1. SUBJECT: Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.
2. PURPOSE: This enforcement guidance analyzes the impact on EEOC enforcement activities of the Supreme Court's ADEA decision in O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996), holding that a prima facie showing of age discrimination in discharge does not require the plaintiff's replacement to be outside the protected age group.
3. EFFECTIVE DATE: Upon issuance.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, Section a (5), this Notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: ADEA Division, Office of Legal Counsel.
6. INSTRUCTIONS: File after the last Enforcement Guidance in the 800 series of Volume II of the EEOC Compliance Manual.
7. SUBJECT MATTER:

I. Background and Holding of Decision

On April 1, 1996, the U.S. Supreme Court issued its decision in O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307 (1996). The O'Connor decision addressed the narrow question of whether, in order to make out a prima facie case, a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 et seq., must show that he was replaced by someone outside the protected age group (i.e., someone under the age of 40). A unanimous Court held that replacement by someone under 40 was not a necessary element of an ADEA prima facie case.

The plaintiff in O'Connor, who was 56 years old at the time he was discharged, had filed suit in federal district court alleging that he had been dismissed by the defendant corporation because of his age. The district court granted the defendant's motion for summary judgment. On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the case.

Applying the McDonnell Douglas framework, the Fourth Circuit stated that the plaintiff in a non-reduction-in-force case could establish a prima facie case of age discrimination only if he showed that: (1) he was in the ADEA protected age group (PAG); (2) he was discharged or demoted; (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, he was replaced by someone of comparable qualifications outside the PAG. The court concluded that the plaintiff had failed to make out a prima facie case because the plaintiff's replacement was 40 years old and, thus, was in the PAG. The Supreme Court reversed.

The Supreme Court initially noted that it had never had occasion to decide whether the basic evidentiary framework set forth in McDonnell Douglas applied to the ADEA. However, since the parties did not contest that point and since the Fourth Circuit, like every other federal court of appeals, had applied some variant of McDonnell Douglas to ADEA disparate treatment cases, the Court assumed for purposes of the decision that it did apply.

Thus, viewing the prima facie case from the perspective of the McDonnell Douglas framework, the Court stated that there must be "at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'" 116 S. Ct. at 1310 (citation omitted). The Court found that the element of replacement by someone under 40 failed to meet this requirement. Id. The Court reasoned that no greater inference of age discrimination (as opposed to PAG discrimination) could be drawn when a 40-year-old is replaced by a 39-year-old (i.e., someone outside the PAG) than when a 56-year-old is replaced by a 40-year-old (i.e., someone within the PAG). Id. The Court concluded that, "[b]ecause it lacks probative value, the fact that

an ADEA plaintiff was replaced by someone outside [the PAG] is not a proper element of the McDonnell Douglas prima facie case." Id.

In reaching its conclusion, the Court emphasized that the ADEA prohibits discrimination "because of [an] individual's age." The statutory language "does not ban discrimination against employees because they are aged 40 or older [i.e., in the PAG]; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older."

116 S. Ct. at 1310. The Court observed: "The fact that one person in the [PAG] has lost out to another person in the [PAG] is thus irrelevant, so long as he has lost out because of his age." Id. (emphasis in original).

The Court further remarked, in dicta, that a prima facie case requires "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion,'" 116 S. Ct. at 1310 (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977)), and that such an inference cannot be drawn by the replacement of one worker with another worker who is "insignificantly younger." Id. Because the ADEA prohibits discrimination based on age rather than on class membership, the Court suggested that, in the age-discrimination context, "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the [PAG]." Id.

II. Questions and Answers

The following questions and answers set forth the Commission's position on issues that arise in relation to the O'Connor decision.

1. **Q What is the basic holding of O'Connor?**

   A. The O'Connor decision holds that a prima facie showing of age discrimination does not require the plaintiff's replacement (if any) to be younger than the PAG minimum age (i.e., 40 years old).

2. **Q. Does the O'Connor decision change the way in which investigators should process age discrimination charges?**

   A. No. O'Connor is consistent with the Commission's long-standing position that an ADEA charge should never be rejected or dismissed on the merits solely because a charging party states that his or her replacement (or comparator) is an individual within the ADEA's protected age group (40 and older).

   Indeed, it is the Commission's view that the characteristics of the comparator are not a necessary element of the prima facie case under the ADEA, Title VII, the Americans with Disabilities Act (ADA), or the Rehabilitation Act of 1973.

3. **Q. Is it possible after O'Connor to establish a prima facie case and, ultimately, a violation of the ADEA where the respondent does not hire a replacement for the charging party?**

   A. Yes. The decision's holding is not dependent upon the respondent's hiring a replacement for the charging party. O'Connor holds only that, when the age of a replacement is made a part of the prima facie case, that case is not defeated solely because the replacement happens to be within the protected age group.

4. **Q. In dicta, the O'Connor Court uses the terms "insignificantly younger" and "substantially younger" in referring to a plaintiff's replacement. Does the decision define these terms?**

   A. No. In discussing the strength of an inference of age discrimination that might be drawn from the facts of a particular case, the Court merely offers the example of a 68-year-old replaced by a 65-year-old and suggests that such facts might amount to "creating a prima facie case on the basis of very thin evidence." 116 S. Ct. at 1310.

5. **Q. Is it necessary to make a specific determination regarding whether the charging party's replacement/ comparator is "insignificantly" or "substantially" younger than the charging party? If so, since the O'Connor decision does not define these terms, how will the Commission make that determination?**

   A. It is not necessary to specifically categorize that age difference as "insignificant" or "substantial." As in the past, however, the relative ages of the charging party and his/her replacement/comparator may be relevant

evidence as to the merits of the case. Where a specific determination on this point must be made, the Commission will make it on a case-by-case basis.

We emphasize, moreover, that there is no "bright line" test for determining whether the age difference can be considered either "insignificant" or "substantial." Whether the age difference is sufficient to support a finding of age discrimination is simply one of the issues to be considered in assessing the case.

6. Q. Does the O'Connor decision require a "no cause" dismissal of a charge where it is determined that the charging party was replaced by a person who is only slightly younger? For example, should a charge alleging discharge because of age be dismissed if the charging party's replacement is only two or three years younger than the charging party?

A. No. Under no circumstances should a charge be dismissed without investigation solely because the charging party's replacement is only slightly younger. Field offices have the discretion to consider this point along with all other facts and circumstances when making a decision on appropriate resource commitment and a determination on the merits.

7. Q. Under what circumstances might a field office issue a cause determination even though the comparator is only slightly younger than the charging party?

A. There may be a number of circumstances in which such a cause determination is proper. The fact that the age difference between the charging party and his/her comparator is not "substantial" is simply one piece of evidence that must be weighed along with all other evidence in determining whether there is reasonable cause. For example:

(1) If the evidence showed that the slightly younger comparator was selected for the purpose of disguising age discrimination, the relatively slight difference in age would not defeat the charging party's case. Such might be the case where, for instance:

* Despite the slight difference in age, the comparator looks appreciably younger, more vigorous, and robust, and the employer has commented favorably on the comparator's "youthful" appearance.

* The replacement is someone who is nearing retirement age and who has expressed an interest in retiring -- thus clearing the way for the employer to hire a considerably younger replacement.

(2) An employer's history of taking action against its oldest workers would support an inference of age discrimination where the comparator was only slightly younger than the charging party.

(3) Evidence that age-based comments were made in connection with the allegedly discriminatory action would buttress an inference of age discrimination despite a relatively slight age difference.

(4) Even if the comparator is only slightly younger than the charging party, his/her being less qualified for the job would also support an inference of age discrimination.

(5) If the slightly younger replacement was hired by someone other than, and outside the control of, the person who fired the charging party, the inference of age discrimination would not be undermined by the relatively small age difference (since the firing and hiring were separate and independent acts by two different individuals).

Where the comparator is only slightly younger than the charging party, but the totality of the evidence is adequate to create an inference of age discrimination, the field should issue a cause determination whenever the respondent fails to articulate a legitimate, non-discriminatory reason for its action, or whenever it is determined that the articulated reason is a pretext for illegal discrimination.

8. Q. Is it appropriate after the O'Connor decision for the Commission to continue to apply the McDonnell Douglas prima facie case framework in age cases?

A. Yes. Although that framework was developed under Title VII, the Commission and virtually all federal courts have applied some variant of the basic evidentiary framework developed in McDonnell Douglas to ADEA disparate treatment cases. Indeed, the Supreme

Court used McDonnell Douglas in O'Connor.

9. **Q. Is the McDonnell Douglas framework the exclusive means of assessing the evidence in a disparate treatment case?**

   A. No. The McDonnell Douglas model is simply one way of assessing the evidence. For example, where there is direct evidence of discrimination, a determination on the merits can be made without relying on the McDonnell Douglas framework. For EEOC investigative purposes, however, the important consideration is that a determination on the merits should be made on the basis of whatever evidence has been obtained, without rigid or inflexible adherence to a prescribed "formula." As noted by the Seventh Circuit in Carson v. Bethlehem Steel Corp., regarding a Title VII prima facie case: "Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes." 82 F.3d at 159.

10. **Q. Does the O'Connor decision address the applicability of the adverse impact theory of discrimination in age cases?**

    A. No. The case deals solely with the disparate treatment theory of discrimination. While the Supreme Court has never ruled on the applicability of the adverse impact theory to age cases, the majority of federal appellate courts have either held or assumed that the theory applies in age cases.

    The Commission applies the adverse impact analysis in age cases unless the law of the circuit prohibits such application. See 29 C.F.R. § 1625.7(d).

11. **Q. Does the holding in O'Connor apply to pending cases? If a case is pending in a field office in the Fourth Circuit involving the replacement of one member of the protected age group by another member of the protected age group and the facts arose before the Supreme Court's decision, how should the field office proceed?**

    A. The O'Connor decision does apply to pending cases. Therefore, field offices (including those in the Fourth Circuit) should apply the law as stated by the Supreme Court.

1. Although this enforcement guidance addresses this issue in the context of private sector discrimination charges, the principles and considerations discussed herein are equally applicable to federal sector complaints.

   With respect to the applicability of the guidance to charges/complaints brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.; and the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq., see discussion below at Question and Answer 2.

2. 67 EPD & 43,927, 70 FEP Cases 486 (1996).

3. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Title VII), the Court held that a plaintiff can establish a prima facie case of disparate treatment in hiring by showing that: (i) he/she belongs to a protected class; (ii) he/she applied and was qualified for the job at issue; (iii) despite these qualifications, he/she was rejected; and (iv) after his/her rejection, the position remained open and the employer continued to seek applicants having the plaintiff's qualifications. 411 U.S. at 802. Courts have adjusted these criteria in analyzing the particular issue in dispute. For example, the prima facie case criteria for analyzing a hiring case differ slightly from those for analyzing a discharge or a denial of transfer case.

4. We note with approval that, in a recent post-O'Connor decision under Title VII, the Court of Appeals for the Seventh Circuit held that a plaintiff alleging racial discrimination in discharge need not show that her replacement was of a different race. Carson v. Bethlehem Steel Corp., 82 F.3d 157 (7th Cir.), 68 EPD & 44,009, 70 FEP Cases 921 (1996).

5. Relevant appellate court decisions applying McDonnell Douglas in an ADEA disparate treatment context are cited in O'Connor at 116 S. Ct. 1309-10 n.2.

6. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

7. For a discussion of the criteria that would preclude application of a Supreme Court decision to pending cases and, thus, limit it to prospective application, see Chevron Oil v. Huson, 404 U.S. 97, 106 (1971).

State Laws on Age Discrimination

Although federal law requires at least 20 employees on staff to file an age discrimination claim, individual state law may allow an age discrimination claim with fewer employees. This is the most common difference between federal and state age discrimination laws. Therefore, even if a company has less than 20 employees, an age discrimination claim can still be filed with either the state's administrative agency, in court or both. The following list shows the minimum number of employees on staff needed file a claim in each state:

State	Minimum number of employees
Alabama	no state law
Alaska	2
Arizona	15
Arkansas	no state law
California	5
Colorado	1
Connecticut	3
Delaware	4
Florida	15
Georgia	no state law
Hawaii	1
Idaho	5
Illinois	15
Indiana	6
Iowa	4
Kansas	5
Kentucky	8
Louisiana	20
Maine	1 (but under 15 damages recovered may be limited)
Maryland	varies by county
Massachusetts	6
Michigan	1
Minnesota	1
Mississippi	no state law
Missouri	6
Montana	1
Nebraska	15
Nevada	15
New Hampshire	6

State	Minimum number of employees
New Jersey	1
New Mexico	4
New York	4
North Carolina	state law allows filing a "public policy" claim based on anti-discrimination law under 20
North Dakota	1
Ohio	4 (state law allows filing a "public policy" claim based on anti-discrimination laws if less than 4)
Oklahoma	15
Oregon	1
Pennsylvania	4
Rhode Island	4
South Carolina	15
South Dakota	1
Tennessee	8
Texas	15
Utah	15
Vermont	1
Virginia	6
Washington	8
West Virginia	15 (state law allows filing a "public policy" claim based on anti-discrimination laws if less than 15)
Wisconsin	1
Wyoming	2

Chapter 6

ADEA Regulation Text

Chapter XIV--Equal Employment Opportunity Commission

29 C.F.R. Part 1625: Age Discrimination in Employment Act

[Code of Federal Regulations]

[Title 29, Volume 4]

[Revised as of Dec 7, 2009]

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Authority: 81 Stat. 602; 29 U.S.C. 621, 5 U.S.C. 301, Secretary's

Order No. 10-68; Secretary's Order No. 11-68; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

Source: 46 FR 47726, Sept. 29, 1981, unless otherwise noted.

§ 1625.1 Definitions.

The Equal Employment Opportunity Commission is hereinafter referred to as the *Commission*. The terms *person, employer, employment agency, labor organization*, and *employee* shall have the meanings set forth in section 11 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq*., hereinafter referred to as the Act. References to employers in this part state principles that are applicable not only to employers but also to labor organizations and to employment agencies.

§ 1625.2 Discrimination prohibited by the Act.

It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old. However, the ADEA does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences.

[72 FR 36875, July 6, 2007]

§ 1625.3 Employment agency.

(a) As long as an employment agency regularly procures employees for at least one covered employer, it qualifies under section 11(c) of the Act as an employment agency with respect to all of its activities whether or not such activities are for employers covered by the act.

(b) The prohibitions of section 4(b) of the Act apply not only to the referral activities of a covered employment agency but also to the agency's own employment practices, regardless of the number of employees the agency may have.

§ 1625.4 Help wanted notices or advertisements.

(a) Help wanted notices or advertisements may not contain terms and phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35*, *young, college student, recent college graduate, boy, girl*, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60, retirees, or supplement your pension.*

(b) Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act. But because asking applicants to state their age may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals, employment notices or advertisements that include such requests will be closely scrutinized to assure that the requests were made for a lawful purpose.

[72 FR 36875, July 6, 2007]

§ 1625.5 Employment applications.

A request on the part of an employer for information such as *Date of Birth* or age on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act. That the purpose is not one proscribed by the statute should be made known to the applicant by a reference on the application form to the statutory prohibition in language to the following effect:

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age," or by other means. The term "employment applications," refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to written preemployment inquiries, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act.

[46 FR 47726, Sept. 29, 1981, as amended at 53 FR 5972, Feb. 29, 1988; 72 FR 36875, July 6, 2007]

§ 1625.6 Bona fide occupational qualifications.

(a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception to the Act it must be narrowly construed.

(b) An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(c) Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.

(d) Whenever the "reasonable factors other than age" defense is raised, the employer bears the burdens of production and persuasion to demonstrate the defense. The "reasonable factors other than age" provision is not available as a defense to a claim of disparate treatment.

(e)(1) A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. Whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

(2) Considerations that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to:

(i) The extent to which the factor is related to the employer's stated business purpose;

(ii) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

(iii) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

(iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

(3) No specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

§ 1625.8 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that

* * * It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of this Act except that no such seniority system * * * shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual. * * *

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(b) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act.

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the Act.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise

applies. The "bona fides" of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

[53 FR 15673, May 3, 1988]

§ 1625.9 Prohibition of involuntary retirement.

(a)(1) As originally enacted in 1967, section 4(f)(2) of the Act provided:

It shall not be unlawful * * * to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.

The Department of Labor interpreted the provision as "Authoriz[ing] involuntary retirement irrespective of age: *Provided*, That such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2)." *See* 34 FR 9709 (June 21, 1969). The Department took the position that in order to meet the requirements of section 4(f)(2), the involuntary retirement provision had to be (i) contained in a bona fide pension or retirement plan, (ii) required by the terms of the plan and not optional, and (iii) essential to the plan's economic survival or to some other legitimate business purpose—i.e., the provision was not in the plan as the result of arbitrary discrimination on the basis of age.

(2) As revised by the 1978 amendments, section 4(f)(2) was amended by adding the following clause at the end:

and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual * * *.

The Conference Committee Report expressly states that this amendment is intended "to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age" (H.R. Rept. No. 95–950, p. 8).

(b)(1) The amendment applies to all new and existing seniority systems and employee benefit plans. Accordingly, any system or plan provision requiring or permitting involuntary retirement is unlawful, regardless of whether the provision antedates the 1967 Act or the 1978 amendments.

(2) Where lawsuits pending on the date of enactment (April 6, 1978) or filed thereafter challenge involuntary retirements which occurred either before or after that date, the amendment applies.

(c)(1) The amendment protects all individuals covered by section 12(a) of the Act. Section 12(a) was amended in October of 1986 by the Age Discrimination in Employment Amendments of 1986, Pub. L. 99–592, 100 Stat. 3342 (1986), which removed the age 70 limit. Section 12(a) provides that the Act's prohibitions shall be limited to individuals who are at least forty years of age. Accordingly, unless a specific exemption applies, an employer can no longer force retirement or otherwise discriminate on the basis of age against an individual because (s)he is 70 or older.

(2) The amendment to section 12(a) of the Act became effective on January 1, 1987, except with respect to any employee subject to a collective bargaining agreement containing a provision that would be superseded by such amendment that was in effect on June 30, 1986, and which terminates after January 1, 1987. In that case, the amendment is effective on the termination of the agreement or January 1, 1990, whichever comes first.

(d) Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

[46 FR 47726, Sept. 29, 1981, as amended at 52 FR 23811, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

§ 1625.10 Costs and benefits under employee benefit plans.

(a)(1) *General*. Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization

to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals.

The legislative history of this provision indicates

that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception:

(i) What a "bona fide employee benefit plan" is;

(ii) What it means to "observe the terms" of such a plan; and

(iii) What kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act."

There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans.

(2) *Relation of section* 4(f)(2) to sections 4(a), 4(b) and 4(c). Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) *Bona fide employee benefit plan*. Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered "bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations there under. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An "employee-pay-all" employee benefit plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the extent and according to the same principles as apply to other plans under section 4(f)(2).

(c) "*To observe the terms*" of a plan. In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of

the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) *Subterfuge*. In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of [the] Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(1) *Cost data—general*. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for its own employees over such a period, or on cost data for a larger group of similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not available, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(2) C*ost data*—Individual benefit basis and "benefit package" basis. Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis, as described below.

(i) *Benefit-by-benefit basis*. Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See paragraph (f)(1) of this section.

(ii) "*Benefit package*" basis. As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be made on a limited "benefit package" basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." A "benefit package" approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A "benefit package" approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that such a "benefit package" approach is not abused and is consistent with the legislative intent, it is subject to the limitations described in paragraph (f), which also includes a general example.

(3) *Cost data—five year maximum basis*. Cost comparisons and adjustments under section 4(f)(2) may be made on the basis of age brackets of up to 5 years. Thus a particular benefit may be reduced for employees of any age within the protected age group by an amount no greater than that which could be justified by the additional cost to provide them with the same level of the benefit as younger employees within a specified five-year age group immediately preceding theirs. For example, where an employer chooses to provide unreduced group term life insurance benefits until age 60, benefits for employees who are between 60 and 65 years of age may be reduced only to the extent necessary to achieve approximate equivalency in costs with employees who are 55 to 60 years old. Similarly, any reductions in benefit levels for 65 to 70 year old employees cannot exceed an amount which is proportional to the additional costs for their coverage

over 60 to 65 year old employees.

(4) *Employee contributions in support of employee benefit plans* —(i) As a condition of employment. An older employee within the protected age group may not be required as a condition of employment to make greater contributions than a younger employee in support of an employee benefit plan. Such a requirement would be in effect a mandatory reduction in take-home pay, which is never authorized by section 4(f)(2), and would impose an impediment to employment in violation of the specific restrictions in section 4(f)(2).

(ii) *As a condition of participation in a voluntary employee benefit plan*. An older employee within the protected age group may be required as a condition of participation in a voluntary employee benefit plan to make a greater contribution than a younger employee only if the older employee is not thereby required to bear a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger employee. Otherwise the requirement would discriminate against the older employee by making compensation in the form of an employer contribution available on less favorable terms than for the younger employee and denying that compensation altogether to an older employee unwilling or unable to meet the less favorable terms. Such discrimination is not authorized by section 4(f)(2). This principle applies to three different contribution arrangements as follows:

(A) *Employee-pay-all plans*. Older employees, like younger employees, may be required to contribute as a condition of participation up to the full premium cost for their age.

(B) *Non-contributory ("employer-pay-all") plans*. Where younger employees are not required to contribute any portion of the total premium cost, older employees may not be required to contribute any portion.

(C) *Contributory plans*. In these plans employers and participating employees share the premium cost. The required contributions of participants may increase with age so long as the proportion of the total premium required to be paid by the participants does not increase with age.

(iii) *As an option in order to receive an unreduced benefit.* An older employee may be given the option, as an individual, to make the additional contribution necessary to receive the same level of benefits as a younger employee (provided that the contemplated reduction in benefits is otherwise justified by section 4(f)(2)).

(5) *Forfeiture clauses*. Clauses in employee benefit plans which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4(d) which provides that it is unlawful for an employer, employment agency, or labor organization to discriminate against any individual because such individual "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

(6) *Refusal to hire clauses*. Any provision of an employee benefit plan which requires or permits the refusal to hire an individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purposes of the Act and cannot be excused under section 4(f)(2).

(7) *Involuntary retirement clauses*. Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(e) *Benefits provided by the Government.* An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

(f) *Application of section 4(f)(2) to various employee benefit plans* —(1) *Benefit-by-benefit approach*. This portion of the interpretation discusses how a benefit-

by-benefit approach would apply to four of the most common types of employee benefit plans.

(i) *Life insurance*. It is not uncommon for life insurance coverage to remain constant until a specified age, frequently 65, and then be reduced. This practice will not violate the Act (even if reductions start before age 65), provided that the reduction for an employee of a particular age is no greater than is justified by the increased cost of coverage for that employee's specific age bracket encompassing no more than five years. It should be noted that a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease upon separation from service.

(ii) *Long-term disability*. Under a benefit-by-benefit approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost—based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Reductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. An employer which provides long-term disability coverage to all employees may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

(A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.

(B) With respect to disabilities which occur after age 60, benefits cease 5 years after disablement. Cost data may be produced to support other patterns of reduction as well.

(iii) *Retirement plans* —(A) Participation. No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93–406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

(2) *"Benefit package" approach*. A "benefit package" approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(i) A benefit package approach shall apply only to employee benefit plans which fall within section 4(f)(2).

(ii) A benefit package approach shall not apply to a retirement or pension plan. The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(iii) A benefit package approach shall not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach. Such benefits appear to be of particular importance to older workers in meeting "problems arising from the impact of age" and were of particular concern to Congress. Therefore, the "benefit package"

approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. Any greater reduction would be a subterfuge to evade the purpose of the Act.

(iv) A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees. No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

(v) Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified. Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their employees. A general example consistent with these limitations may be given. Assume two employee benefit plans, providing Benefit "A" and Benefit "B." Both plans fall within section 4(f)(2), and neither is a retirement or pension plan subject to special rules. Both benefits are available to all employees. Age-based cost increases would justify a 10% decrease in both benefits on a benefit-by-benefit basis. The affected employees would, however, find it more favorable—that is, more consistent with meeting their needs—for no reduction to be made in Benefit "A" and a greater reduction to be made in Benefit "B." This "trade-off" would not result in a reduction in health benefits. The "trade-off" may therefore be made. The details of the "trade-off" depend on data on the relative cost to the employer of the two benefits. If the data show that Benefit "A" and Benefit "B" cost the same, Benefit "B" may be reduced up to 20% if Benefit "A" is unreduced. If the data show that Benefit "A" costs only half as much as Benefit "B", however, Benefit "B" may be reduced up to only 15% if Benefit "A" is unreduced, since a greater reduction in Benefit "B" would result in an impermissible reduction in total benefit costs.

(g) *Relation of ADEA to State laws*. The ADEA does not preempt State age discrimination in employment laws. However, the failure of the ADEA to preempt such laws does not affect the issue of whether section 514 of the Employee Retirement Income Security Act (ERISA) preempts State laws which related to employee benefit plans.

[44 FR 30658, May 25, 1979, as amended at 52 FR 8448, Mar. 18, 1987. Redesignated and amended at 52 FR 23812, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

§ 1625.11 Exemption for employees serving under a contract of unlimited tenure.

(a)(1) Section 12(d) of the Act, added by the 1986 amendments, provides:

Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).

(2) This exemption from the Act's protection of covered individuals took effect on January 1, 1987, and is repealed on December 31, 1993 (see section 6 of the Age Discrimination in Employment Act Amendments of 1986, Pub. L. 99–592, 100 Stat. 3342). The Equal Employment Opportunity Commission is required to enter into an agreement with the National Academy of Sciences, for the conduct of a study to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education.

(b) Since section 12(d) is an exemption from the nondiscrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the ADEA, this exemption must be narrowly construed.

(c) Section 1201(a) of the Higher Education Act of 1965, as amended, and set forth in 20 U.S.C. 1141(a), provides in pertinent part:

The term *institution of higher education* means an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is

accredited by a nationally recognized accrediting agency or association or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

The definition encompasses almost all public and private universities and two and four year colleges. The omitted portion of the text of section 1201(a) refers largely on one-year technical schools which generally do not grant tenure to employees but which, if they do, are also eligible to claim the exemption.

(d)(1) Use of the term any employee indicates that application of the exemption is not limited to teachers, who are traditional recipients of tenure. The exemption may also be available with respect to other groups, such as academic deans, scientific researchers, professional librarians and counseling staff, who frequently have tenured status.

(2) The Conference Committee Report on the 1978 amendments expressly states that the exemption does not apply to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95–950, p. 10).

(e)(1) The phrase *unlimited tenure* is not defined in the Act. However, the almost universally accepted definition of academic "tenure" is an arrangement under which certain appointments in an institution of higher education are continued until retirement for age of physical disability, subject to dismissal for adequate cause or under extraordinary circumstances on account of financial exigency or change of institutional program. Adopting that definition, it is evident that the word *unlimited* refers to the duration of tenure. Therefore, a contract (or other similar arrangement) which is limited to a specific term (for example, one year or 10 years) will not meet the requirements of the exemption.

(2) The legislative history shows that Congress intended the exemption to apply only where the minimum rights and privileges traditionally associated with tenure are guaranteed to an employee by contract or similar arrangement. While tenure policies and practices vary greatly from one institution to another, the minimum standards set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement. The 1940 Statement of Principles on academic tenure provides as follows:

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution.

In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an advisor of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

(3) A contract or similar arrangement which meets the standards in the 1940 Statement of Principles will satisfy the tenure requirements of the exemption. However, a tenure arrangement will not be deemed inadequate solely because it fails to meet these standards in every respect. For example, a tenure plan will not be deemed inadequate solely because it includes a probationary period somewhat longer than seven years. Of course, the greater the deviation from the standards in the 1940 Statement of Principles, the less likely it is that the employee in question will be deemed subject to "unlimited tenure" within the meaning of the exemption. Whether or not a tenure arrangement is adequate to satisfy the requirements of the exemption must be determined on the basis of the facts of each case.

(f) Employees who are not assured of a continuing appointment either by contract of unlimited tenure or other similar arrangement (such as a State statute) would not, of course, be exempted from the prohibitions against compulsory retirement, even if they perform functions identical to those performed by employees with appropriate tenure.

(g) An employee within the exemption can lawfully be forced to retire on account of age at age 70 (see paragraph (a)(1) of this section). In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status: *Provided*, that the employee voluntarily accepts this new position or status. For example, an employee who falls within the exemption may be offered a nontenured position or part-time employment. An employee who accepts a nontenured position or part-time employment, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee (unless such less favorable treatment is excused by an exception to the Act).

[44 FR 66799, Nov. 21, 1979; 45 FR 43704, June 30, 1980, as amended at 53 FR 5973, Feb. 29, 1988]

§ 1625.12 Exemption for bona fide executive or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments and as amended in 1984 and 1986, provides:

Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or higher policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $44,000.

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in §541.1 of this chapter. Each

of the requirements in paragraphs (a) through (e) of §541.1 must be satisfied, regardless of the level of the employee's salary or compensation.

(2) Even if an employee qualifies as an executive under the definition in §541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the Conference Committee Report in the form of examples (see H.R. Rept. No. 95–950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95–950, p. 9):

Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking position," according to the Conference Report (H.R. Rept. No. 95–950, p. 10), is limited to "* * * certain top level employees who are not 'bona fide executives' * * *." Specifically, these are:

* * * individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.

For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decision-makers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high policymaking position.

(g) The Conference Committee Report expressly states that the exemption is not applicable to Federal employees covered by section 15 of the Act (H.R. Rept. No. 95–950, p. 10).

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining

compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

(j)(1) The annual retirement benefit must equal, in the aggregate, at least $44,000. The manner of determining whether this requirement has been satisfied is set forth in §1627.17(c).

(2) In determining whether the aggregate annual retirement benefit equals at least $44,000, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan. (Regulations issued pursuant to section 12(c)(2) of the Act, regarding the manner of calculating the amount of qualified retirement benefits for purposes of the exemption, are set forth in §1627.17 of this chapter.)

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $44,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

(2) An annual retirement benefit will not be deemed forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with Treasury Regulation 1.401–4(c). However, as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will meet its obligations.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98–459, 98 Stat. 1792))

[44 FR 66800, Nov. 21, 1979; 45 FR 43704, June 30, 1980, as amended at 50 FR 2544, Jan. 17, 1985; 53 FR 5973, Feb. 29, 1988]

Subpart B—Substantive Regulations

§ 1625.21 Apprenticeship programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623. Age limitations in apprenticeship programs are valid only if excepted under sec. 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), or exempted by the Commission under sec. 9 of the Act, 29 U.S.C. 628, in accordance with the procedures set forth in 29 CFR 1627.15.

[61 FR 15378, Apr. 8, 1996]

§ 1625.22 Waivers of rights and claims under the ADEA.

(a) *Introduction*. (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is "knowing and voluntary". Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

(b) *Wording of Waiver Agreements*. (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver,

that:

The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed "in writing in a manner calculated to be understood by the average participant." The same standards applicable to the similar language in section 7(f)(1)(A) of the ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that "the waiver specifically refers to rights or claims under this Act." Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be "advised in writing to consult with an attorney prior to executing the agreement."

(c) *Waiver of future rights*. (1) Section 7(f)(1)(C) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) *Consideration*. (1) Section 7(f)(1)(D) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) "Consideration in addition" means anything of value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute "consideration" for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) *Time periods*. (1) Section 7(f)(1)(F) of the ADEA states that:

A waiver may not be considered knowing and voluntary unless at a minimum * * *

(i) The individual is given a period of at least 21 days within which to consider the agreement; or

(ii) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement

provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term "exit incentive or other employment termination program" includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) *Informational requirements*. (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of "programs" under which employers seeking waivers must make written disclosures: "exit incentive programs" and "other employment termination programs." Usually an "exit incentive program" is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, "additional consideration") in exchange for their decision to resign voluntarily and sign a waiver. Usually "other employment termination program" refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a "program" will be decided based upon the facts and circumstances of each case. A "program" exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue. (See paragraph (f)(3) of this section, "The Decisional Unit.")

(D) A "program" for purposes of the ADEA need not constitute an "employee benefit plan" for purposes of the Employee Retirement Income Security Act of

1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms "class," "unit," or "group" in section 7(f)(1)(H)(i) of the ADEA and "job classification or organizational unit" in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. "Facility" as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as "school," "plant," or "complex" may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) *Facility-wide*: Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) *Division-wide*: Fifteen of the employees in the Computer Division will be terminated in December;

(C) *Department-wide*: One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) *Reporting*: Ten percent of the employees, who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) *Job Category*: Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as “age 20–30”) does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as

the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		
(4) Structural Engineers, II	23	2	4
	Etc., for all ages		
(5) Purchasing Agents	26	10	11
	Etc., for all ages		

(g) Waivers settling charges and lawsuits. (1) Section 7(f)(2) of the ADEA provides that:

A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) Subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, "discrimination of a kind prohibited under section 4 or 15" refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1) (A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered

"reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) *Burden of proof.* In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) *EEOC's enforcement powers*. (1) Section 7(f)(4) of the ADEA states:

No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) *Effective date of this section.* (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) *Statutory authority*. The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

§ 1625.23 Waivers of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

(b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

(c) *Restitution, recoupment, or setoff*. (1) Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, "reduction") against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(d) No employer may abrogate its duties to any

signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

[65 FR 77446, Dec. 11, 2000]

Subpart C—Administrative Exemptions

Source: 44 FR 38459, July 2, 1979, unless otherwise noted. Redesignated at 72 FR 72944, Dec. 26, 2007.

§ 1625.30 Administrative exemptions; procedures.

(a) Section 9 of the Act provides that,

In accordance with the provisions of subchapter II of chapter 5, of title 5, United States Code, the Secretary of Labor * * * may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

(b) The authority conferred on the Commission by section 9 of the Act to establish reasonable exemptions will be exercised with caution and due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action consistent with this statutory purpose may be taken under this section, with or without a request therefore, when found necessary and proper in the public interest in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a reasonable exemption from the Act's provisions will be granted only if it is decided, after notice published in the Federal Register giving all interested persons an opportunity to present data, views, or arguments, that a strong and affirmative showing has been made that such exemption is in fact necessary and proper in the public interest. Request for such exemption shall be submitted in writing to the Commission.

§ 1625.31 Special employment programs.

(a) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1625.30(b) of this part, it has been found necessary and proper in the public interest to exempt from all prohibitions of the Act all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the employment of, persons with special employment problems, including employment activities and programs under the Manpower Development and Training Act of 1962, Pub. L. No. 87-415, 76 Stat. 23 (1962), as amended, and the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964), as amended, for persons among the long-term unemployed, individuals with disabilities, members of minority groups, older workers, or youth. Questions concerning the application of this exemption shall be referred to the Commission for decision.

(b) Any employer, employment agency, or labor organization the activities of which are exempt from the prohibitions of the Act under paragraph (a) of this section shall maintain and preserve records containing the same information and data that is required of employers, employment agencies, and labor organizations under §§ 1627.3, 1627.4, and 1627.5, respectively.

[44 FR 38459, July 2, 1979, as amended at 52 FR 32296, Aug. 27, 1987; 55 FR 24078, June 14, 1990; 57 FR 4158, Feb. 4, 1992; 72 FR 72944, Dec. 26, 2007; 74 FR 63984, Dec. 7, 2009]

§ 1625.32 Coordination of retiree health benefits with Medicare and State health benefits.

(a) Definitions.

(1) Employee benefit plan means an employee benefit plan as defined in 29 U.S.C. 1002(3).

(2) Medicare means the health insurance program available pursuant to Title XVIII of the Social Security Act, 42 U.S.C. 1395 et seq.

(3) Comparable State health benefit plan means a State-sponsored health benefit plan that, like Medicare, provides retired participants who have attained a minimum age with health benefits, whether or not the type, amount or value of those benefits is equivalent to the type, amount or value of the health benefits provided under Medicare.

(b) Exemption. Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit

plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the Act, and in accordance with the procedures provided therein and in § 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

(c) Scope of Exemption. This exemption shall be narrowly construed. No other aspects of ADEA coverage or employment benefits other than those specified in paragraph (b) of this section are affected by the exemption. Thus, for example, the exemption does not apply to the use of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section. Nor does it apply to the use of the age of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section.

Appendix to § 1625.32—Questions and Answers Regarding Coordination of Retiree Health Benefits With Medicare and State Health Benefits

Q1. Why is the Commission issuing an exemption from the Act?

A1. The Commission recognizes that while employers are under no legal obligation to offer retiree health benefits, some employers choose to do so in order to maintain a competitive advantage in the marketplace—using these and other benefits to attract and retain the best talent available to work for their organizations. Further, retiree health benefits clearly benefit workers, allowing such individuals to acquire affordable health insurance coverage at a time when private health insurance coverage might otherwise be cost prohibitive. The Commission believes that it is in the best interest of both employers and employees for the Commission to pursue a policy that permits employers to offer these benefits to the greatest extent possible.

Q2. Does the exemption mean that the Act no longer applies to retirees?

A2. No. Only the practice of coordinating retiree health benefits with Medicare (or a comparable State health benefit plan) as specified in paragraph (b) of this section is exempt from the Act. In all other contexts, the Act continues to apply to retirees to the same extent that it did prior to the issuance of this section.

Q3. May an employer offer a "carve-out plan" for retirees who are eligible for Medicare or a comparable State health plan?

A3. Yes. A "carve-out plan" reduces the benefits available under an employee benefit plan by the amount payable by Medicare or a comparable State health plan. Employers may continue to offer such "carve-out plans" and make Medicare or a comparable State health plan the primary payer of health benefits for those retirees eligible for Medicare or the comparable State health plan.

Q4. Does the exemption also apply to dependent and/or spousal health benefits that are included as part of the health benefits provided for retired participants?

A4. Yes. Because dependent and/or spousal health benefits are benefits provided to the retired participant, the exemption applies to these benefits, just as it does to the health benefits for the retired participant. However, dependent and/or spousal benefits need not be identical to the health benefits provided for retired participants. Consequently, dependent and/or spousal benefits may be altered, reduced or eliminated pursuant to the exemption whether or not the health benefits provided for retired participants are similarly altered, reduced or eliminated.

Q5. Does the exemption address how the ADEA may apply to other acts, practices or employment benefits not specified in the rule?

A5. No. The exemption only applies to the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefit program. No other aspects of ADEA coverage or employment benefits other than retiree health benefits are affected by the exemption.

Q6. Does the exemption apply to existing, as well as to newly created, employee benefit plans?

A6. Yes. The exemption applies to all retiree health benefits that coordinate with Medicare (or a comparable State health benefit plan) as specified in paragraph (b) of this section, whether those benefits are provided for in an existing or newly created employee benefit plan.

Q7. Does the exemption apply to health benefits that are provided to current employees who are at or over the age of Medicare eligibility (or the age of eligibility for a comparable State health benefit plan)?

A7. No. The exemption applies only to retiree health benefits, not to health benefits that are provided to current employees. Thus, health benefits for current employees must be provided in a manner that comports with the requirements of the Act. Moreover, under the laws governing the Medicare program, an employer must offer to current employees who are at or over the age of Medicare eligibility the same health benefits, under the same conditions, that it offers to any current employee under the age of Medicare eligibility.

[72 FR 72945, Dec. 26, 2007]

29 C.F.R. Part 1626: Procedures

[Code of Federal Regulations]

[Title 29, Volume 4]

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Authority: Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p. 321.

Source: 48 FR 140, Jan. 3, 1983, unless otherwise noted.

§ 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

§ 1626.2 Terms defined in the Age Discrimination in Employment Act of 1967, as amended.

The terms person, employer, employment agency, labor organization, employee, commerce, industry affecting commerce, and State as used herein shall have the meanings set forth in section 11 of the Age Discrimination in Employment Act, as amended.

§ 1626.3 Other definitions.

For purpose of this part, the term the *Act* shall mean the Age Discrimination in Employment Act of 1967, as amended; the *Commission* shall mean the Equal Employment Opportunity Commission or any of its designated representatives; *charge* shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act; *complaint* shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act; *charging party* means the person filing a charge; *complainant* means the person filing a complaint; and *respondent* means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

§ 1626.4 Information concerning alleged violations of the Act.

The Commission may, on its own initiative, conduct investigations of employers, employment agencies and labor organizations, in accordance with the

powers vested in it pursuant to sections 6 and 7 of the Act. The Commission shall also receive information concerning alleged violations of the Act, including charges and complaints, from any source. Where the information discloses a possible violation, the appropriate Commission office may render assistance in the filing of a charge. The identity of a complainant, confidential witness, or aggrieved person on whose behalf a charge was filed will ordinarily not be disclosed without prior written consent, unless necessary in a court proceeding.

§ 1626.5 Where to submit complaints and charges.

Complaints and charges may be submitted in person, by telephone, or by mail to any office of the Commission or to any designated representative of the Commission. The addresses of the Commission's offices appear at §1610.4.

[71 FR 26831, May 9, 2006]

§ 1626.6 Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

§ 1626.7 Timeliness of charge.

(a) Potential charging parties will be advised that, pursuant to section 7(d) (1) and (2) of the Act, no civil suit may be commenced by an individual until 60 days after a charge has been filed on the subject matter of the suit, and such charge shall be filed with the Commission or its designated agent within 180 days of the alleged discriminatory action, or, in a case where the alleged discriminatory action occurs in a State which has its own age discrimination law and authority administering that law, within 300 days of the alleged discriminatory action, or 30 days after receipt of notice of termination of State proceedings, whichever is earlier.

(b) For purposes of determining the date of filing with the Commission, the following applies:

(1) Charges filed by mail:

(i) Date of postmark, if legible,

(ii) Date of letter, if postmark is illegible,

(iii) Date of receipt by Commission, or its designated agent, if postmark and letter date are illegible and/or cannot be accurately affixed;

(2) Written charges filed in person: Date of receipt;

(3) Oral charges filed in person or by telephone, as reduced to writing: Date of oral communication received by Commission.

[48 FR 140, Jan. 3, 1983, as amended at 68 FR 70152, Dec. 17, 2003]

§ 1626.8 Contents of charge; amendment of charge.

(a) In addition to the requirements of §1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of §1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.

§ 1626.9 Referral to and from State agencies; referral States.

The Commission may refer all charges to any appropriate State agency and will encourage State

agencies to refer charges to the Commission in order to assure that the prerequisites for private law suits, as set out in section 14(b) of the Act, are met. Charges so referred shall be deemed to have been filed with the Commission in accordance with the specifications contained in §1626.7(b). The Commission may process any charge at any time, notwithstanding provisions for referral to and from appropriate State agencies.

[48 FR 140, Jan. 3, 1983, as amended at 68 FR 70152, Dec. 17, 2003]

§ 1626.10 Agreements with State or local fair employment practices agencies.

(a) Pursuant to sections 6 and 7 of the ADEA and section 11(b) of the FLSA, the Commission may enter into agreements with State or local fair employment practices agencies to cooperate in enforcement, technical assistance, research, or public informational activities, and may engage the services of such agencies in processing charges assuring the safeguard of the Federal rights of aggrieved persons.

(b) The Commission may enter into agreements with State or local agencies which authorize such agencies to receive charges and complaints pursuant to §1626.5 and in accordance with the specifications contained in §§1626.7 and 1626.8.

(c) When a worksharing agreement with a State agency is in effect, the State agency will act on certain charges and the Commission will promptly process charges which the State agency does not pursue. Charges received by one agency under the agreement shall be deemed received by the other agency for purposes of §1626.7

§ 1626.11 Notice of charge.

Upon receipt of a charge, the Commission shall promptly notify the respondent that a charge has been filed.

§ 1626.12 Conciliation efforts pursuant to section 7(d) of the Act.

Upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Upon failure of such conciliation the Commission will notify the charging party. Such notification enables the charging party or any person aggrieved by the subject matter of the charge to commence action to enforce their rights without waiting for the lapse of 60 days. Notification under this section is not a Notice of Dismissal or Termination under §1626.17.

[48 FR 140, Jan. 3, 1983, as amended at 68 70152, Dec. 17, 2003]

§ 1626.13 Withdrawal of charge.

Charging parties may request withdrawal of a charge. Because the Commission has independent investigative authority, see §1626.4, it may continue any investigation and may secure relief for all affected persons notwithstanding a request by a charging party to withdraw a charge.

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

§1626.14 Right to inspect or copy data.

A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

§ 1626.15 Commission enforcement.

(a) As provided in sections 9, 11, 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209, 211, 216 and 217) (FLSA) and sections 6 and 7 of this Act, the Commission and its authorized representatives may (1) investigate and gather data; (2) enter and inspect establishments and records and make transcripts thereof; (3) interview employees; (4) impose on persons subject to the Act appropriate recordkeeping and reporting requirements; (5) advise employers, employment agencies and labor organizations with regard to their obligations under the Act and any changes necessary in their policies, practices and procedures to assure compliance with the Act; (6) subpoena witnesses and require the production of documents and other evidence; (7) supervise the payment of amounts owing pursuant to section 16(c) of the FLSA, and (8) institute action under section 16(c) or section 17 of the FLSA or both to obtain appropriate relief.

(b) Whenever the Commission has a reasonable basis to conclude that a violation of the Act has occurred or will occur, it may commence conciliation under section 7(b) of the Act. Notice of commencement of will ordinarily be issued in the form of a letter of violation; provided, however, that failure to issue a written violation letter shall in no instance be construed as a finding of no violation. The Commission will ordinarily notify the respondent and aggrieved persons of its determination. In the process of conducting any investigation or conciliation under this Act, the identity of persons who have provided information in confidence shall not be disclosed except in accordance with §1626.4.

(c) Any agreement reached as a result of efforts undertaken pursuant to this section shall, as far as practicable, require the respondent to eliminate the unlawful practice(s) and provide appropriate affirmative relief. Such agreement shall be reduced to writing and will ordinarily be signed by the Commission's delegated representative, the respondent, and the charging party, if any. A copy of the signed agreement shall be sent to all the signatories thereto.

(d) Upon the failure of informal conciliation, conference and persuasion under section 7(b) of the Act, the Commission may initiate and conduct litigation.

(e) The District Directors, the Field Directors, the Director of the Office of Field Programs or their designees, are hereby delegated authority to exercise the powers enumerated in §1626.15(a) (1) through (7) and (b) and (c). The General Counsel or his/her designee is hereby delegated the authority to exercise the powers in paragraph (a) of this section and at the direction of the Commission to initiate and conduct litigation.

[48 FR 140, Jan. 3, 1983, as amended at 54 FR 32063, Aug. 4, 1989; 54 FR 33503, Aug. 15, 1989; 68 FR 70152, Dec. 17, 2003; 71 FR 26831, May 9, 2006]

§ 1626.16 Subpoenas.

(a) To effectuate the purposes of the Act the Commission shall have the authority to issue a subpoena requiring:

(1) The attendance and testimony of witnesses;

(2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(3) Access to evidence for the purpose of examination and the right to copy.

(b) The power to issue subpoenas has been delegated by the Commission, pursuant to section 6(a) of the Act, to the General Counsel, the District Directors, the Field Directors, the Director of the Office of Field Programs, or their designees. The subpoena shall state the name, address and title of the issuer, identify the person or evidence subpoenaed, the name of the person to whom the subpoena is returnable, the date, time and place that testimony is to be given or that documents are to be provided or access provided.

(c) A subpoena issued by the Commission or its designee pursuant to the Act is not subject to review or appeal.

(d) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the provisions of sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. 49 and 50, to compel compliance with the subpoena.

(e) Persons subpoenaed shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

[48 FR 140, Jan. 3, 1983, as amended at 54 FR 32063, Aug. 4, 1989; 71 FR 26831, May 9, 2006]

§ 1626.17 Notice of dismissal or termination.

(a) *Issuance of Notice of Dismissal or Termination*. (1) Where a charge filed with the Commission under the ADEA is dismissed or the Commission's proceedings are otherwise terminated, the Commission will issue a Notice of Dismissal or Termination on the charge as described in paragraph (c) of this section to the person(s) claiming to be aggrieved. In the case of a charge concerning more than one aggrieved person, the Commission will only issue a Notice of Dismissal or Termination when the charge is dismissed or proceedings are otherwise terminated as to all aggrieved persons.

(2) Where the charge has been filed under the ADEA and Title VII or the Americans with Disabilities Act (ADA), the Commission will issue a Notice of Dismissal or Termination under the ADEA at the same time it issues the Notice of Right to Sue under Title VII or the ADA.

(3) The issuance of a Notice of Dismissal or Termination does not preclude the Commission from offering such assistance to a person receiving the notice as the Commission deems necessary or appropriate. The issuance does not preclude or interfere with the Commission's continuing right to investigate and litigate the same matter or any ADEA matter under its enforcement authority.

(b) *Delegation of Authority To Issue Notices of Dismissal or Termination*. The Commission hereby delegates authority to issue Notices of Dismissal or Termination, in accordance with this section, to: Directors of District, Field, Area and Local offices; the Director of the Office of Field Programs; the Director of Field Management Programs, Office of Field Programs; the General Counsel; or their designees.

(c) *Contents of the Notice of Dismissal or Termination*. The Notice of Dismissal or Termination shall include:

(1) A copy of the charge;

(2) Notification that the charge has been dismissed or the Commission's proceedings have otherwise been terminated; and

(3) Notification that the aggrieved person's right to file a civil action against the respondent on the subject charge under the ADEA will expire 90 days after receipt of such notice.

[68 FR 70152, Dec. 17, 2003, as amended at 71 FR 26831, May 9, 2006]

§ 1626.18 Filing of private lawsuit.

(a) An aggrieved person may file a civil action against the respondent named in the charge in either Federal or State court under section 7 of the ADEA.

(b) An aggrieved person whose claims are the subject of a timely pending charge may file a civil action at any time after 60 days have elapsed from the filing of the charge with the Commission (or as provided in §1626.12) without waiting for a Notice of Dismissal or Termination to be issued.

(c) The right of an aggrieved person to file suit expires 90 days after receipt of the Notice of Dismissal or Termination or upon commencement of an action by the Commission to enforce the right of such person.

(d) If the Commission becomes aware that the aggrieved person whose claim is the subject of a pending ADEA charge has filed an ADEA lawsuit against the respondent named in the charge, it shall terminate further processing of the charge or portion of the charge affecting that person unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs; the General Counsel; the Director of Field Management Programs; or their designees determine at that time or at a later time that it would effectuate the purpose of the ADEA to further process the charge.

[68 FR 70152, Dec. 17, 2003, as amended at 71 FR 26831, May 9, 2006]

§ 1626.19 Filing of Commission lawsuit.

The right of the Commission to file a civil action under the ADEA is not dependent on the filing of a charge and is not affected by the issuance of a Notice of Dismissal or Termination to any aggrieved person.

[68 FR 70152, Dec. 17, 2003]

§ 1626.20 Procedure for requesting an opinion letter.

(a) A request for an opinion letter should be submitted in writing to the Chairman, Equal Employment Opportunity Commission, 131 M Street, NE., Washington DC 20507, and shall contain:

(1) A concise statement of the issues on which an opinion is requested;

(2) As full a statement as possible of relevant facts and law; and

(3) The names and addresses of the person making the request and other interested persons.

(b) Issuance of an opinion letter by the Commission is discretionary.

(c) Informal advice. When the Commission, at its discretion, determines that it will not issue an opinion letter as defined in § 1626.18, the Commission may provide informal advice or guidance to the requestor. An informal letter of advice does not represent the formal position of the Commission and does not commit the Commission to the views expressed therein. Any letter other than those defined in § 1626.18(a)(1) will be considered a letter of advice and may not be relied upon by any employer within the meaning of section 10 of the Portal to Portal Act of 1947, incorporated into the Age Discrimination in Employment Act of 1967 through section 7(e)(1) of the Act.

[48 FR 140, Jan. 3, 1983, as amended at 54 FR 32063,

Aug. 4, 1989. Redesignated at 68 FR 70152, Dec. 17, 2003; 74 FR 3430, Jan. 21, 2009]

§ 1626.21 Effect of opinions and interpretations of the Commission.

(a) Section 10 of the Portal to Portal Act of 1947, incorporated into the Age Discrimination in Employment Act of 1967 through section 7(e)(1) of the Act, provides that:

In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulations, order, ruling, approval or interpretation * * * or any administrative practice or enforcement policy of [the Commission].

The Commission has determined that only (1) a written document, entitled "opinion letter," signed by the Legal Counsel on behalf of and as approved by the Commission, or (2) a written document issued in the conduct of litigation, entitled "opinion letter," signed by the General Counsel on behalf of and as approved by the Commission, or (3) matter published and specifically designated as such in the Federal Register, may be relied upon by any employer as a "written regulation, order, ruling, approval or interpretation" or "evidence of any administrative practice or enforcement policy" of the Commission "with respect to the class of employers to which he belongs," within the meaning of the statutory provisions quoted above.

(b) An opinion letter issued pursuant to paragraph (a)(1) of this section, when issued to the specific addressee, has no effect upon situations other than that of the specific addressee.

(c) When an opinion letter, as defined in paragraph (a)(1) of this section, is requested, the procedure stated in §1626.17 shall be followed.

[48 FR 140, Jan. 3, 1983. Redesignated at 68 FR 70152, Dec. 17, 2003]

§ 1626.22 Rules to be liberally construed.

(a) These rules and regulations shall be liberally construed to effectuate the purposes and provisions of this Act and any other acts administered by the Commission.

(b) Whenever the Commission receives a charge or obtains information relating to possible violations of one of the statutes which it administers and the charge or information reveals possible violations of one or more of the other statutes which it administers, the Commission will treat such charges or information in accordance with all such relevant statutes.

(c) Whenever a charge is filed under one statute and it is subsequently believed that the alleged discrimination constitutes an unlawful employment practice under another statute administered and enforced by the Commission, the charge may be so amended and timeliness determined from the date of filing of the original charge.

[48 FR 140, Jan. 3, 1983. Redesignated at 68 FR 70152, Dec. 17, 2003]

Chapter XIV--Equal Employment Opportunity Commission

29 C.F.R. Part 1627: Records to be Made or Kept Relating to Age: Notices to be Posted: Administrative Exemptions

[Code of Federal Regulations]

[Title 29, Volume 4]

[Revised as of Dec 26, 2007]

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Authority: Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 11, 52 Stat.

1066, 29 U.S.C. 211; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

Source: 44 FR 38459, July 2, 1979, unless otherwise noted.

Subpart A—General

§ 1627.1 Purpose and scope.

(a) Section 7 of the Age Discrimination in Employment Act of 1967 (hereinafter referred to in this part as the Act) empowers the Commission to require the keeping of records which are necessary or appropriate for the administration of the Act in accordance with the powers contained in section 11 of the Fair Labor Standards Act of 1938. Subpart B of this part sets forth the recordkeeping and posting requirements which are prescribed by the Commission for employers, employment agencies, and labor organizations which are subject to the Act. Reference should be made to section 11 of the Act for definitions of the terms “employer”, “employment agency”, and “labor organization”. General interpretations of the Act and of this part are published in part 1625 of this chapter. This part also reflects pertinent delegations of the Commission’s duties.

(b) Subpart D of this part sets forth the Commission’s regulations issued pursuant to section 12(c)(2) of the Act, providing that the Secretary of Labor, after consultation with the Secretary of the Treasury, shall prescribe the manner of calculating the amount of qualified retirement benefits for purposes of the exemption in section 12(c)(1) of the Act.

[44 FR 38459, July 2, 1979, as amended at 44 FR 66797, Nov. 21, 1979; 72 FR 72944, Dec. 26, 2007]

Subpart B—Records To Be Made or Kept Relating to Age; Notices To Be Posted

§ 1627.2 Forms of records.

No particular order or form of records is required by the regulations in this part 1627. It is required only that the records contain in some form the information specified. If the information required is available in records kept for other purposes, or can be obtained readily by recomputing or extending data recorded in some other form, no further records are required to be made or kept on a routine basis by this part 1627.

§ 1627.3 Records to be kept by employers.

(a) Every employer shall make and keep for 3 years payroll or other records for each of his employees which contain:

(1) Name;

(2) Address;

(3) Date of birth;

(4) Occupation;

(5) Rate of pay, and

(6) Compensation earned each week.

(b)(1) Every employer who, in the regular course of his business, makes, obtains, or uses, any personnel or employment records related to the following, shall, except as provided in paragraphs (b) (3) and (4) of this section, keep them for a period of 1 year from the date of the personnel action to which any records relate:

(i) Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual,

(ii) Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee,

(iii) Job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings,

(iv) Test papers completed by applicants or candidates for any position which disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action,

(v) The results of any physical examination where such examination is considered by the employer in connection with any personnel action,

(vi) Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.

(2) Every employer shall keep on file any employee benefit plans such as pension and insurance plans, as well as copies of any seniority systems and merit systems which are in writing, for the full period the plan or system is in effect, and for at least 1 year after its termination. If the plan or system is not in writing, a memorandum fully outlining the terms of such plan or system and the manner in which it has been communicated to the affected employees, together with notations relating to any changes or revisions thereto, shall be kept on file for a like period.

(3) When an enforcement action is commenced under section 7 of the Act regarding a particular applicant or employee, the Commission or its authorized representative shall require the employer to retain any record required to be kept under paragraph (b) (1) or (2) of this section which is relative to such action until the final disposition thereof.

(Approved by the Office of Management and Budget under control number 3046–0018)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981; 56 FR 35756, July 26, 1991]

§ 1627.4 Records to be kept by employment agencies.

(a)(1) Every employment agency which, in the regular course of its business, makes, obtains, or uses, any records related to the following, shall, except as provided in paragraphs (a) (2) and (3) of this section, keep them for a period of 1 year from the date of the action to which the records relate:

(i) Placements;

(ii) Referrals, where an individual is referred to an employer for a known or reasonably anticipated job opening;

(iii) Job orders from employers seeking individuals for job openings;

(iv) Job applications, resumes, or any other form of employment inquiry or record of any individual which identifies his qualifications for employment, whether for a known job opening at the time of submission or for future referral to an employer;

(v) Test papers completed by applicants or candidates for any position which disclose the results of any agency-administered aptitude or other employment test considered by the agency in connection with any referrals;

(vi) Advertisements or notices relative to job openings.

(2) When an enforcement action is commenced under section 7 of the Act regarding a particular applicant, the Commission or its authorized representative shall require the employment agency to retain any record

required to be kept under paragraph (a)(1) of this section which is relative to such action until the final disposition thereof.

(b) Whenever an employment agency has an obligation as an "employer" or a "labor organization" under the Act, the employment agency must also comply with the recordkeeping requirements set forth in §1627.3 or §1627.5, as appropriate.

(Approved by the Office of Management and Budget under control number 3046–0018)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981; 56 FR 35756, July 26, 1991]

§ 1627.5 Records to be kept by labor organizations.

(a) Every labor organization shall keep current records identifying its members by name, address, and date of birth.

(b) Every labor organization shall, except as provided in paragraph (c) of this section, keep for a period of 1 year from the making thereof, a record of the name, address, and age of any individual seeking membership in the organization. An individual seeking membership is considered to be a person who files an application for membership or who, in some other manner, indicates a specific intention to be considered for membership, but does not include any individual who is serving for a stated limited probationary period prior to permanent employment and formal union membership. A person who merely makes an inquiry about the labor organization or, for example, about its general program, is not considered to be an individual seeking membership in a labor organization.

(c) When an enforcement action is commenced under section 7 of the Act regarding a labor organization, the Commission or its authorized representative shall require the labor organization to retain any record required to be kept under paragraph (b) of this section which is relative to such action until the final disposition thereof.

(d) Whenever a labor organization has an obligation as an "employer" or as an "employment agency" under the Act, the labor organization must also comply with the recordkeeping requirements set forth in §1627.3 or §1627.4, as appropriate.

(Approved by the Office of Management and Budget under control number 3046–0018)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981; 56 FR 35756, July 26, 1991]

§ 1627.6 Availability of records for inspection.

(a) Place records are to be kept. The records required to be kept by this part shall be kept safe and accessible at the place of employment or business at which the individual to whom they relate is employed or has applied for employment or membership, or at one or more established central recordkeeping offices.

(b) Inspection of records. All records required by this part to be kept shall be made available for inspection and transcription by authorized representatives of the Commission during business hours generally observed by the office at which they are kept or in the community generally. Where records are maintained at a central recordkeeping office pursuant to paragraph (a) of this section, such records shall be made available at the office at which they would otherwise be required to be kept within 72 hours following request from the Commission or its authorized representative.

(Approved by the Office of Management and Budget under control number 3046–0018)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§ 1627.7 Transcriptions and reports.

Every person required to maintain records under the Act shall make such extension, recomputation or transcriptions of his records and shall submit such reports concerning actions taken and limitations and classifications of individuals set forth in records as the Commission or its authorized representative may request in writing.

(Approved by the Office of Management and Budget under control number 3046–0018)

(Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))

[44 FR 38459, July 2, 1979, as amended at 46 FR 63268, Dec. 31, 1981]

§§ 1627.8-1627.9 [Reserved]

§ 1627.10 Notices to be posted.

Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Commission or its authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

§ 1627.11 Petitions for recordkeeping exceptions.

(a) *Submission of petitions for relief*. Each employer, employment agency, or labor organization who for good cause wishes to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period or periods prescribed in this part, may submit in writing a petition to the Commission requesting such relief setting forth the reasons therefore and proposing alternative recordkeeping or record-retention procedures.

(b) *Action on petitions.* If, no review of the petition and after completion of any necessary or appropriate investigation supplementary thereto, the Commission shall find that the alternative procedure proposed, if granted, will not hamper or interfere with the enforcement of the Act, and will be of equivalent usefulness in its enforcement, the Commission may grant the petition subject to such conditions as it may determine appropriate and subject to revocation. Whenever any relief granted to any person is sought to be revoked for failure to comply with the conditions of the Commission, that person shall be notified in writing of the facts constituting such failure and afforded an opportunity to achieve or demonstrate compliance.

(c) *Compliance after submission of petitions.* The submission of a petition or any delay of the Commission in acting upon such petition shall not relieve any employer, employment agency, or labor organization from any obligations to comply with this part. However, the Commission shall give notice of the denial of any petition with due promptness.

Subpart C—Administrative Exemptions

§ 1627.15 Administrative exemptions; procedures.

(a) Section 9 of the Act provides that,

In accordance with the provisions of subchapter II of chapter 5, of title 5, United States Code, the Secretary of Labor * * * may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

(b) The authority conferred on the Commission by section 9 of the Act to establish reasonable exemptions will be exercised with caution and due regard for the remedial purpose of the statute to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action consistent with this statutory purpose may be taken under this section, with or without a request therefore, when found necessary and proper in the public interest in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a reasonable exemption from the Act's provisions will be granted only if it is decided, after notice published in the Federal Register giving all interested persons an opportunity to present data, views, or arguments, that a strong and affirmative showing has been made that such exemption is in fact necessary and proper in the public interest. Request for such exemption shall be submitted in writing to the Commission.

§ 1627.16 Specific exemptions.

(a) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in §1627.15(b) of this part, it has been found necessary and proper in the public interest to exempt from all prohibitions of the Act all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the employment of, persons with special employment problems, including employment activities and programs under the Manpower Development and Training Act of 1962, as amended, and the Economic Opportunity Act of 1964, as amended, for persons among the long-term unemployed, handicapped, members of minority groups, older workers, or youth. Questions concerning the application of this exemption shall be referred to the Commission for decision.

(b) Any employer, employment agency, or labor organization the activities of which are exempt from the prohibitions of the Act under paragraph (a) of this section shall maintain and preserve records containing the same information and data that is required of employers, employment agencies, and labor organizations under §§1627.3, 1627.4, and 1627.5, respectively.

[44 FR 38459, July 2, 1979, as amended at 52 FR 32296, Aug. 27, 1987; 55 FR 24078, June 14, 1990; 57 FR 4158, Feb. 4, 1992]

Subpart D—Statutory Exemption

§ 1627.17 Calculating the amount of qualified retirement benefits for purposes of the exemption for bona fide executives or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments and amended in 1984 and 1986, provides:

Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

The Commission's interpretative statements regarding this exemption are set forth in section 1625 of this chapter.

(b) Section 12(c)(2) of the Act provides:

In applying the retirement benefit test of paragraph (a) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(c)(1) The requirement that an employee be entitled to the equivalent of a $44,000 straight life annuity (with no ancillary benefits) is satisfied in any case where the employee has the option of receiving, during each year of his or her lifetime following retirement, an annual payment of at least $44,000, or periodic payments on a more frequent basis which, in the aggregate, equal at least $44,000 per year: Provided, however, that the portion of the retirement income figure attributable to Social Security, employee contributions, rollover contributions and contributions of prior employers is excluded in the manner described in paragraph (e) of this section. (A retirement benefit which excludes these amounts is sometimes referred to herein as a "qualified" retirement benefit.)

(2) The requirement is also met where the employee has the option of receiving, upon retirement, a lump sum payment with which it is possible to purchase a single life annuity (with no ancillary benefits) yielding at least $44,000 per year as adjusted.

(3) The requirement is also satisfied where the employee is entitled to receive, upon retirement, benefits whose aggregate value, as of the date of the employee's retirement, with respect to those payments which are scheduled to be made within the period of life expectancy of the employee, is $44,000 per year as adjusted.

(4) Where an employee has one or more of the options described in paragraphs (c)(1) through (3) of this section, but instead selects another option (or options), the test is also met. On the other hand, where an employee has no choice but to have certain benefits provided after his or her death, the value of these benefits may not be included in this determination.

(5) The determination of the value of those benefits which may be counted towards the $44,000 requirement must be made on the basis of reasonable actuarial assumptions with respect to mortality and interest. For purposes of excluding from this determination any benefits which are available only after death, it is not necessary to determine the life expectancy of each person on an individual basis. A reasonable actuarial assumption with respect to mortality will suffice.

(6) The benefits computed under paragraphs (c)(1), (2) and (3) of this section shall be aggregated for purposes of determining whether the $44,000

requirement has been met.

(d) The only retirement benefits which may be counted towards the $44,000 annual benefit are those from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans. Such plans include, but are not limited to, stock bonus, thrift and simplified employee pensions. The value of benefits from any other employee benefit plans, such as health or life insurance, may not be counted.

(e) In calculating the value of a pension, profit-sharing, savings, or deferred compensation plan (or any combination of such plans), amounts attributable to Social Security, employee contributions, contributions of prior employers, and rollover contributions must be excluded. Specific rules are set forth below.

(1) *Social Security*. Amounts attributable to Social Security must be excluded. Since these amounts are readily determinable, no specific rules are deemed necessary.

(2) *Employee contributions*. Amounts attributable to employee contributions must be excluded. The regulations governing this requirement are based on section 411(c) of the Internal Revenue Code and Treasury Regulations thereunder (§1.411(c)–(1)), relating to the allocation of accrued benefits between employer and employee contributions. Different calculations are needed to determine the amount of employee contributions, depending upon whether the retirement income plan is a defined contribution plan or a defined benefit plan. Defined contribution plans (also referred to as individual account plans) generally provide that each participant has an individual account and the participant's benefits are based solely on the account balance. No set benefit is promised in defined contribution plans, and the final amount is a result not only of the actual contributions, but also of other factors, such as investment gains and losses. Any retirement income plan which is not an individual account plan is a defined benefit plan. Defined benefit plans generally provide a definitely determinable benefit, by specifying either a flat monthly payment or a schedule of payments based on a formula (frequently involving salary and years of service), and they are funded according to actuarial principles over the employee's period of participation.

(i) *Defined contribution plans* — (A) Separate accounts maintained. If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained*. If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, the proportion of the total benefit attributable to employee contributions is determined by multiplying that benefit by a fraction:

(1) The numerator of which is the total amount of the employee's contributions under the plan (less withdrawals), and

(2) The denominator of which is the sum of the numerator and the total contributions made under the plan by the employer on behalf of the employee (less withdrawals).

Example: A defined contribution plan does not maintain separate accounts for employee contributions. An employee's annual retirement benefit under the plan is $40,000. The employee has contributed $96,000 and the employer has contributed $144,000 to the employee's individual account; no withdrawals have been made. The amount of the $40,000 annual benefit attributable to employee contributions is $40,000×$96,000/$96,000+$144,000=$16,000. Hence the employer's share of the $40,000 annual retirement benefit is $40,000 minus $16,000 or $24,000—too low to fall within the exemption.

(ii) *Defined benefit plans* — (A) Separate accounts maintained. If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.

(B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, all of the contributions made by an employee must be converted actuarially to a single life annuity (without ancillary benefits) commencing at the age of forced retirement. An employee's accumulated contributions are the sum of all contributions (mandatory and, if not separately accounted for, voluntary) made by the employee, together with interest on the sum of all such contributions compounded annually at the rate of 5 percent per annum from the time each such

contribution was made until the date of retirement. *Provided, however*, That prior to the date any plan became subject to section 411(c) of the Internal Revenue Code, interest will be credited at the rate (if any) specified in the plan. The amount of the employee's accumulated contribution described in the previous sentence must be multiplied by an "appropriate conversion factor" in order to convert it to a single life annuity (without ancillary benefits) commencing at the age of actual retirement. The appropriate conversion factor depends upon the age of retirement. In accordance with Rev. Rul. 76–47, 1976–2 C.B. 109, the following conversion factors shall be used with respect to the specified retirement ages:

Retirement age	Conversion factor percent
65 through 66	10
67 through 68	11
69	12

Example: An employee is scheduled to receive a pension from a defined benefit plan of $50,000 per year. Over the years he has contributed $150,000 to the plan, and at age 65 this amount, when contributions have been compounded at appropriate annual interest rates, is equal to $240,000. In accordance with Rev. Rul. 76–47, 10 percent is an appropriate conversion factor. When the $240,000 is multiplied by this conversion factor, the product is $24,000, which represents that part of the $50,000 annual pension payment which is attributable to employee contributions. The difference—$26,000—represents the employer's contribution, which is too low to meet the test in the exemption.

(3) *Contributions of prior employers.* Amounts attributable to contributions of prior employers must be excluded.

(i) *Current employer distinguished from prior employers.* Under the section 12(c) exemption, for purposes of excluding contributions of prior employers, a prior employer is every previous employer of the employee except those previous employers which are members of a "controlled group of corporations" with, or "under common control" with, the employer which forces the employee to retire, as those terms are used in sections 414 (b) and 414(c) of the Internal Revenue Code, as modified by section 414(h) (26 U.S.C. 414(b), (c) and (h)).

(ii) *Benefits attributable to current employer and to prior employers.* Where the current employer maintains or contributes to a plan which is separate from plans maintained or contributed to by prior employers, the amount of the employee's benefit attributable to those prior employers can be readily determined. However, where the current employer maintains or contributes to the same plan as prior employers, the following rule shall apply. The benefit attributable to the current employer shall be the total benefit received by the employee, reduced by the benefit that the employee would have received from the plan if he or she had never worked for the current employer. For purposes of this calculation, it shall be assumed that all benefits have always been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) *Rollover contributions.* Amounts attributable to rollover contributions must be excluded. For purposes of §1627.17(e), a rollover contribution (as defined in sections 402(a)(5), 403(a)(4), 408(d)(3) and 409(b)(3)(C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in §1627.17(e)(2). Accordingly, no separate calculation is necessary to comply with this requirement.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98–459, 98 Stat. 1792))

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