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# Age Discrimination in Employee Benefit Plans: Financial Dilemma for the Older Worker

Patricia A. Martin

# AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS: FINANCIAL DILEMMA FOR THE OLDER WORKER*

## INTRODUCTION

Congress' passage of the Age Discrimination in Employment Act of 1967 (ADEA) was an attempt to alleviate the harsh results of a dilemma that confronted older workers for decades.[1] Older employees who chose to retire often experienced severe financial problems[2] due to the inadequacies of the Social Security system[3] and the insufficiency of private savings.[4] These inadequacies were intensified as employment beyond the normal retirement age was not a viable alternative for many workers. These older individuals were the victims of a variety of discriminatory practices including refusals to hire, denials of promotions, and forced retirement. In addition, older workers who remained

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1. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, stat. 60 (codified at 29 U.S.C. §§621-634 (1976)). As used throughout this note, the terms older worker, older employee, or older individual are intended to refer, in a non-pejorative sense, to those individuals within the ADEA's protected class of employees from 40 to 70 years of age.

2. Despite over 130 federal programs which provide direct benefits to older individuals, a considerable segment of the retirement-age population has, until fairly recently, remained outside the scope of congressional attention. _See_ HOUSE SELECT COMM. ON AGING, TEAMWORK IN THE DELIVERY OF FEDERAL PROGRAMS TO THE ELDERLY, 96th Cong., 2d Sess., 1 (Comm. Pub. No. 96-227 1980).

The magnitude of these federal programs is demonstrated by an Office of Management and Budget estimate that approximately $155 billion, or 25% of the 1981 executive budget proposals, consisted of program benefits to older individuals. To further exemplify the dimensions of these programs, appropriations for the Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat. 218 (codified at 42 U.S.C. §§3001-3057(g) (1980)), have increased from $6,500,000 in fiscal year 1966 to over $1 billion in fiscal year 1980. In combination with Social Security, Medicare, and various federal pension and annuity funds, the Older Americans Act constitutes the basic source of federal benefits designed specifically for the elderly. _Id. See generally_ Pepper, _An Improved Lifestyle for the Elderly_, 55 FLA. B.J. 178 (1981), for a discussion of various federal programs which aid older citizens, with an emphasis on the Florida situation.

3. The Social Security Act of 1935 was the first American legislative program designed to compensate for the loss of earning power experienced upon retirement. Social Security Act of 1935, 42 U.S.C. §§301-1396(i) (1976).

Nearly every country in the world now has some form of social insurance plan. A report published in 1974 by the U.S. Department of Health, Education, and Welfare listed 105 different countries which maintain social insurance plans for old age, disability and survivors' benefits. _See_ W. GREENOUGH & F. KING, PENSION PLANS AND PUBLIC POLICY 242 (1976) _citing_ SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, RESEARCH REPORT No. 44, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD 1973, at xi (1974).

4. _See_ R. CLARK, THE ROLE OF PRIVATE PENSIONS IN MAINTAINING LIVING STANDARDS IN RETIREMENT 8-10 (1977). "If a worker were forced to rely on personal savings alone, the magnitude of the savings rates he would have to attain to provide adequate retirment income is quite impressive, and perhaps it is even beyond the reach of many U.S. families." _Id._ at 9. _See also_ R. BALL, SOCIAL SECURITY, TODAY AND TOMORROW 92 (1978). (earnings on savings are generally not sufficient to add greatly to retirement income); J. BARRO, SOCIAL SECURITY AND PRIVATE SAVINGS: ANOTHER LOOK, 42 SOC. SEC. BULL. 33 (1979).

on the job often received lower salaries and benefits than younger workers with the same job. ADEA was designed to rectify these problems and to assure equitable treatment of workers regardless of age.[5]

A major purpose of the Act and its subsequent amendments[6] was to regulate retirement and pension plans and to oversee the delivery of accompanying plan benefits. Private pension plans had become increasingly relied upon as a source of income maintenance for retirees, due in great part to the insufficiency of the Social Security system.[7] Although private sponsorship of pensions has never

5. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 60 (codified at 29 U.S.C. §§621-634 (1976).

6. The ADEA has been amended twice. The Fair Labor Standards Amendment of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. §201-19 (1976)), added a new section to the ADEA which made unlawful any discrimination on account of age in federal government employment. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified at 29 U.S.C. §621-34 (1978)) extended the protection of the Act to cover employees between the ages of 40 and 70. Exemptions to the extended age limitation were made for tenured college faculty and managerial or highly compensated personnel. Two procedural changes were also made. The amendments eliminated the notice of intent to sue requirement and added a provision for tolling the statute of limitations during conciliation. Most importantly, the amendments clarified the bona fide employee benefit plan exception by specifically outlawing mandatory retirement before age 70.

7. Since its inception, the Social Security system has been maligned as a costly, ineffective, and unreliable means of providing federal benefits. However, a recent report by the Social Security Advisory Council bolstered confidence in the system with its conclusion that all current and future beneficiaries would be able to count on receiving the benefits to which they are entitled, provided taxes are revised. *See* REPORT OF THE 1979 SOCIAL SECURITY ADVISORY COUNCIL-EXECUTIVE SUMMARY, *reprinted in Oversight on Recommendations of 1979 Social Security Advisory Council, Hearings Before the House Subcomm. on Retirement Income and Employment of the Select Comm. on Aging*, 96th Cong., 2d Sess. 103 (1980).

To encourage system stability, the report recommends integrating earmarked portions of personal and corporate income taxes into the system in lieu of increasing payroll taxes. It also endorsed the making of payments to the various trust funds from general revenues or borrowing among funds as ways of increasing flexibility of the system and thus protecting it against economic fluctuation. *Id.*

*See also* COMMERCE CLEARING HOUSE, INC., 1978 SOCIAL SECURITY AND MEDICARE EXPLAINED 21-22 (1978) for further explanation of the mechanics of the Social Security system. The old age, survivors, and disability insurance system and hospital insurance benefits for the aged and disabled (OASDHI), are largely financed out of taxes paid by employers, employees, and the self-employed under the provisions of the Federal Insurance Contributions Act and the Self-Employment Contribution Act. These taxes are collected by the Internal Revenue Service and are paid into the United States Treasury as internal revenue collections.

*See also* Social Security Administration, U.S. Dep't of Health, Education and Welfare, *Social Security in Review*, SOC. SEC. BULL. no. 12, at 1 (1979). In August, 1979, the system paid about $9 billion in monthly cash benefits to 34.8 million people, including the retired and disabled, their dependents, widows, widowers, and children of deceased workers. *Id.*

For a complete breakdown of the categories of benefits and the amounts paid to each, *see id.* at 1-2. The average monthly benefit for retired workers was $292.55; for disabled workers, $320.95; for aged widows and widowers, $265.95; and for children of deceased workers, $203.42. *Id.*

Social Security payments are generally recognized as an insufficient single source of income. *See, e.g.*, G. TOLLEY & R. BURKHAUSER, INCOME SUPPORT POLICIES FOR THE AGED 133-49 (1977). *But see* R. CLARK, THE ROLE OF PRIVATE PENSIONS IN MAINTAINING LIVING STANDARDS IN RETIREMENT vi (1977).

been mandated by law,[8] these programs are in effect subsidized by the government in the form of preferential tax treatment to encourage coverage of the private labor force.[9] Recently, private pension regulation underwent substantial reform under the auspices of the Employee Retirement Income Security Act of 1974 (ERISA).[10] That act dealt with the technical aspects of pension law, including specific funding, vesting, and accrual requirements for plan sponsors.

Although ERISA was the most comprehensive statute to deal with pensions, provisions of ADEA relating to retirement and pension plans highlighted problems not specifically addressed by ERISA. ERISA focused on the structural aspects of plan design, while the ADEA directed itself to the equities involved in providing employees with the benefits generated by their plan participation. Pension practices such as mandatory retirement[11] and age-based benefit reductions[12] were sought to be curtailed by ADEA because of the threat posed to an

8. The first formal private pension plan was developed in 1875 by the American Express Company to provide benefits to its disabled, elderly employees. Benefits were available only to permanently incapacitated workers over 60 years of age who had served the company for at least 20 years. *See* W. GREENOUGH & F. KING, *supra* note 3, at 27-35.

Over three-fourths of the 397 pension plans established between 1875 and 1929 were noncontributory. These early plans were usually paid out of an employer's current earnings as a current business expense. By the early 1920's, however, many plans had been turned into trusts to take greater advantage of favorable tax provisions. Such plans immediately ignited a controversy as to their proper tax treatment. In 1926, pension trusts created by employers solely to benefit their employees were exempted from federal income tax. Employer contributions to, and the income derived from, these trusts were not taxable to the beneficiaries until actually distributed. Increasingly complex additions were made to the growing body of pension law, both in the Internal Revenue Code and within the provisions of various statutes. The epitome of complexity in pension regulation was subsequently reached with the passage of the Employee Retirement Income Security Act of 1974 Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§1001-1381 (1976)). *See* W. GREENOUGH & F. KING, *supra* note 3, at 59-67. All of the legislation dealing with pension regulation, however, has been designed with regard to the employer's option of discontinuing the plan. The complexity of the area is thus partly a response to the difficulty of balancing the rights of employees and the prerogatives of employers.

9. *See* I.R.C. §404, which provides for a deduction for contributions by an employer to an employee's trust, pension, profit-sharing, stock bonus, or annuity plan.

10. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§1001-1381 (1976)). ERISA was a response to various forces within the pension field which were all pressing for a comprehensive reform of the system. The expectations of many employees were dashed when several major industry shutdowns occurred in the mid-1960's. Reform recommendations and other pension legislation were introduced into Congress. What eventually resulted in 1974 was the 208-page statute known as the Pension Reform Act or ERISA. The passage of the Act denoted a shift in public policy regarding private pensions from a tax-based orientation to one more focused on employee security. *See* W. GREENOUGH & F. KING, *supra* note 3, at 66-67.

ERISA established new basic requirements in almost every area of pension administration and funding. It set rules for employee participation in pension plans requiring employers to allow an employee to participate if he has worked the requisite one year. 29 U.S.C. §1052 (1976). It established standards for "vesting" of an employee's plan benefits which meant that his rights to those benefits became nonforfeitable after a certain time period. *Id.* §1053. It defined the proper funding calculations for an employer's pension plan and set limitations on benefits and contributions. *Id.* §§1081-1086. It imposed strict fiduciary obligations upon plan sponsors, including complex reporting and disclosure requirements. *Id.* §§1021-1031,

individual's ability to maintain an adequate standard of living after retirement. These very practices, however, were permitted by various provisions of ERISA.[13] Unfortunately, regulations promulgated to remedy conflicting interpretations of the two statutes have instead resulted in additional confusion and uncertainty.

This note will examine the ADEA in its original and amended forms to determine whether the option of post-retirement-age employment is really a viable one today. It will also analyze the regulations promulgated under the Act and examine their consistency with the goals of the Act itself. Finally, it will offer proposals to reconcile these internal conflicts so as to promote equitable treatment of the employee without placing an undue burden on the employer.

## AGE DISCRIMINATION LEGISLATION

In response to mounting public sentiment against discriminatory employment practices,[14] Congress enacted the ADEA in 1967.[15] Aided by a Labor Department report and the results of extensive public hearings and studies,[16]

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1101-1114. Finally, the Act created the Pension Benefit Guaranty Corporation (PBGC), an independent, non-profit plan termination insurance company. All plans covered by the Act are now required to pay insurance premiums to the PBGC for termination coverage. *Id.* §§1301-1381 (1976).

For more complete examinations of ERISA, its effects, and its implications, *see generally* R. BILDERSEE, PENSION REGULATION MANUAL (rev. ed. 1979); N. LEVIN, ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS (2d rev. ed. 1975); D. LOGUE, LEGISLATIVE INFLUENCE ON CORPORATE PENSION PLANS (1979); J. MAMORSKY, EMPLOYEE BENEFITS LAW, ERISA AND BEYOND (1980); PRACTICING LAW INSTITUTE, INTRODUCTION TO QUALIFIED PENSION AND PROFIT-SHARING PLANS (1979).

11. *See* 29 U.S.C. §623(f)(2) (1976). The term mandatory retirement as used throughout this note signifies the policy of requiring termination of employment upon the attainment of a specified age. Such retirement is based upon age alone and has nothing to do with the employee's ability. The age of 65 is generally recognized as the normal retirement age. *See* 29 U.S.C. §1002(24) (1975). *See generally* J. WALKER, THE END OF MANDATORY RETIREMENT: IMPLICATIONS FOR MANAGEMENT (1978).

12. *See* Costs and Benefits Under Employee Benefit Plans, 29 C.F.R. §860.120(a)(1) (1980). This terminology reflects the practice of reducing the level of various employee benefits, such as life insurance or disability coverage, to account for the increased cost of providing such benefits to older workers. *Id.*

13. *See, e.g.*, 29 U.S.C. §1052(a)(2) (1976), which under certain circumstances permits the exclusion of employees from plan participation on the basis of age.

14. *See generally Hearings on Proposed Age Discrimination in Employment Legislation Before the House General Subcommittee on Labor of the Committee on Education and Labor*, 90th Cong., 1st Sess. (1967) [hereinafter cited as ADEA Hearings]. Testimony of various individuals and organizations reflected strong public disfavor with the employment situation of older individuals. *See generally* Note, *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U. L. REV. 383 (1966). (complete analysis of the factors leading up to passage of the initial age discrimination legislation).

15. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 60 (codified at 29 U.S.C. §§621-634 (1976)).

16. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. 1-3, 2-3, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214-15 [hereinafter cited as House Report]. The House General Subcommittee on Labor of the Committee on Education and Labor began public hearings

Congress concluded that adoption of a comprehensive program to combat age discrimination was required.[17] The ADEA reflects a national policy favoring the promotion of the rights of older workers by basing employment opportunities on ability rather than age. The scope and magnitude of the Act are far-reaching. More than sixty-four million people are employed by over one million employers subject to the ADEA provisions.[18] Data compiled by the Labor Department indicate that thirty-seven million workers were within the forty to sixty-five year old protected age class in 1975.[19]

In language identical to Title VII of the 1964 Civil Rights Act,[20] the ADEA expressly provides for elimination of age discrimination against workers between the ages of forty and sixty-five in all terms, conditions, and privileges of employment.[21] The Act applies to employers of over twenty workers, labor organizations, and employment agencies.[22] Specific exemptions permitted actions that adversely affect older employees so long as they are based on one of four factors: 1) age is a bona fide occupational qualification essential to job performance;[23] 2) factors other than age could reasonably be shown to justify

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on the original age discrimination proposal on August 1, 1967. *See* ADEA HEARINGS, *supra* note 14, at 1. During the six days of testimony, the subcommittee heard from 16 witnesses and received statements from various interested parties. The subcommittee also discussed a study conducted by the Labor Department which recommended statutory action to end age discrimination in employment. This study eventually resulted in an administrative proposal to Congress, H.R. 4221, which was amended into a clean bill, H.R. 13054, 96th Cong., 1st Sess. (1967), and subsequently ordered reported favorably out of the Committee on Education and Labor. *See also* SECRETARY OF LABOR, THE OLDER AMERICAN WORKER — AGE DISCRIMINATION IN EMPLOYMENT (1965).

17. *See* 29 U.S.C. §621 (1976).

18. *See* EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: REPORT COVERING ACTIVITIES UNDER THE ACT DURING 1974, 17 (1975).

19. *Id.*

20. 42 U.S.C. §2000e-2(a)-(c) (1976).

21. *See* 29 U.S.C. §623(a)-(e) (1976). The language of the ADEA is identical to the corresponding sections of Title VII of the Civil Rights Act, except that the words "race, color, religion, sex, or national origin" were replaced by "age." *Accord*, Rogers v. Exxon Research & Eng'r. Co., 11 FEP Cases 776 (D. N.J. 1975) ("The Age Discrimination in Employment Act of 1976 may be profitably compared with Title VII of the Civil Rights Act of 1964, in both purpose and scope").

22. *See* 29 U.S.C. §623(a)-(c) (1976).

23. *Id.* (f)(1). *See* 29 C.F.R. §860.102 (1980). These regulations promulgated by the Labor Department attempt to define a "bona fide occupational qualification." Whether the qualification is indeed bona fide will be determined "on the basis of all the pertinent facts surrounding each particular situation." *Id.* §860.102(b). The regulations also provide that this exception is to be construed narrowly, with the burden of proof on the party invoking it. *Id.* An example of a permissible bona fide occupational qualification, according to the regulations, would be "a federal statutory [or] regulatory requirement which provide[s] compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public." *Id.* §860.102(d). An example of a valid bona fide occupational requirement would be the compulsory retirement of airline pilots within the jurisdiction of the Federal Aviation Agency (FAA). FAA regulations do not permit airline pilots to engage in carrier operations as pilots after reaching age 60. *Id. Cf.* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976). In reviewing a Massachusetts statute mandating the

different treatment of older workers;[24] 3) terms of bona fide seniority systems or employee benefit plans expressly provide for such treatment;[25] and 4) the employer's action was for good cause.[26]

## LITIGATION OF AGE DISCRIMINATION ISSUES

As with any new legislation, the initial burden of defining the ADEA's scope fell to the courts. Early judicial interpretation often relied upon the precedent of Title VII discrimination cases for aid in determining such issues as burden of proof[27] and preliminary statutory construction.[28] Although this

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retirement of state police officers at age 50, the Court employed a rationality test as the standard of review for an equal protection claim of age discrimination. The Court determined that the statute was rationally related to the state's legitimate objective of protecting the public by assuring the physical preparedness of its police force. *Id.* at 314. This decision has been criticized for its relegation of age discrimination claims to the weakest equal protection standard, the rationality test. *See generally* Abramson, *Compulsory Retirement, The Constitution, and the Murgia Case*, 42 MO. L. REV. 25 (1977); Comment, *Forced Retirement Affirmed: Is the Supreme Court Sanctioning Age Discrimination?*, 23 LOY. L. REV. 251 (1977); Comment, *The Burger Court's "Newest" Equal Protection: Irrebuttable Presumption Doctrine Rejected — Two-Tier Review Reinstated*, 1977 WASH. U. L.Q. 140.

24. 29 U.S.C. §623(f)(1) (1976). *See* 29 C.F.R. §860.103 (1979). The regulations are not as helpful in defining what such "reasonable factors" might be. Analysis of the reasons offered by employers will be on an individual, case-by-case basis. The regulations, however, do list certain factors which may be recognized as supporting a differentiation based on reasonable factors other than age. For example, physical fitness requirements based upon pre-employment or periodic physical examinations relating to minimum standards for employment could generally qualify for the exception. These standards, however, must be reasonably necessary for the specific work to be performed and must be uniformly applied to all applicants for the particular job category, regardless of age. Additionally, evaluation factors such as quantity or quality of production, or educational level, would be acceptable grounds for differentiation when such factors are shown to have a valid relationship to job requirements and are applied equally to all employees. *See also* Stringfellow v. Monsanto Co., 320 F. Supp. 1175, 1182 (W.D. Ark. 1970) (layoffs of a number of selected employees found to be based on reasonable factors other than age, because defendant-employer had established a valid plan for carefully evaluating employees individually so that those retained would be the most capable and competent).

25. 29 U.S.C. §623(f)(2) (1976). See notes 57-118 *infra*.

26. 29 U.S.C. §623(f)(3) (1976). Apparently this section was deemed to be unambiguous as no regulations were promulgated by the Labor Department to interpret it.

For a more complete discussion of all of the exceptions to the ADEA, *see generally* Player, *Defense Under the Age Discrimination in Employment Act: Misinterpretation, Misdirection, and the 1978 Amendments*, 12 GA. L. REV. 747 (1978).

27. *See, e.g.*, Laugesen v. Anaconda Co., 510 F.2d 307, 310 (6th Cir. 1975) (cases arising under ADEA subject to a greater burden of proof than in Title VII actions); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 822 (5th Cir. 1972) (burden of proof in age discrimination suit identical to any other discrimination area). *Cf.* Muniz v. Beto, 434 F.2d 697, 700-01 (5th Cir. 1970) (Mexican-American seeking review of habeas corpus proceeding could establish a prima facie case of discrimination in the selection of grand jury by showing a disparity between the percentage which his race constitutes of the group of persons from whom a jury list is drawn and the percentage which his race constitutes of the jury list which is thereafter compiled).

28. *See, e.g.*, Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974) (discharge of employee after 33 years of service deemed unlawful under ADEA);

volume of litigation construing the ADEA's general prohibitions was significant, interpretation of the exemption provisions[29] was more prodigious in both amount and controversy.

One often litigated provision[30] was section 4(f)(2)'s bona fide retirement plan exemption.[31] That provision condoned disparate treatment of older employees in allocation of benefits if conducted pursuant to a bona fide seniority system or employee benefit plan.[32] A bona fide plan was defined as one whose terms were explained to employees in writing and which provided benefits in accordance with its terms.[33]

Conflict arose when many plan sponsors assumed that the exemption provision left intact the option of forced retirement even if practiced upon individuals within the Act's protected age group. This conclusion was not unreasonable in light of the statutory language which permitted sponsors of pension plans to observe the terms of bona fide plans.[34] Section 4(f)(2) expressly stated that a bona fide plan not established as a "subterfuge to evade the Act's purposes" could lawfully contain terms that effectively discriminated on the basis of age.[35] Employees who were involuntarily retired under plans

Brennan v. Reynolds & Co., 367 F. Supp. 440, 444 (N.D. Ill. 1973) (employer granted summary judgment under ADEA because firing was due to employee's habitual tardiness, not age); Schulz v. Hickok Mfg. Co., 358 F. Supp. 1208, 1213 (N.D. Ga. 1973) (employee's evidence of decline of average age of employer's sales managers and comments of employer indicating desire to hire younger people sufficient to sustain prima facie case of unlawful discrimination under ADEA). *See also* C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW 91-97 (1978); Calille, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 U. DET. J. URB. L. 431, 437-459 (1977).

29. *See* 29 U.S.C. §623(f) (1976).

30. *See, e.g.*, deLoraine v. MEBA Pension Trust, 499 F.2d 49, 50 (2d Cir. 1974) (pension plan provision mandating marine engineer's retirement was within the section 4(f)(2) exception to the ADEA even though employee had been reinstated after previously retiring voluntarily); Steiner v. National League of Professional Baseball Clubs, 377 F. Supp. 945, 947 (C.D. Cal. 1974) (baseball umpire's forced retirement pursuant to a retirement income plan was valid even where the option of allowing deferred retirement was available to the employer and was totally discretionary); Gill v. Union Carbide Corp., 368 F. Supp. 364, 367 (E.D. Tenn. 1973) (employee's termination valid as a reduction in force despite claims that it was based on arbitrary age discrimination).

31. *See, e.g.*, Amicus Curiae Brief for the Chamber of Commerce of the United States of America, United Airlines v. McMann, 434 U.S. 192 (1977) (arguing for reversal); Amici Curiae Brief for the Nat'l Retired Teachers Ass'n, et al., United Airlines v. McMann, 434 U.S. 192 (1977) (arguing for affirmance).

32. 29 U.S.C. §623(f)(2) (1976).

33. 29 C.F.R. §860.120(b) (1979).

34. *See* 19 U.S.C. §623(f)(2) (1976). In addition to the statutory language, support for this conclusion was readily available within the legislative history. *See, e.g.*, House Report, *supra* note 16, at 5. "It is important to note that exception (3) [referring to 29 U.S.C. §623(f)(2) (1976)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill — hiring of older workers — by permitting employment without necessarily including such workers in employee benefit plans." *Id.*

35. 29 U.S.C. §623(f)(2) (1976). The section states that activities which might be unlawful under other provisions of the ADEA are permissible if conducted in observance of a "bona fide seniority system or any bona fide employee benefit plan." *Id. See* 29 C.F.R. §860.120(b) (1979).

incorporating such terms challenged this interpretation and sought clarification of the actual legislative intent. Rather than providing clarification, however, the resulting litigation produced a conflict among the circuit courts as to the proper construction of section 4(f)(2).

The first interpretation of the exemption provision was the 1974 Fifth Circuit decision *Brennan v. Taft Broadcasting Co.*[36] The issue in that case was whether a profit-sharing plan's mandatory retirement provision which predated enactment of the ADEA qualified for the section 4(f)(2) exemption.[37] To resolve this question, the court adopted a chronological approach based on a literal reading of statutory language.[38] The court reasoned that a plan in existence prior to passage of the Act met the exemption's bona fide requirements because such a plan could not have been designed as a subterfuge to evade the purpose of the Act.[39]

The Fourth Circuit came to the opposite conclusion in *McMann v. United Airlines.*[40] In contrast to *Taft Broadcasting,* the court in *McMann* looked to the ADEA's legislative history for the proper interpretation of section 4(f)(2). The court concluded that Congress had not intended to permit mandatory retirement on the basis of age alone, despite the existence of the exemption

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36. 500 F.2d 212 (5th Cir. 1974). This was the first case to present the question of whether a profit-sharing plan with a mandatory retirement clause was an unlawful evasion of the ADEA. The plaintiff-employee was a sixty-year-old technical supervisor who had been employed by the defendant-employer for nineteen years. *Id.* at 214.

37. *Id.* at 215. The court noted that, "Taft's 'Plan' was instituted in 1963. [The plaintiff] exercised his option to participate in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans." *Id.*

38. The court rejected the employee's legislative history argument that the purpose in enacting section 4(f)(2) was to protect employers from increased costs of maintaining benefit plans. *Id.* at 216-17. Instead, the court cited Braunstein v. Commissioner, 347 U.S. 65 (1963), for the proposition that it is "improper to consider Congressional purpose when the meaning of a statute is plain." Additionally, the court noted the practical difficulty of analyzing congressional purpose on a case-by-case basis. Its final reason for rejecting the plaintiff's reliance on legislative history was its belief that statutory language should serve the funtion of indicating prohibited conduct. Continual reference to legislative history mitigates against this function. 500 F.2d at 217.

39. 500 F.2d at 215. The court stated only that the plan was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion. *Id.* Other courts have used the same chronological approach in construing the subterfuge language of section 4(f)(2). *See, e.g.,* Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406, 413 (5th Cir. 1980) (mandatory retirement provision of employee benefit plan valid because plan had been in effect continuously since its establishment in 1944 and thus could not be a subterfuge to evade the purposes of the ADEA); Alford v. City of Lubbock, 484 F. Supp. 1001, 1005 (N.D. Tex. 1979) (Texas Municipal Retirement System's provision mandating retirement at age 65 not a subterfuge to evade the ADEA as it was created in 1947, well before the enactment of the ADEA).

40. 542 F.2d 217 (4th Cir. 1976). The plaintiff was hired by United Airlines in 1944 and served in various capacities, most recently as a "Technical-Specialist—Aircraft Systems." *Id.* at 218-19. His duties did not involve flying airplanes, but were managerial in nature. *Id.* at 219 n.3. *Cf.* 29 C.F.R. §860.102(d) (1979) (airline pilots within the jurisdiction of the Federal Aviation Agency are not permitted to perform as pilots after age 60).

provision.[41] Instead, for any plan to qualify for the exemption, reasons other than age must be demonstrated as justification for a mandatory retirement provision.[42] This broke new ground in the applicability of the exemption, as the necessity for such evidence was never considered in *Taft Broadcasting*. The *McMann* court suggested that proof of economic or business purpose was necessary to override the otherwise unlawful provision.[43] Thus *McMann* stood for the proposition that section 4(f)(2) was not intended to authorize involuntary retirement before age sixty-five, but instead was only intended to make the hiring of older employees more economically feasible by condoning the provision of lesser benefits for them.

In *Zinger v. Blanchette*,[44] the Third Circuit approached section 4(f)(2) from a new perspective. Although a legislative history analysis similar to that in *McMann* was employed, the *Zinger* court interpreted the exemption as a congressional response to concern for the financial situation of the retired employee.[45] According to this reasoning, the ADEA covered only discriminatory discharges and was not intended to forbid mandatory retirement provisions when they are part of a valid plan which paid out adequate benefits.[46] Because

41. 542 F.2d at 221. The court did not dispute the validity of a plan which requires retirement where exclusion is justified by economic considerations, however. *Id.* See note 43 *infra*.

42. 542 F.2d at 220. According to the court's analysis, a different reading of the exception would "produce the absurd result that an employer could discharge an employee pursuant to a retirement plan for no reason other than age, but then could not refuse to hire the presumptively otherwise-qualified individual, for 29 U.S.C. §623(f)(2) explicitly provides that 'no such employee benefit plan shall excuse the failure to hire any individual . . . '." *Id.*

43. *Id.* The court further stated that "Congress did not intend retirement plan provisions ever to excuse the failure to hire *or the discharge* of any individual, but only to permit exclusion of some workers *from the plan* on the basis of age where exclusion is justified by economic consideration." *Id.* at 221 (emphasis in original). In reaching this conclusion the court turned to the same legislative history which had been glossed over in *Taft Broadcasting*.

44. 549 F.2d 901 (3d Cir. 1977). *Zinger* involved a sixty-four year old employee of the Penn Central Railroad who had been involuntarily retired pursuant to his employer's pension plan. The employee claimed that the employer's action was not protected by the section 4(f)(2) exemption, because the agreement under which it was carried out was contrary to the provisions of the original plan. *Id.* at 902-03. The employee's major contention, however, was that involuntary retirement in and of itself, was impermissible. *Id.* at 904-05.

45. This conclusion was based at least in part on an interpretative bulletin issued by a former Secretary of Labor which the court construed as differentiating between retirement with and without a pension. The latter would have the same financial effect as a discharge. *Id.* at 907-08. The court stated that "[W]hile discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor." *Id.* (citing to *Hearings on Early Retirement and Related Subjects Before the Subcom. on Retirement and the Individual of the Senate Special Comm. on Aging*, 90th Cong., 1st Sess., pt. 2 (1967) and Note, *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398 (1975)).

46. 549 F.2d at 905. "While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor." *Id.* (citing to *Hearings on Early Retirement and Related Subjects Before the Subcom. on Retirement and the Individual of the Senate Special Comm. on Aging*, 90th Cong., 1st Sess., pt. 2 (1967) and Note, *Mandatory Retirement: The Law, the Courts, and the Broader Social Context*, 11 WILLAMETTE L.J. 398 (1975)).

the plan at issue did pay substantial benefits, the court concluded that it came within the purview of the exemption.[47] The court's holding, however, went beyond this conclusion to condone a bona fide plan which either required or permitted retirement prior to age sixty-five at the employer's option.[48]

These conflicting interpretations were temporarily settled by the Supreme Court's review of the *McMann* decision.[49] Upon reasoning almost identical to that used in the *Taft Broadcasting* case, the Court reversed the Fourth Circuit and held that the section 4(f)(2) exemption did not prohibit mandatory retirement pursuant to a bona fide pension plan.[50] Although the Court's decision

47. 549 F.2d at 909. This sufficiency of benefits argument postulates that insofar as a retirement or pension plan pays out benefits of a sizable amount it will not be deemed a subterfuge to evade the purposes of the ADEA. It has been used successfully to demonstrate a plan's authenticity. *See, e.g.*, Marshall v. Baltimore & O. R.R., 461 F. Supp. 362, 374 (D. Md. 1978) (railroad retirement plan which had been in existence for over 25 years and had paid substantial benefits to retired employees was valid under ADEA); McKinley v. Bendix Corp., 420 F. Supp. 1001, 1003 (W.D. Miss. 1976) (plaintiff who received substantial retirement benefits under company plan could not claim it was not a bona fide pension plan under the ADEA).

48. 549 F.2d at 910. This determination appears antithetical to the language of the Act and has in fact been the basis for opposite holdings in other courts. *See, e.g.*, Thompson v. Chrysler Corp., 569 F.2d 989, 992 (6th Cir. 1978) (mandatory retirement provision valid under ADEA because retirement was required by the plan and was not optional with the employer); Hannan v. Chrysler Motors Corp., 443 F. Supp. 802, 804 (E.D. Mich. 1978) (although retirement plan was bona fide in that it predated the ADEA and paid substantial benefits, it did not fall under the Act's exemption because it did not always strictly observe the terms of the plan which resulted in unlawful optional retirements). *But see, e.g.*, Marshall v. Hawaiian Tel. Co., 575 F.2d 763, 767 (9th Cir. 1978) (mandatory retirement provision valid although permitting employer to exercise option of retiring employees even where the plan does not require those retirements). The reason is that section 4(f)(2) grants an exemption only when the retirement action is taken in accordance with the terms of a bona fide plan. 29 U.S.C. §623(f)(2) (1976). When retirement is dictated by the employer, it cannot logically be argued that the retirement is mandated by the requirements of a valid plan.

49. United Airlines, Inc. v. McMann, 434 U.S. 192 (1977).

50. *Id.* at 203-04. The Court refuted the proposition that section 4(f)(2) was only intended as an economic incentive to encourage hiring of older workers. Instead, the Court found that the true intent of the provision was to protect the employer's right to require pre-sixty-five retirement pursuant to a valid plan. *Id.* at 200-01. To support this contention, the Court turned to the legislative history to demonstrate the absence of congressional intent to undermine retirement plans existing when the Act was passed. *Id. See Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 53 (1967) (statement of Willard Wirtz) [hereinafter cited as Senate Hearings]. Senator Javits recognized a potential problem in the administration of section 4(f)(2). In the debate on the legislation he noted that the exemption "[did] not provide any flexibility in the amount of pension benefits paid to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers." *Id.* at 27.

At least one of the Court's legislative history examples, however, bears a very attenuated relationship to the conclusion it was meant to support. Specifically, the Court pointed to the dialogue between the minority and majority managers of the bill which eventually became the ADEA. Their discussion involved a clarification of the exemption's effect on existing plans. Rather than supporting the Court's statement that pre-age-65 retirements were protected, it actually sustained the plaintiff's argument that the exemption was more of an economic concession to employers. The dissent also noted the discrepancy in the Court's

appeared to be a windfall for proponents of mandatory retirement,[51] Congress explicitly overruled it[52] less than four months later through enactment of the 1978 amendments to the ADEA.[53]

### THE 1978 AMENDMENTS AND THEIR EFFECT ON BENEFIT PRACTICES

The primary purpose of the 1978 amendments was to strengthen and broaden the ADEA to assure equal employment opportunities for older workers.[54] The steps implemented to achieve this goal included raising the upper age limit from sixty-five to seventy-five years[55] and instituting procedural changes to facilitate the filing of suits under the Act.[56] The most significant

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analysis. 434 U.S. at 215 n.9. (Marshall, J., dissenting). Nonetheless, the Court adopted the chronological test applied in *Taft Broadcasting*. Its holding, therefore, was that a bona fide plan predating the ADEA's enactment could not be a subterfuge for evading the Act and thus by its terms could permissibly require involuntary retirement. *Id.* at 203.

51. By citing *Taft Broadcasting* with approval and expressly reversing the Fourth Circuit's decision, the Court in effect validated all pre-Act bona fide retirement plans.

52. *See* H.R. CONF. REP. No. 95-950, 95th Cong., 1st Sess. 7, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528, 529 [hereinafter cited as House Conf. Report]. This report clearly stated congressional motive for the 1978 amendment to section 4(f)(2): "The conferees specifically disagree with the Supreme Court's holding and reasoning in [the *McMann*] case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." *Id.*

*See also* S. REP. No. 95-493, 95th Cong., 1st Sess. 10, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 513 [hereinafter cited as Senate Report]. The Senate position on the amendment was equally clear: "The amendment to section 4(f)(2) serves to express congressional approval of the result reached by the Fourth Circuit in *McMann*." *Id.*

53. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (amending 29 U.S.C. §631 (1976)).

54. *See* Senate Report, *supra* note 52, at 1. *See generally* Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U. L. REV. 767, 768 (1978); Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After* McMann *and the 1978 Amendments*, 54 NOTRE DAME LAW. 323, 323 (1978); Note, *The Age Discrimination in Employment Act Amendments of 1978: A Legal and Economic Analysis*, 7 PEPPERDINE L. REV. 85, 86 (1979).

The purpose of the amendments was to assure that the courts would reach the merits of the cases more often, and that they would do so expeditiously. Senate Report, *supra* note 52, at 12.

Consideration of the many issues involved in the procedure for enforcement of the ADEA is outside the scope of this note. For in-depth analysis of these questions, *see generally* Sheeder, *Procedural Complexity of the Age Discrimination in Employment Act: An Age-Old Problem*, 18 DUQ. L. REV. 241 (1980); Note, *The Procedural Requirements of the Age Discrimination in Employment Act of 1967*, 9 RUT.-CAM. L.J. 540 (1978); Note, *The Age Discrimination in Employment Act: Procedural and Substantive Issues in the Aftermath of the 1978 Amendments*, 1979 U. ILL. L.F. 665 (1979).

55. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (amending 29 U.S.C. §631 (1976)).

56. *Id.* §4 (amending 29 U.S.C. §§626(c)-(e) (1976). There were two basic procedural changes made. First, the 180-day notice of intent to sue which was required to be filed with the Secretary of Labor was eliminated from section 7(d) of the Act. This requirement had created many problems of interpretation. As stated in the Senate Report, *supra* note 52, at 12, "failure to timely file the notice as required by section 7(d) [had] been the most common basis for dismissal of ADEA law suits by private individuals. The 180-day limit [had] been

aspect of the amendments, however, was the clarification of section 4(f)(2).[57] In unambiguous language, the amendment prohibited any plan provision which would require or permit mandatory retirement due to age of any individual protected by the Act.[58] The Senate report[59] described the legislative position as a complete rejection of the notion of mandatory retirement.[60]

Despite this stated position against involuntary retirement, Congress still intended to allow employers some flexibility in providing pension benefits to older workers.[61] Passage of the amendments, however, limited the availability of such options for the plan sponsor. Consequently, considerable research has been generated[62] regarding current employer benefit practices and the preliminary adjustments anticipated or made in their plans to assure compliance with the ADEA. One survey[63] concluded that a clear majority of the responding companies were employing techniques designed to discourage their older employees from deferring retirement.[64] In many instances, corporate policy di-

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interpreted as jurisdictional by some courts, and consequently complaints [were] dismissed" (citing Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975); Hiscott v. General Elec. Co., 521 F.2d 632 (6th Cir. 1975); Powell v. Southwestern Bell Tel. Co., 494 F.2d 485 (5th Cir. 1974)). *See generally* Comment, *Age Discrimination — Notice — Filing Notice of Intent to Sue Within 180 Days After the Alleged Violation is a Jurisdictional Prerequisite to an Action Under the Age Discrimination in Employment Act*, 45 U. CIN. L. REV. 123 (1976).

The second procedural amendment involved the tolling of the Act's statute of limitations during the conciliation period required by section 7(b). The Senate Report, *supra* note 52, at 13, once again expressed congressional dissatisfaction with judicial interpretation of the requirement: "various courts have held that the failure to comply with the conciliation requirement in section 7(b) requires dismissal of the lawsuit. Some courts have gone so far as to say that conciliation is a 'jurisdictional prerequisite' to bringing a lawsuit under the Act." (citing Dunlop v. Resource Sciences Corp., 410 F. Supp. 836 (N.D. Okla. 1976); Usery v. Sun Oil Co., 423 F. Supp. 125 (N.D. Tex. 1975).

Additionally, new exemptions for executive or high policy-making positions and tenured college and university faculty were added. Pub. L. No. 95-256, §3, 92 Stat. 189 (1978) (current version at 29 U.S.C. §631 (1976 & Supp. III 1979)).

57. Pub. L. No. 95-256, §2(a), 92 Stat. 189 (1978). The amendment added the following language to section 4(f)(2) of the original ADEA: "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." Clearly, mandatory retirement pursuant to a pension or benefit plan was deemed unlawful. Compare with the original language of the Act, note 29 *supra*.

58. Pub. L. No. 95-256, §2(a), 92 Stat. 189 (1978).

59. See Senate Report, *supra* note 52.

60. "In the [Senate Human Resources] committee's view, forced retirement extinguishes an individual's right to employment and is thus not excused by section 4(f)(2) unless the retirement is based on some reason other than age, such as disability or poor performance." *Id.* at 10. "The committee believes that the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than upon a careful analysis of the fact." *Id.* at 4.

61. *See, e.g.*, House Report, *supra* note 16, at 5.

62. *See generally* JOHNSON & HIGGINS, A SURVEY ON THE EFFECTS OF THE 1978 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1980); C. SPENCER & ASSOCIATES, SURVEY ON CORPORATE RESPONSE TO THE ADEA (1979). Business Insurance, May 19, 1980, at 56, col. 1.

63. *See* JOHNSON & HIGGINS, *supra* note 62.

64. *Id.* at 5. The report accompanying the survey results cited one finding that about 61% of the 85 companies participating followed the policy of freezing retirement and other

rected that benefits under the various plans be frozen when the employee reaches age sixty-five.[65] Other companies chose not to credit service, salary increases, or benefit improvements after age sixty-five for purposes of calculating the final deferred retirement benefit.[66]

The entire area of pension and retirement benefits for the older employee is of increasing concern to the employer in light of the 1978 amendments. Trying to integrate the required changes into existing benefit plans while minimizing cost increases has been the most commonly cited difficulty among plan sponsors.[67] Recognition of the employer's dilemma prompted the issuance of a revised Department of Labor interpretative bulletin outlining final regulations dealing with the impact of the ADEA amendments.[68]

## Regulations Under the ADEA

The regulations contain numerous detailed rules concerning eligibility, participation, and accrual of benefits by employees who continue to work beyond a pension or benefit plan's normal retirement age, typically age sixty-five.

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employee benefits at the normal retirement age set by the particular plan, typically 65. This was seen as reflecting an attitude towards discouraging post-retirement age employment. *Id.*

65. *Id.* at 5.

66. See note 62 *supra.*

67. *See* Johnson & Higgins, *supra* note 62, at 27. Forty-seven percent of the 85 companies surveyed responded that compliance with the ADEA amendments increased the cost of maintaining their employee benefit plans. *Id. But see* Senate Report, *supra* note 52, at 15-16. In response to a congressional question that Labor Department stated that no cost increases would result from the ADEA amendments. Rather, it opined that financial pressure on pension plans could be alleviated. It reasoned that requiring an employer to permit qualified employees to work until the Act's upper age limit would result in cost savings rather than cost increases. Accordingly, the longer an employee works, the shorter the retirement benefits will have to be paid, thus actually lowering the funding obligations of the plan.

68. *See* Costs and Benefits Under Employee Benefit Plans, 29 C.F.R. §860.120 (1979). Sections (a)(1)-(2) set out the employee benefit plan exception in section 4(f)(2) of the ADEA and indicate the purpose of the exception to be the allowance of age-related reductions in employee benefit plans where the reductions can be justified by significant cost considerations. These sections also introduce the notion of cost equivalency. Where employers are justified in reducing benefits, they may nonetheless do so only if the actual amount expended is no less for older workers than for younger workers. See text accompanying note 78, *infra.*

Sections (b)-(d) defined the statutory terminology of section (4)(f)(2) of the ADEA: section (b) defines "bona fide employee benefit plan" as a plan which accurately describes in writing all of its terms to all employees and which actually provides the benefits in accordance with the terms of the plan; section (c) specifies what it means "to observe the terms" of a plan. This is defined as including only those actions, otherwise discriminatory, which are actually prescribed by the terms of the plan. Optional provisions will not bring the plan within the section 4(f)(2) exception. Section (d) provides that a plan will not be a "subterfuge" of the ADEA if the lower level of benefits paid to older workers is cost justified. The section details at great length the standards of acceptability required for employers' cost justification data. See notes 79-80 and accompanying text, *infra* for further discussion of these sections.

Section (e) covers benefits provided by the government and permits employers to take advantage of the savings achieved through government provision of certain benefits, even though the availability of the benefits may be based on age.

Section (f) illustrates the application of the ADEA's section (4)(f)(2) exception to various employee benefit and retirement plans.

These regulations are the product of suggestions and compromises offered by labor organizations, employers, and other members of the public.[69] The general rule reflected in the regulations is that age-based reductions in employee benefits, such as life insurance, health care, and disability plans, must be justified by actuarially significant[70] cost considerations. Underlying the cost justification rule was the basic premise that equal costs, but not necessarily equal benefits must be expended for workers under the protection of the Act.[71] This rationale was based upon congressional recognition that the cost of providing certain benefits to older workers is greater than providing the same benefits to younger workers.[72] Requiring the delivery of equal benefits to all workers might have discouraged employment of those in the protected class, defeating the entire purpose of the Act.

The administration of any benefit plan presents the employer with two choices. An employer may either reduce the premiums it pays for employee benefits after the recipients reach age sixty-five or it may maintain the premiums paid at the pre-sixty-five level and effectively reduce the coverage of the older participants. Neither alternative is permissible without a showing of financially mitigating circumstances. Once such circumstances are established,

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69. *See* Employee Benefit Plans; Amendment to Interpretative Bulletin, 44 Fed. Reg. 30648, 30649-30658 (1979) [hereinafter referred to as Amend. to Interp. Bull.]. The pages cited refer to the preamble to the interpretation of the ADEA's section 4(f)(2) which was proposed by the Labor Department in 1979. This proposal was subsequently codified at 29 C.F.R. §860.120 (1980).

In this preamble, the Labor Department discussed several general questions that had arisen with respect to the treatment of employee benefit plans under the ADEA. The Department then offered proposals for resolving these questions and accepted comments from interested parties and the general public on the same issues.

70. *See* King County Employees' Ass'n v. State Emp. Ret. Bd., 54 Wash. 2d 1, 5, 336 P.2d 387, 391 (1959). In an action by an employees' association challenging a state retirement board's usage of certain annuity tables in computing benefits, the court defined "actuarial equivalent" as "a benefit of equal value when computed upon the basis of such mortality and other tables as may be adopted by the retirement board." *Id.*

71. *See* Copperman & Rappaport, *Pension and Welfare Benefits for Older Workers: The Preliminary Impact of the ADEA Amendments*, 1980 AGING & WORK 75, 83 (1980); Mamorsky, *Impact of the 1978 ADEA Amendments on Employee Benefit Plans*, 4 EMPLOYEE REL. L.J. 173, 181 (1978); Ray, *Age and Sex in Retirement Plans*, 51 N.Y. ST. B. J. 538, 541 (1979).

72. *See* 113 CONG. REC. 34750 (1967) (remarks of Rep. Randall). *But see* W. KENDIG, AGE DISCRIMINATION IN EMPLOYMENT 51-52 (1978). The author states that the rates for health insurance, a factor normally included in benefit plans, are "not based on age, but on marital status, family coverage, and usage by the participants in the plan. While older workers may be ill for longer periods of time than younger employees, this factor is largely offset by the high maternity-benefit costs of younger employees and the insurance payments made on behalf of the children of younger employees. Hence in an organization with balanced age groups, the hiring of older employees should not increase health insurance costs." As for life insurance costs, the author concedes that premiums are higher for older employees. However, he states that "since most employers have group life coverage, if an employer maintains a balanced age distribution in his work-force his premiums would not be increased substantially (if at all) by hiring a few more older employees." *Id.*

*See generally* AMERICAN COUNCIL OF LIFE INSURANCE, 1980 LIFE INSURANCE FACT BOOK (1980); R. EILERS & R. CROWE, GROUP INSURANCE HANDBOOK (1965); J. PICKRELL, GROUP HEALTH INSURANCE (rev. ed. 1961).

however, the employer may, within the regulations' guidelines,[73] opt for either course of action.

Under the ADEA regulations, the cost justification rule pertains only to employee benefit plans providing health and insurance coverage such as those mentioned. Retirement and pension plans, such as defined benefit[74] and defined contribution[75] plans, are free of this requirement because they are funded differently than other benefit plans.[76] Consequently, the two will be treated separately.

*Employee Benefit Plans*

An employee benefit plan is one which provides employees with what are frequently termed "fringe benefits." These typically include life insurance, medical and dental coverage, and long-term disability protection. The employer generally absorbs all of the costs of these plans or shares the expense proportionately with the employee.[77] Where such plans meet the criteria of section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for younger and older workers.[78] The older worker may thereby receive a lesser amount of benefits or coverage.

The regulations outline standards of acceptability for age-related cost data proffered by an employer as justification for its plan's disparate treatment.[79] In general, the figures or statistics relied upon must be "valid and reasonable," with evidence of actual costs preferred, although logical projections from similar plans are acceptable.[80] Employers have the option of making cost comparisons and adjustments by either of two approaches, the benefit-by-benefit basis or the benefit package basis.[81]

Under the benefit-by-benefit approach, reductions or adjustments are made according to the specific form of benefit for a specific event or contingency.[82] For example, higher premiums for older workers' group life insurance (the benefit), would justify a corresponding reduction in their coverage for death (the event). Of course, the allowance of this reduction would depend on the

73. *See* 29 C.F.R. §860.120(d)(1)-(4) (1980).
74. Reg. §1.401-1(b)(i)(i) (1974). See text accompanying note 97 *infra*.
75. Reg. §1.401-1(b)(ii), (iii) (1974). See text accompanying note 98 *infra*.
76. *See* 29 U.S.C. §§1081-1086 (1976).
77. *See* W. GREENOUGH & F. KING, *supra* note 3, at 176.
78. 29 C.F.R. §860.120(a)(1) (1979).
79. 29 C.F.R. §860.120(d)(1)-(3) (1979).
80. 29 C.F.R. §860.120(d)(1) (1980). For example, an employer may rely on cost data which show the actual costs to it of providing the particular benefit in question over a representative period of years in order to meet the "valid and reasonable" standard. If such figures are not readily available for an employer's own employees over such a period, data for a larger group of similarly situated employees may be used. Where an employer for some reason incurs costs significantly different from costs for a group of similarly situated employees, however, it may not rely on the supporting data where such reliance would result in lower benefits for its own older employees.
81. 29 C.F.R. §860.120(d)(2).
82. *Id.* at (d)(2)(i).

employer's ability to demonstrate an actual cost increase.[83] However, this method, which focuses on the individual benefit, does not permit the substitution of one entire form of benefit for another, even where both forms of benefit are designed to provide for the same contingency.[84] For instance, substitution of health insurance for a long-term disability plan would be an impermissible exchange of disability benefits.

The mechanics of the benefit-by-benefit method are best understood by reference to more specific examples. For instance, life insurance coverage normally remains constant up to a specified age, usually sixty-five at which time either the coverage is reduced or premiums increase.[85] Plans will not violate the Act if they reflect the cost increase through a reduction in coverage, provided that the reduction for an employee of a particular age is consonant.

In the operation of health insurance programs the employer has available several options under the benefit-by-benefit method. Although the cost of medical care generally increases with age,[86] actual employer costs for employees over sixty-five may actually be less due to Medicare.[87] With respect to those employees who are eligible for Medicare, the Act permits the employer to omit from its own health insurance plan those benefits paid by Medicare.[88] Alterna-

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83. *Id.* at (a)(1).

84. See *Id.* at (d)(2)(i) (1980). *See also* Amend. to Interp. Bull., *supra* note 69, at 30651. Comments received by the Labor Department while it was formulating its revised regulations indicated uncertainty as to the precise meaning of a "benefit" under the benefit-by-benefit approach. Some commentators appeared to believe that the Department intended a "plan-by-plan" approach. Others understood the approach as meaning an "event-by-event" basis. This would have meant that all benefits available for a particular event — death, disability, etc. — would be taken together. Recognizing the ambiguity of its terminology, the Department articulated its position that a strict view of a "benefit" would be taken. This means that an "event-by-event" approach was specifically rejected because it would ignore the differences in the forms available for a particular event. Consequently, it appears clear that adjustments in benefits under the benefit-by-benefit approach must be made in the amount of the benefit, not in its form. *Id.*

85. *See* JOHNSON & HIGGINS, *supra* note 62, at 7. Reduction in life insurance benefits at a specified age is not a new policy and its practice is not forbidden by the Act. What is new, however, are the mechanics of doing so, as imposed by the regulations. Cost-equivalent reductions, under the benefit-by-benefit approach, may be made on the basis of age and based on average costs of providing the benefits over a maximum age bracket of five years. The approach taken by most employers is either a yearly eight percent reduction starting at age 65 or a one time 35 percent reduction for the five-year bracket from ages 65-70. This method is specifically provided for in the Labor Department regulations in 29 C.F.R. §860.120 (1979).

The Johnson and Higgins survey was based on responses from 85 Fortune-ranked companies questioned during December, 1979. Surprisingly, a bare majority — 50.6% — of those surveyed did not reduce group life insurance benefits for active employees before age 70. Of those that did, however, 88% began the reductions at age 65. *See* JOHNSON & HIGGINS, *supra* note 62, at 8.

*See also* Copperman & Rappaport, *supra* note 71, at 83-84. The findings of this survey indicated that the provision of life insurance benefits was significantly related to firm size. Generally, the larger the firm, the more likely life insurance coverage continued.

86. *See* COMMERCE CLEARING HOUSE, INC., *supra* note 7, at 212-13.

87. 42 U.S.C. §§1395-1396(i) (1976).

88. *See* 29 C.F.R. §860.120(f)(1)(ii)(A)(B)(C) (1980). With respect to those employees eligible for Medicare, an employer may "carve out" from its health insurance plan any benefits

tively, the employer may insure employees eligible for Medicare under a separate supplemental plan. The benefits provided, however, must be no less favorable to the employee than those he would receive under the employer's regular plan.[89] A rather obvious question arises: because Medicare may result in a significant cost savings to the employer, should the Act provide that the savings be passed on to the employee in the form of extra benefits? It is certainly arguable that the employee and not the employer should benefit from Medicare. Moreover, the additional benefits received would be going to the employee when they are most needed. The ADEA, however, sought only to equalize treatment between older and younger workers. Therefore, it would be beyond the scope of the Act to make affirmative demands on an employer where the entire existence of the benefit plan is itself purely voluntary.

The employer's other option in its delivery of employee benefits is the benefit package approach. This method offers greater flexibility than does the individual benefit approach because adjustments are determined by looking at the plan in its entirety. Benefits in one area may be altered more than those in another, provided the plan's overall compliance with the ADEA remains unaffected.[90] This will generally operate in favor of the individual employee because the Act permits him to select which benefits will be adjusted. Furthermore, the regulations provide a safeguard as the benefit package will only be in compliance with the Act when neither the cost of benefits to the employer nor the favorability of the overall benefits to the employee are reduced by its operation.[91] For example, assume that two benefits are available to employees wherein age-based cost increases would justify a ten percent decrease in both benefits if the benefit-by-benefit basis were utilized. With the package approach,

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actually paid for by Medicare. However, an employer may not assume that employees eligible for Medicare have in fact taken advantage of the available coverage. To benefit from Medicare coverage, the employer must inform each eligible employee of the need to apply for coverage and must provide any necessary assistance for making application for Medicare benefits. Because of the savings to employers that result from Medicare, reductions in health benefits for employees between 65 and 70 will usually not be justified. *Id.*

89. *Id.* Furthermore, the cost to the employer for the supplemental plan may not be less than the cost which would be expended to include Medicare-covered employees in the regular health plan.

90. *See* Amend. to Interp. Bull., *supra* note 69, at 30656-57. Part of the reason for allowing the benefit package approach was to aid employers and workers in finding ways of meeting problems arising from the impact of age on employment. Consequently, in order to assure that this approach is being used to the advantage of older workers, certain limitations were placed on its use. First, a benefit package approach may apply only to employee benefit plans which fall under section 4(f)(2) of the ADEA. Thus, uninsured paid sick leave or paid vacation plans are not involved here. Second, this approach may not apply to retirement or pension plans. Even though they fall under section 4(f)(2), these plans are subject to different rules than other employee benefit plans. See note 76 *supra*. Third, the package approach will not justify health benefit reductions greater than would be justified under the benefit-by-benefit approach. Finally, a reduction in other benefits greater than that which would be justified under a benefit-by-benefit approach must be offset by another benefit that is available to the same employees. Thus, greater reductions in one area are permissible, provided the employees affected have the opportunity to replace the reduced benefits with other benefits.

91. *See* 29 C.F.R. §860.120(f)(2) (1980).

employees would have the option of choosing not to reduce one benefit and offsetting that with a twenty percent reduction in the other.[92]

The general rule with regard to employee benefit adjustments, then, is that reductions in older employees' benefits are permissible upon a demonstration of cost justification and cost equivalency.[93] As noted earlier,[94] retirement and pension plans are exceptions to this rule.

*Pension and Retirement Plans*

There are two basic types of retirement plans, the defined benefit plan[95] and the defined contribution plan.[96] The former refers to a plan which specifies that fixed benefits are payable at retirement irrespective of profits.[97] Contributions to such a plan are determined actuarially. In contrast, a defined contribution plan involves an individual account for each participant into which proceeds from profit-sharing, investments, forfeitures, etc., are paid according to specified formulas.[98] The rules governing the creation and application of these formulas are embodied in very complex provisions of ERISA.[99] The rules governing other employee benefit plans such as those discussed earlier,[100] however, are set out in the regulations under the ADEA. The result is that the two different types of plans covered by section 4(f)(2) of the ADEA are each subject to varied sets of regulations. Thus, conflicts between ERISA and the 1978 amendments to the ADEA may exist. For example, extension of the ADEA's age limit to seventy-five years may require a change in an employer's retirement benefit calculation, which would be forbidden by ERISA. Congressional sponsors of the amendment recognized the potential for this type of problem and consequently sought administrative opinions on the question. In 1978, both the ADEA and ERISA came under the enforcement jurisdiction of the Labor Department,[101] and accordingly, that office was asked to issue a state-

92. This trade-off of benefits is perfectly lawful under the ADEA. The details of the trade, however, depend on the actual costs to the employer of the two benefits. For example, if cost data show that the two benefits cost the same, the 20% reduction in one is permissible. However, if one benefit costs only half as much as the other, it may be reduced up to only 15% if the other is unreduced. *See* 29 C.F.R. §860.120(f)(2)(v) (1979).

93. See text accompanying notes 69-70 *supra.*

94. See text accompanying note 76 *supra.*

95. See note 74 *supra* and 97 *infra.*

96. See note 75 *supra* and 98 *infra.*

97. *See* W. GREENOUGH & F. KING, *supra* note 3, at 178-89. Under most private pension plans the pension commitment is defined in terms of plan output, in other words, a definition of the benefit. The amount of this benefit is stated by formula and the formula is applied for each plan participant upon his or her retirement. The pension obligation created by the formula for all participants combined becomes the base for the actuarial calculation of the plan's liabilities and funding requirements.

98. *Id.* at 176-78. In defined contribution plans, the pension commitment is specified in terms of input to the plan. The regular contribution of the employer to the pension plan is stated as a percentage of the current compensation of the plan participant. This amount is then credited to an individual account on behalf of each participant.

99. See notes 10 and 76 *supra.*

100. See text accompanying note 76 *supra.*

101. Administration of the ADEA was subsequently transferred to the Equal Employment Opportunity Commission (EEOC). See note 132 *infra.*

ment regarding the effect of a revised ADEA on ERISA.[102] The Labor Department's conclusion in five specific areas of concern was that no conflicts were anticipated.[103]

The first of these issues was whether an employer would be required to credit an employee's years of service after normal retirement age for purposes of benefit accrual.[104] The Labor Department's response was that nothing in either ADEA or ERISA would require such credit.[105] The second question was whether an employer would be required to pay an actuarial equivalent[106] of normal retirement benefits to an employee who continued to work beyond the normal retirement age.[107] The Department stated that no adjustment in the size of the employee's periodic payments at the time he actually retired would be necessary.[108] Both ERISA and the Internal Revenue Code specifically cover this situation.[109] The third question was whether a pension plan which provided for the commencement of retirement benefits at age sixty-five could be amended to allow the start of benefits only at the date of actual retirement without violating ADEA or ERISA.[110] The Department's response was that

102. *See* SENATE REPORT, *supra* note 52, at 13-14. A letter was addressed to Donald Elisburg, Assistant Secretary for Employment Standards, U.S. Department of Labor, from Senators Williams and Javits of the Senate Human Resources Committee. The Committee was concerned about ADEA-ERISA conflicts and sought a written opinion addressing that issue.

103. *Id.* at 14.

104. *Id.* An employee's final retirement benefit is calculated according to a formula determined by the sponsor of the particular retirement plan. Rates of payment will of course vary among plans. All plan formulas, however, are based on certain factors, namely, an employee's age, an employee's years of service with the employer, and a percentage of the employee's compensation. *See* COMMERCE CLEARING HOUSE INC., PENSION REFORM ACT OF 1974, LAW AND EXPLANATION 14-17 (1974). Service credit normally ceases when an employee reaches 65. The question was thus whether the extension of the ADEA's protected age limit to 70 would require credit until age 70.

105. *See* SENATE REPORT, *supra* note 52, at 15. The Labor Department response did note, however, that there is a section in ERISA (section 204) which limits the extent to which a plan may provide for a higher rate of benefit accrual during later, and presumably higher paid, years of service. This provision sets forth three alternative tests. A plan must meet one of these tests in order to demonstrate proper benefit accrual.

106. See note 70 *supra*. *See* Bompey, *supra* note 56, at 223-24. "Actuarial equivalent" refers to the result of adjustments which are designed to "produce a benefit of equivalent value after considering changes in the circumstances surrounding the payment of that benefit." The purpose of this type of adjustment was explained: "An upward actuarial adjustment in the monthly lifetime benefit to be paid to a plan participant who retires after his or her normal retirement age is designed to take account of the fact that such benefit is likely to be paid over a shorter period of time. The cost impact of such an adjustment is that the plan, and, accordingly, the sponsoring employer, does not derive the fortuitous benefit it might otherwise gain from the reduced pay out period." *Id.*

107. *See* SENATE REPORT, *supra* note 52, at 14.

108. *Id. See also* COMMERCE CLEARING HOUSE, INC., *supra* note 104, at 324. In the House-Senate Conference Committee's joint explanation on section 204 of ERISA, it was stated that "[n]o actuarial adjustment of the accrued benefit would be required, however, if the employee voluntarily postponed his own retirement. For example, if the plan provided a benefit of $400 a month payable at age 65, this same $400 a month benefit (with no upward adjustment) could also be paid by the plan who voluntarily retired at age 68." *Id.*

109. 29 U.S.C. §1054 (1974); Treas. Reg. §§1.411(c)-1(f)(2) (1974).

110. *See* SENATE REPORT, *supra* note 52, at 14.

most plans already condition benefit payment on actual retirement.[111] Accordingly, amendment of most plans would be unnecessary. Any plan which provided for payment at a date other than normal retirement age, however, could be amended without violating either act.[112] The fourth issue concerned the probability of increased funding costs for pension plans if the upper age limit of the ADEA were extended.[113] According to the Labor Department, no increase in cost would be experienced; rather, financial pressure on plans could be alleviated.[114] Finally, the Department was asked whether an employer's failure to provide for the accrual of benefits for an employee working beyond normal retirement age would constitute age discrimination under the ADEA, even if ERISA did not require those accruals.[115] The Department stated that requiring a plan to provide benefit accrual after the plan's normal retirement age would run counter to the purpose of the Act.[116] Thus, it concluded that there would be no violation of the ADEA in that instance.[117]

*Defined Benefit Plans*

An employer maintaining a defined benefit retirement plan remained relatively unaffected by the changes in the ADEA, as no employer is required to provide such a plan for his employees. Congress sought to avoid the imposition of strict regulations which might discourage employers from continuing their plans.[118] Consequently, under the current regulations:

1) An employer is not required by either the ADEA or ERISA to credit years of service completed after normal retirement age when calculating a final benefit.[119]

2) An employer will not be required to increase the amount of the pension to reflect the delay in commencement of benefits when an employee works beyond the normal retirement age.[120]

111. *Id.* Neither ADEA nor ERISA require the payment of retirement benefits to employees who continue to work beyond normal retirement age or on the actual date of retirement whichever is later. *See* 29 U.S.C. §1056 (1974).

112. *See* SENATE REPORT, *supra* note 52, at 15.

113. *Id.* at 14.

114. The Labor Department noted that "as an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also stem from the fact that . . . a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it." *Id.* at 16.

115. *Id.* at 14.

116. *Id.* at 16. The Labor Department based its belief on its reading of the ADEA's legislative history. According to its interpretation, the section 4(f)(2) pension plan exception was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid.

117. *Id.* This dialogue was subsequently formalized into the Interpretative Bulletin mentioned earlier, see note 68 *supra*, which more fully outlined the employer's duties with respect to both defined benefit and defined contribution pension plans.

118. *See* SENATE REPORT, *supra* note 52, at 5.

119. 29 C.F.R. §860.120(f)(iv)(B)(3) (1979).

120. *Id.* at (B)(4).

3) An employer may amend its plan to provide that retirement benefits will not commence until the actual date of retirement, rather than at normal retirement age for employees who choose to work longer.[121]

4) An employer need not take into account salary increases and benefit improvements under the plan which take place after an employee reaches normal retirement age.[122]

Although this freezing of pension benefits is permitted by the regulations and appears to be consistent with the legislative history of the ADEA, it is not reconcilable with the rationale underlying pension design generally. The purpose of a defined benefit plan is to replace income lost because of retirement.[123] Freezing pension benefits ignores the fact that the need for an income substitute created by an individual's departure from the work force is not necessarily causally related to the age at which he retires. Regardless of actual retirement age, a retiree will still be faced with the necessity of replacing lost earnings. Therefore, the freezing of pension benefits at a certain age is illogical and antithetical to the basic purpose of the pension system. A pension is a reflection of the performance and length of service which an individual has contributed to his employer. Consequently, an employer's financial arguments for the freezing or reduction of retirement benefits are less tenable than in the case of other employee benefits where the employer voluntarily assumes full pecuniary responsibility for providing them. The denial of benefits beyond a set age also destroys any incentive for job achievement by older employees because superior performance does not result in any financial reward. Moreover, this approach is extremely inequitable in its failure to take into account the impact of inflation on the retiree whose monthly pension check is often his only source of income.[124]

*Defined Contribution Plans*

Unlike a defined benefit plan, the funding of a retirement plan by defined contributions is not affected by the age of an employee.[125] In a defined contribution plan, the employer does not have to provide funding for a specific level of benefits, and the benefit received by an employee at retirement depends only upon the value of the contributions made on his behalf.[126] Therefore, age

121. *Id.* at (B)(6).

122. *Id.* at (B)(7).

123. *See* Copperman & Rappaport, *supra* note 71, at 78. The authors take the position that the freezing of benefits at a certain age is unjustified because it goes against the purpose of a pension plan. This purpose is to provide retirement income. When benefits are frozen, retirement income needs will not be fully met, frustrating the entire goal of the plan. *See also American Attitudes Toward Pensions and Retirement: Hearing Before the Select Committee on Aging, House of Reps.*, 96th Cong., 1st Sess. 24 (1979).

124. Unlike Social Security payments, private pension benefits rarely provide cost-of-living adjustments. *See* Munnell, *The Impact of Inflation on Private Pensions*, 1979 NEW ENGLAND ECON. REV. 18, 19. *See generally Energy Costs and Inflation: the Impact of the Elderly: Hearing Before the Subcommittee on Housing and Consumer Interests of the House Select Comm. on Aging*, 96th Cong., 1st Sess. (1979).

125. See note 98 *supra*. Because the contribution is generally based on a percentage of the employee's salary, age is not a factor in funding this type of plan.

126. *See* [1977] 2 EMPL. PRAC. GUIDE (CCH) ¶5022. This statement was included in an

does not affect the level of an employer's contributions as it does in a defined benefit plan. Accordingly, the exclusion of a newly-hired older worker from a defined contribution plan would be much harder to justify than in the case of a defined benefit plan, since with the former there is no persuasive evidence that a continuation of such a benefit to older employees would impose an unreasonable economic burden on the employer.[127] Nonetheless, the Labor Department regulations do allow employers to cease their contributions to any participant in a defined contribution plan after he has reached the normal retirement age.[128] Additionally, defined contribution plans may completely exclude participation by an employee hired after the normal retirement age.[129]

The type of contributions made by the employer may, however, be dispositive of the type of treatment of older workers permissible under these plans. For example, some plans allocate investment gains and losses, employee termination forfeitures, and profit-sharing to individual employee accounts instead of using these amounts to reduce the figure defined as the employer's contribution.[130] Where this is the case, no disparate treatment of older workers is permitted and allocations must be made equally to all employees regardless of whether they are over the normal retirement age.[131] This is the most equitable approach because age has no bearing on the amounts of these allocations.

### Analysis of Labor Department Regulations

Since administration of the ADEA was transferred from the Labor Department to the Equal Employment Opportunity Commission (EEOC) in 1979,[132] the Commission has been attempting to revise, and in some cases revoke, the Department's regulations and interpretations of the Act.[133] Faced with a dif-

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Opinion Letter from the Administrator of the Wage and Hour Division of the Department of Labor. The letter was the Department's response to a question from an individual asking whether employees hired while in the 40 to 65 age group could be lawfully excluded from participation in their employer's pension or retirement plan. The opinion subsequently concluded that the exclusion of a newly-hired older worker from a defined contribution plan would be a violation of the ADEA. *Cf.* 29 C.F.R. §860.120(f)(iv)(B)(1) (1979) (defined contribution plan may provide for the cessation of contributions after the normal retirement age of any participant in the plan. Moreover, such a plan may completely exclude from participation those employees hired after normal retirement age).

127. *See* Mamorsky, *supra* note 71, at 180. The author noted that his conclusion was consistent with the rationale of the Labor Department as expressed in its Opinion Letter, *supra* note 126.

128. 29 C.F.R. §860.120(f)(iv)(B)(1) (1980).

129. *Id.* The regulations, however, apply only with respect to those defined contribution plans which are not "supplemental" plans. A plan will be deemed "supplemental" if an employee is a participant in it as well as in a defined benefit plan maintained by the same employer. No employee, regardless of age, may be excluded from a "supplemental" plan. The rationale behind this rule is that age is never a factor in such a plan, because the funds in the plan are acquired from sources like profits, investments, etc.

130. *See* 29 C.F.R. §860.120(f)(iv)(B)(2) (1979).

131. *Id.*

132. *See* Reorg. Plan. No. 1 of 1978, §2, 43 Fed. Reg. 19807.

133. *See Statement of Eleanor Holmes Norton, Chair, U.S. Equal Employment Opportunity Commission, Before the House Select Committee on Aging* 17-22 (June 18, 1980)

ferent constituency[134] than the Labor Department, the EEOC's policy judgments generally reflect a stronger enforcement stance in employment discrimination matters. Accordingly, the Commission expressed particular interest in re-examining an employer's obligation to continue providing pension and other employee benefits to employees over sixty-five years of age.[135] The EEOC's position is that the Labor Department regulations allowing cessation of benefits upon normal retirement age created a windfall for employers by requiring neither that they continue paying into retirement funds nor that they provide alternate forms of compensation.[136]

In an effort to remedy what it saw as an indefensible interpretation of the ADEA by the Labor Department, the EEOC circulated its own proposal for comment by the Labor Department, the Internal Revenue Service, and the President's Commission on Pension Policy.[137] This proposal would require continued contributions and accruals of benefits beyond age sixty-five.[138] It would also treat pension plans similarly to employee benefit plans in that employers would be forced to continue to provide benefits to employees between the ages of sixty-five and seventy.[139] All practices formerly permissible under the Labor Department regulations would now constitute violations of the Act.[140]

The EEOC's justification for this drastic revamping of private pension practices rested on a new interpretation of the legislative history of the ADEA which discerned a congressional intent to forbid cessation of benefit expendi-

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[hereinafter referred to as *Norton Statement*] (*to be reprinted in EEOC Enforcement of the Age Discrimination in Employment Act: Hearing Before the House Select Comm. on Aging*, 97th Cong., 1st Sess. (1980)). This hearing was called in the face of allegations about the Commission's effectiveness and the seriousness with which it regards its mandate under the ADEA. *Id.* (statement of Aging Committee Chairman Claude Pepper).

134. Pursuant to President Carter's Reorganization Plan of 1978, *supra* note 215, the EEOC became the "principal Federal agency in fair employment enforcement." *See* Letter of President Carter transmitting Reorganization Plan No. 1 of 1978 to the Congress (February 23, 1978) (*reprinted in* CONGRESSIONAL RESEARCH SERVICE, LEGAL DEVELOPMENTS IN AGE DISCRIMINATION IN EMPLOYMENT 80 (1978)). The EEOC thus has enforcement power over Title VII of the Civil Rights Act, the ADEA, the Equal Pay Act, and over antidiscrimination policies concerning Federal employees, formerly handled by the Civil Service Commission.

135. *See Norton Statement*, *supra* note 133, at 19. The EEOC has approved interim interpretative regulations reflecting the statutory changes made in 1974. *See* 44 Fed. Reg. 68858 (1979).

136. *See Norton Statement*, *supra* note 133, at 19.

137. *See* [1980] DAILY LAB. REP. (BNA) A-12 (May 15, 1980).

138. *See* M. Siegel & C. Buckmann, *EEOC Proposes to Alter Age-Bias Bulletin*, N.Y.L.J. Daily, June 9, 1980, at 1, col. 1.

139. *Id.*

140. For example, employers would no longer be able to exclude employees hired within five years of normal retirement age from defined benefit plans. Participants in profit-sharing and other defined contribution plans would be required to be given allocations of employer contributions through age 70 on the theory that there is no cost justification for discontinuing contributions at any age to such plans. If a participant in a defined benefit plan continued to work beyond normal retirement age, his or her accrued benefit would have to be adjusted by either increasing it actuarially to reflect the retention of funds by the plan or crediting service and salary after normal retirement age. *Id.*

tures on behalf of post-age-sixty-five plan participants.[141] According to the Commission, Congress believed that continuing benefit accruals and contributions past the age of sixty-five would be unnecessary only where the individual employees involved already were assured of a reasonable pension benefit.[142] The Commission's focus was thus, laudably, on the financial position of the retiree. The concern was perfectly understandable because, under the current regulations, an employee continuing past the age of sixty-five is in effect working only for the difference between his salary and the pension he would be receiving if he had retired at sixty-five.[143] There is no logical or equitable justification for distinguishing treatment of deferred retirees under pension plans from their treatment under other employee benefit plans, or for eliminating additional pension credit at age sixty-five. This conclusion is supported by the language of the Act itself, as the ADEA in no way differentiates between pension and employee benefit plans.[144]

Nonetheless, the EEOC's position has been strongly criticized as a usurpation of the legislative role of Congress by an administrative agency.[145] Although this may be an overly harsh criticism, it is not without merit because the legislative history analysis upon which the EEOC's proposal is based draws no support from other sources.[146] The body of statements and opinions comprising the ADEA's history are well known, well publicized, and relatively unambiguous, yet the EEOC's position has never before been taken.

The EEOC's suggested proposal is designed to respond to what it perceives to be a difficult situation. The provisions of the Labor Department regulations relating to pension plans are inequitable and are not mandated by the language of the ADEA. Indeed, in terms of their effect on older employees, the regulations seem to be more of a departure from the statutory objectives than a reflection of them. The Act's legislative history, however, compels the conclusion that Congress did not attempt to mandate costly departures from long-standing pension practices. Support for the original ADEA would not have been so pronounced if it had been intended to regulate the maintenance of private benefit and pension plans so strictly.

Although the Commission's approach appears in many ways to be more reflective of true statutory intent and purpose than is the Labor Department's, its highly divergent course makes it untenable as a matter of law.[147] In view of

141. *See* M. Siegel & C. Buckmann, *supra* note 138, at 15, col. 4.

142. *Id.*

143. In other words, an employe working past age 65 ceases to receive pension credit for salary increases instituted after his 65th birthday as well as additional pension credit for whatever post-65 years he works.

144. *See* 29 U.S.C. §623(f)(2) (1976 & Supp. III 1979).

145. *See* M. Siegel & C. Buckmann, *supra* note 138, at 15, col. 5, [1980] DAILY LAB. REP. (BNA), *supra* note 137, at A-11 (citing letter from John A. Connors, chief executive partner of Kwasha Lipton, consulting actuaries).

146. *See* M. Siegel & C. Buckmann, *supra* note 138, at 1, col. 1. The original legislative history analysis undertaken by the Labor Department in its regulations was the definitive interpretation according to most observers in the area.

147. Rules or regulations, such as those involved here, which are promulgated by an executive branch or agency are merely interpretative and as such are not accorded the force of

the importance of the issues involved, it is preferable that any changes of this scope be accomplished by statutory amendment rather than by administrative decision. The Labor Department obviously concurs in this view, since it has vehemently disagreed with the EEOC's proposed action. In a letter to EEOC Chair Elenor Holmes Norton, former Secretary of Labor Marshall sharply disputed the Commission's analysis of the ADEA's legislative history.[148] Secretary Marshall reasserted the Labor Department's position that the proposed EEOC interpretation contravenes both the ADEA and ERISA.[149] The letter also recommended that the two agencies reach agreement on an historical interpretation of the ADEA amendments before any proposal was published in the Federal Register.[150] Although, the EEOC is apparently reconsidering its position, a formal vote on the proposal has been postponed indefinitely.[151]

## CONCLUSION

The bitter dispute between present and former administrators of the ADEA emphasizes the need for immediate congressional involvement in this area. The contingencies provided for in the Labor Department's regulations are complex and too confusing to be adequately treated by an executive Department or an administrative agency. Reliance on the courts would also be undesirable.[152] Congress should reconsider the entire area of employee benefits under the ADEA by analyzing both the Labor Department's and the EEOC's proposals. Then, swift legislative adoption of an approved interpretation should be made in the form of amendments to the ADEA itself.

A compromise between the approaches of the Labor Department and the EEOC would be the most appropriate course of action. As a first step in this direction, Congress should again amend section 4(f)(2) to make separate provision for pension and employee benefit plans. This would emphasize the

law. *See* 29 C.F.R. §860.1 (1980). Such rulemaking is subject to review by the courts which may substitute their own judgment as to the content or effect of the rules. *See generally* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944); Davis, ADM. LAW & GOV'T 119 (1975, ed.).

148. *See* CALLAGHAN & CO., 4 EQUAL EMPL. COMPL. UPDATE 25 (November, 1980). The EEOC Commissioners were scheduled to take a formal vote on the matter of their revised regulations in late October of 1980. This meeting had been postponed several times during the months of August and September. Interview with Arlene Shadoan, Special Assistant to EEOC Chair Norton, in Washington, D.C. (September 3, 1980). The scheduled meeting, however, has been postponed indefinitely as a result of Secretary of Labor Marshall's letter addressed to EEOC Chair Norton. The Secretary's letter expressed sharp disagreement with the EEOC's analysis of the ADEA's legislative history. He asserted that the EEOC interpretation is contrary to both the ADEA and ERISA.

149. *Id.* The Secretary pointed out that ERISA was a carefully balanced statute which took into account both the rights of employees and the incentives to employers. It sought to avoid the risk that federal regulation would be so complex and expensive for employers that they would cease to sponsor pension plans altogether. Consequently, when Congress was considering the 1978 ADEA amendments, it was careful to make clear that the amendments would not require that additional pension benefits, accruals, or actuarial adjustments be made by employers other than those already required by ERISA.

150. *Id.*

151. *Id.* See note 148 *supra.*

152. See note 147 *supra.*

distinction between these types of plans and clarify the fact that different rules pertain to each. As a second step, a new provision should be adopted, which would relate solely to pension plans and would provide for benefit accruals past the age of sixty-five. A fair reading of the legislative history seems to require that much. Nevertheless, if Congress did not intend to go that far, an exception, such as the cost justification rule used in employee benefit plans, should be provided for pension plans as well. Plan sponsors would thus bear the burden of demonstrating significant cost increases to justify an exception from the rule. This would provide relief only where truly needed, because deferred retirements usually result in cost savings to a plan.[153] Finally, whatever Congress decides, it should attempt to make its intention clearer than it has in the past. Not only must the statutory language be specific, but the discussion and reports of amendments should evidence an identifiable legislative intent. Only when employers and employees alike are fully apprised of their rights and duties under the ADEA will post-retirement age employment be a viable option for workers.

PATRICIA A. MARTIN

153. See note 67 *supra.*