Employers are prohibited by the Age Discrimination in Employment Act from discriminating against workers who are 40 years of age or older. The ADEA's purpose is "to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment" ([29 USC 621(b)] 29 U.S.C. § 621(b)).

**State Workers Cannot Sue State** - Under a 2000 U.S. Supreme Court decision, state employees cannot sue their employers for monetary damages under the ADEA, although other types of ADEA lawsuits against states and state officials are still viable.

**Exemptions** - Several groups of employees are exempt from ADEA coverage. These include:

- High-level managers in "bona fide executive or high policy-making positions," who may be compelled to retire at age 65 if they are entitled to receive annual pension benefits of at least $44,000;

- Anyone appointed by elected officials who serves in a "policy-making" capacity;

- Public safety personnel, such as police officers, firefighters, and prison guards, who may be hired or compelled to retire in accordance with state and local laws and retirement plans in effect on March 3, 1983, or state or local laws enacted after Sept. 30, 1996, the effective date of the Age Discrimination in Employment Amendments of 1996; however, the ADEA specifies that the hiring or termination must be pursuant to a bona fide hiring or retirement plan that is not designed to evade the purposes of the law;

- Employees serving under contracts of "unlimited tenure" at colleges and universities, who may be compelled to retire at age 70 until 1994; and
• Uniformed personnel of the armed forces.

**Exceptions for Benefit Plans and Seniority Systems** - The U.S. Supreme Court decided in *Public Employees Retirement System of Ohio v. Betts* ([50 FEP Cases 104] 50 FEP Cases 104 (1989)) that bona fide employee benefit plans were excepted from the ADEA. Congress responded with the Older Workers Benefit Protection Act of 1990. This law restored the original intent of the ADEA to prohibit discrimination against older workers in all employee benefits except when age-based reduction in employee benefit plans are justified by significant cost considerations. Specifically, employers may observe the terms of a bona fide employee benefit plan provided that the actual amount of payments made, or costs incurred on behalf of an older worker, are not less than those made or incurred on behalf of a younger worker for each benefit or benefits package ([29 USC 623(i)] 29 U.S.C. § 623(i)).

In addition, the OWBPA provides for several other narrowly construed exceptions from the general prohibition against age-based discrimination in employee benefits. Allowed are certain:

• Voluntary early retirement plans;

• Early retirement benefit subsidies in defined benefit pension plans;

• Payment of Social Security supplements under defined benefit pension plans;

• Minimum ages for benefit eligibility in pension plans;

• Reductions from severance benefits; and

• Deductions or offsets for long-term disability benefits.

The ADEA also permits an employer to observe the terms of a bona fide seniority system. No benefit plan or seniority system can legally prohibit the hiring of a person or compel early retirement because of age, however ([29 USC 623(f)] 29 U.S.C. § 623(f)).

**Waivers of ADEA Rights** - Any right or claim under the ADEA cannot be waived unless the waiver is knowing and voluntary, as defined in [29 USC 626(f)] Sec. 626(f) of the law.

**Employer Defenses** - An employer can defend itself against an age discrimination charge by showing that age is a bona fide occupational qualification for a particular job—for example, if the job is physically demanding—or that an employment decision concerning older workers is based on "reasonable factors other than age." Whether a differentiation among workers is based on factors other than age will be decided on individually, taking into consideration all the facts and circumstances in each situation. In its Interpretations of the ADEA ([29 CFR 1625.7] 29 C.F.R. § 1625.7), the EEOC provides guidelines on the use of "reasonable factors other than age" in justifying job decisions involving older employees.

These guidelines note that:

• When an employment practice, including tests, is shown to have an adverse impact on people protected by the ADEA, it is permissible only if it can be justified as a business necessity; and

• A differentiation based on the average cost of employing older workers as a group is unlawful except when employee benefits plans that qualify for the section 4(f)(2) exception are involved.
**Willfulness** - The ADEA provides that employers who "willfully" violate the law—that is, they either know their actions are unlawful or show reckless disregard for whether their actions are unlawful—may be assessed penalties that can include double damages. More detailed information concerning damages and the procedural aspects of ADEA appear in Tab 431.

**Posting and Recordkeeping Requirements** - Employers are required to post in "conspicuous places" in the workplace EEOC notices of workers' rights under the ADEA (see the Consolidated EEO Poster, 441:153). In addition, employers are required to maintain personnel and payroll records and to make them available for EEOC inspection.

**State Laws** - In addition to the federal law, most states have enacted their own age discrimination laws. A chart outlining state age bias provisions appears at 451:58.

To link to the summaries of state fair employment practice laws and regulations in any of the 50 states, Puerto Rico, Virgin Islands, or the District of Columbia, double-click on one of the following jurisdictions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming.

It must be noted that although the federal statute does not preempt state age bias laws it does provide a minimum standard by which state laws must abide. Thus, all people age 40 and older are protected, regardless of whether a state has removed its upper limit age cap. However, state laws can provide coverage for people younger than 40.

**ADEA COVERAGE**

**Who is Covered**

The ADEA covers private employers of 20 or more persons, state and local governments, employment agencies serving covered employers, and labor unions with 25 or more members.

**State Employers**

The U.S. Supreme Court decided in January 2000, however, that under the 11th Amendment Congress lacked the power to subject the states to lawsuits by private persons for monetary damages under the ADEA (*Kimel v. Florida Bd. of Regents*, [81 FEP Cases 970] 81 FEP Cases 970 (U.S. 2000)). Thus, state employees cannot sue their employers for age discrimination under the ADEA, although they probably have recourse under state FEP laws. Some of these state law protections, however, are not as comprehensive as the ADEA.

*Kimel* does not affect private lawsuits by local government employees, such as employees of school boards and municipalities (*Alden v. Maine*, [5 WH Cases 2d 609] 5 WH Cases 2d 609 (U.S. 1999)). Other types of lawsuits against state employers are also not affected. Moreover, state employees might be able to sue individual state officials acting in their individual capacities (*Hafer v. Melo*, [57
In 2002 the U.S. Supreme Court held that a federal rule tolling the statute of limitations in a state law age discrimination claim while a related claim is brought in federal court couldn't be applied to claims against a "non-consenting" state defendant. The court rejected a petition by two former state workers whose state age claims were dismissed by the state supreme court for failing to meet a filing deadline after their federal age claims had earlier been dismissed on 11th Amendment grounds. The state supreme court held that the federal rule (28 U.S.C. §1367(d), part of the federal supplemental jurisdiction statute) that would have suspended the state filing deadline while the federal case was proceeding was unconstitutional when applied to state defendants. Although affirming the state supreme court's dismissal of the workers' claims, the U.S. Supreme Court declined to adopt the state court's finding that the rule is unconstitutional. The rule "may not clearly exclude" such claims, the court said, but the "lack of clarity" in its language argued against its application in these cases. The court also declined to address the application or constitutionality of the rule when a state has consented to the lawsuit or in cases involving private defendants (Raygor v. Regents of Univ. of Minn., [88 FEP Cases 6] 88 FEP Cases 6 (U.S. 2002)).

**Employment Agencies, Unions, Indian Tribes**

Employment agencies are prohibited either from refusing to refer individuals for employment because of age or from classifying or referring persons for employment on the basis of age.

Unions also are prohibited from discriminating on the basis of age in employment practices.

The ADEA is not applicable to Indian tribes, because it would interfere with their treaty-protected right of self-government.

**What Is Prohibited**

Under the ADEA, employers are forbidden to:

- Fail or refuse to hire, to discharge, or otherwise discriminate against any person with respect to compensation, terms, conditions, or privileges of employment because of such person's age;
- Limit, segregate, or classify an employee in any way that would deprive the employee of job opportunities or adversely affect employment status because of age;
- Reduce the wage rate of an employee in order to comply with the act;
- Indicate any "preference, limitation, specification, or discrimination" based on age in any notices or advertisements for employment; and
- Operate a seniority system or employee benefit plan that requires or permits involuntary retirement.

**GENERAL OBSERVATIONS**

The ADEA prohibits covered employers from discriminating on the basis of age in all aspects of
employment, though it may be difficult to pinpoint what constitutes "age discrimination."

For example, refusing to hire a job applicant because he was "overqualified" was deemed a euphemism for age bias by one appeals court (Taggart v. Time, [54 FEP Cases 1628] 54 FEP Cases 1628 (2d Cir. 1991)). Many employees with far more work experience than is necessary for a job find themselves later in life in need of jobs in a situation where the loss of employment can be economically and emotionally devastating, the court pointed out.

Another court, however, held that the rejection of an applicant with more than 30 years of experience on the ground of "over-qualification" did not violate the ADEA. This court found that an insurance company's explanation-that it believed that the applicant, who had applied for a position as a loss-control representative, would delve too deeply into accounts, become too involved in uncomplicated risks, and impose on insured’s time to an inappropriate degree-was not a pretext for age discrimination (EEOC v. Insurance Co. of N. Am., [67 FEP Cases 411] 67 FEP Cases 411 (9th Cir. 1995)).

An employer's pay system that linked salary to years of work experience and that resulted in the rejection of older applicants whose many years of work experience qualified them for higher salaries than the employer could afford to pay was "an economically defensible and reasonable means of determining salaries" and does not violate the ADEA, according to another appeals court decision that came after the U.S. Supreme Court's Hazen Paper Co. ruling discussed below (EEOC v. Francis W. Parker Sch., [66 FEP Cases 85] 66 FEP Cases 85 (7th Cir. 1994), cert. denied, [68 FEP Cases 64] 68 FEP Cases 64 (U.S. 1995)).

The U.S. Supreme Court has distinguished one factor that is correlated with age-years of service-as being "analytically distinct" from age. An employer's interference with the vesting of an employee's pension benefits, under a plan that bases vesting on years of service and not on age, does not per se violate the ADEA, the Supreme Court ruled. However, the court acknowledged that in some cases "pension status may be a proxy for age" (Hazen Paper Co. v. Biggins, [61 FEP Cases 793] 61 FEP Cases 793 (U.S. 1993)).

The law protects all workers age 40 and older, including those of average or below average ability, from being treated more harshly than they would have been if they were younger (Neufeld v. Searly Labs, [50 FEP Cases 1126] 50 FEP Cases 1126 (8th Cir. 1989)). In other words, the law protects imperfect older workers from being treated worse than imperfect younger ones (Shager v. Up john Co., [53 FEP Cases 1522] 53 FEP Cases 1522 (7th Cir. 1990)).

Discrimination sometimes occurs between older and younger workers within the age-40-and-over category. When bias occurs "within" the protected group, for example when employees in their 50s are discriminated against in favor of those in their 40s, the employees in the older group can prevail under the statute on a disparate treatment claim of age bias, at least one appeals court has held (Lowe v. Commack Union Sch. Dist., [50 FEP Cases 1400] 50 FEP Cases 1400 (2d Cir. 1989); see also, EEOC Interpretations of ADEA, [29 CFR 1625.2] 29 C.F.R. § 1625.2)). There is no disparate impact recognition of "subgroups," however, in the analysis of the impact that a hiring process has on those protected by the ADEA, the appeals court decided.

In its interpretations of the act, the EEOC states that extending additional benefits, such as increased severance pay, to classes of older employees within the protected group may be lawful if the employer has a reasonable basis to conclude that those benefits will counteract problems related to age

An employer's policy of granting enhanced severance benefits to all terminated employees who sign releases of all their claims does not violate the ADEA under either a disparate treatment or a disparate impact theory, the U.S. Court of Appeals for the Third Circuit ruled, rejecting the argument that the failure to additionally compensate workers age 40 and older for their "accrued" ADEA claims was unlawful (DiBiase v. Smith Kline Beecham Corp., [67 FEP Cases 58] 67 FEP Cases 58 (3d Cir. 1995)).

Generally, the ADEA is considered the exclusive remedy for age discrimination under federal law. Thus, a police officer's age bias claim under the Constitution's Equal Protection Clause was barred by the ADEA (Zombo v. Baltimore City Police Dept., [49 FEP Cases 297] 49 FEP Cases 297 (4th Cir. 1989), cert. denied, [50 FEP Cases 1496] 50 FEP Cases 1496 (U.S. 1989)).

Guidelines: Help-Wanted Notices

Help-wanted notices or advertisements that contain terms that deter the employment of older persons are prohibited under the ADEA ([29 USC 623(e)] 29 U.S.C. § 623(e)). Examples of such terms or phrases include "age 25 to 35," "young," "college student," "recent college graduate," "boy," or "girl." Other phrases such as "40 to 50," "age over 65," "retired person," or "supplement your pension" discriminate against others in the protected age group (40 or older) and are therefore impermissible too.

Asking a respondent to an advertisement to "state age" does not, by itself, violate the law. But, the EEOC says, since such a request may deter older persons from applying, an advertisement including that phrase or a similar one will be "closely scrutinized" to determine if its purpose is lawful (EEOC's Interpretations of ADEA, [29 CFR 1625.4] 29 C.F.R. § 1625.4 (403:1369); see also, EEOC Policy Guide on Job Advertising and Pre-Employment Inquiries Under ADEA (405:4027)).

Guidelines: Employment Applications

Asking for date of birth or age on a job application form does not, by itself, violate the ADEA. But as with help-wanted ads, such a request could deter older persons from applying; therefore, it will be scrutinized to ensure a lawful purpose. The EEOC's Interpretations of ADEA instruct an employer to make clear on the application that the purpose for requesting the information is not prohibited under the law. For example, the application could state, "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to people who are at least 40 years of age" or some similar phrase indicating that age information will not be used unlawfully.

The EEOC notes that the term "employment applications" refers to all written inquiries concerning a job or promotion, including resumes, pre-employment inquiries, and inquiries by employees concerning terms, conditions, or privileges of employment ([29 CFR 1625.5] 29 CFR 1625.5, 403:1369).

EXEMPTIONS

The ADEA provides limited and specified exemptions for bona fide benefit plans and certain highly compensated policymaking executives. An exemption for bona fide apprenticeship programs was
removed by the EEOC from its regulations effective May 8, 1996. Exemptions applicable to firefighters, law enforcement officers, and tenured employees at institutions of higher learning expired Dec. 31, 1993; however, the firefighter and law enforcement officer exemption was reenacted retroactive to Dec. 31, 1993. An exemption applicable to persons elected to public office and those chosen by such elected officials to serve on their personal staffs was limited by a portion of the Civil Rights Act of 1991 known as the Government Employee Rights Act. In addition, courts have determined that the ADEA's ban on discrimination in "military departments" does not include uniformed military personnel, that the free exercise clause of the U.S. Constitution bars the application of the ADEA to certain religious leaders, and that the ADEA is not applicable to Indian tribes.

**Bona Fide Benefit Plan Exemption**

Bona fide employee benefit plans may contain provisions that differentiate among workers according to age when for each benefit "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker" and as long as the plans are not "intended to evade the purposes of ADEA." Such plans may not require or permit the involuntary retirement of any employee because of age, and employers have the burden of proving that such plans are lawful ([29 USC 623(f)] 29 USC 623(f)).

The provisions on benefit plans were added to the ADEA by the Older Workers Benefit Protection Act, the congressional response to *Public Employees Retirement System of Ohio v. Betts* ([50 FEP Cases 104] 50 FEP Cases 104 (U.S. 1989)). The Supreme Court ruled in *Betts* that bona fide benefit plans were exempt from the purview of the ADEA as long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship. The court also held that the term subterfuge, which was used in the ADEA at that time, should be given its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." Therefore, a plan adopted before the enactment of the ADEA could not be a "subterfuge" to evade the purposes of the statute.

The OWBPA removed the word subterfuge from the ADEA and added a provision making it clear that benefit plans predating the ADEA could nevertheless violate the law. Most significantly, the act extended the ADEA's prohibition against age bias to employee benefit plans with a few narrow exceptions, chief among which is the equal cost or equal benefit provision.

**Public Safety Personnel Exemption**

An exemption allowing agencies to refuse to hire or to force the retirement of firefighters and law enforcement officers based on ages specified in state or local laws that were in effect on March 3, 1983, and pursuant to bona fide hiring or retirement plans that are not subterfuges to evade the purposes of the ADEA expired Dec. 31, 1993. The exemption was reenacted, however, retroactive to Dec. 31,1993, by the Age Discrimination in Employment Amendments of 1996 (incorporated into the Omnibus Consolidated Appropriations Act of 1997, [PL 104-208] P.L. 104-208).

The 1996 amendments also modified and enlarged the exemption pertaining to firefighters and law enforcement officers to include laws enacted by state and local governments after Sept. 30, 1996, the effective date of the Age Discrimination in Employment Amendments of 1996. State or local laws enacted after Sept. 30, 1996, however, may not compel the retirement of people before they reach age 55 ([29 USC 6230]) Sec. 6230).
The 1996 amendments also require the secretary of Health and Human Services, through the director of the National Institute for Occupational Safety and Health, to conduct a study of and issue advisory guidelines for tests to assess the physical and mental fitness of people to perform firefighter and law enforcement officer jobs. After the advisory guidelines are issued, the secretary must issue regulations identifying valid, nondiscriminatory job performance tests that will be used by employers seeking the exemption. Effective the date of the issuance of the regulations, any employer seeking the exemption shall provide to each firefighter or law enforcement officer who has attained retirement age, the opportunity to demonstrate his or her fitness to continue employment.

**Executive, Policymaker Exemption**

The ADEA provides that employees may be compelled to retire at age 65 if they are employed in "bona fide executive" or "high policy-making" positions. Courts have differed, however, in their definitions of the terms.

**Example:** A community college president was a policymaker and therefore not entitled to protection under the ADEA, the U.S. Court of Appeals for the Sixth Circuit ruled. The court held that the president met the policymaker exemption even though the college's board of trustees retains decision-making powers over many aspects of the school's administration.

Although acknowledging that there are some decisions that "the president cannot or would not choose to make alone," the court concluded that this fact "does not diminish the very significant policy-making power that he possesses" (**EEOC v. Board of Trustees of Wayne County Cmty. Hosp.**, [33 FEP Cases 911] 33 FEP Cases 911 (6th Cir. 1983)).

**Example:** A corporation's chief labor lawyer was not a bona fide executive or a chief policymaker, the U.S. Court of Appeals for the Second Circuit ruled. Rejecting the argument that the lawyer's higher salary and title automatically removed him from coverage under the ADEA, the court said that the test "is one of function, not of pay."

Concluding that the lawyer was illegally forced to retire at age 65, the court pointed out that the lawyer had minimal supervisory responsibilities and played only a minor role in policy formulation (**Whittlesey v. Union Carbide Corp.**, [35 FEP Cases 1089] 35 FEP Cases 1089 (2d Cir. 1984)).

**Tenured Faculty Exemption**

The compulsory retirement of tenured faculty members who have reached age 70 was permitted until Dec. 31, 1993 ([29 USC 631 (d)] 29 U.S.C. § 631(d). The National Academy of Sciences conducted a study at the EEOC's request to analyze the potential consequences of the elimination of mandatory retirement on institutions of higher education. The study concluded that the exemption for tenured faculty members should be allowed to expire.

**Public Appointee Exemption**

The exemption from coverage for persons elected to public office, persons chosen by elected officials to be on their personal staffs, and appointees on the policymaking level or immediate advisors with respect to the exercise of the constitutional or legal powers of the office (not applicable to
employees covered by state civil service laws at [29 USC 630(f)] 29 U.S.C. § 630(f) was limited by the Government Employee Rights Act, part of the Civil Rights Act of 1991.

Some 36 states and the District of Columbia have interpreted this exemption to include state court judges and consequently have adopted laws requiring these judges to retire at specified ages. The U.S. Supreme Court has upheld these laws, ruling that they violate neither the ADEA nor the 14th Amendment's equal protection clause (Gregory v. Ashcroft, [56 FEP Cases 10] 56 FEP Cases 10 (U.S. 1991)).

Gregory involved a Missouri law requiring judges to retire at age 70. "In the context of a statute that plainly excludes most important state public officials, 'appointee on the policy-making level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges," the court held.

However, the exemption applies only to those workers directly appointed by elected officials, according to the U.S. Court of Appeals for the Second Circuit. Thus, a former deputy county attorney whose appointment was approved by an elected official but who was actually appointed by another appointed official was permitted to proceed with his age bias suit. Regardless of whether the attorney was a policymaker, the court ruled, the final approval of his appointment by an elected official was not enough to make the position fit within the exemption (Tranello v. Frey, [58 FEP Cases 1334] 58 FEP Cases 1334 (2d Cir. 1992)).

The Government Employee Rights Act prohibits age discrimination in employment against presidential employees and employees of elected state or local officials. The Congressional Accountability Act of 1995 made the ADEA applicable to all employees of the House and the Senate and to a number of other congressional offices, beginning January 23, 1996.

Apprenticeship Program Exemption

Until 1996, the EEOC interpreted the ADEA as providing that age limitations for entry into bona fide apprenticeship programs were not intended to be affected by the ADEA (EEOC Interpretations of ADEA, [29 CFR 1625.13] 29 CFR 1625.13)).

In August 1995, in a draft notice of proposed rulemaking circulated to other federal agencies, the EEOC indicated that it was considering rescinding the apprenticeship program exemption in light of changes in the American workforce, including the increase in the older worker population. In the April 8, 1996, Federal Register, the EEOC reversed its former position. Effective May 8, 1996, the EEOC removed Section 1625.13 from its Interpretations of the ADEA (see 403:1369) and issued a new substantive regulation, Section 1625.21, which provides that all apprenticeship programs, including those maintained by joint labor-management organizations, are subject to the prohibitions of the ADEA unless specifically exempted under procedures adopted by the EEOC at [29 CFR 1627.15] 29 CFR 1627.15 under [29 USC 628] 29 U.S.C. § 628 or unless specifically excepted under [29 USC 623(f)(1)] 29 U.S.C. § 623(f)(1).

Military Exemption

The ADEA covers federal agencies, including "military departments," but this does not encompass uniformed personnel of the armed forces, the U.S. Court of Appeals for the Seventh Circuit
held. Thus, a challenge to the age-42 cutoff for enlistment in the Naval Reserves was barred (Kawitt v. United States, [50 FEP Cases 3] 50 FEP Cases 3 (7th Cir. 1988)).

**Indian Tribe Exemption**

The ADEA is not applicable to Indian tribes because enforcement would interfere with the tribes' treaty-protected right of self-government (EEOC v. Cherokee Nation, [49 FEP Cases 1074] 49 FEP Cases 1074 (10th Cir. 1989)).

**Religious Leader Exemption**

The free exercise clause of the U.S. Constitution prohibited a minister's ADEA action against a church that he alleged denied him an appointment due to his age, because the determination of who speaks for the church is per se a religious matter over which the lay courts have no jurisdiction, the U.S. Court of Appeals for the District of Columbia said (Minker v. Baltimore Conference, [51 FEP Cases 1372] 51 FEP Cases 1372 (D.C. Cir. 1990)).

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**BONA FIDE OCCUPATIONAL QUALIFICATION**

The ADEA provides an exception when age can be shown to be a bona fide occupational qualification (see EEOC's Policy Guide on ADEA's Bona Fide Occupational Qualifications Exemption, 405:6777). The majority of cases on the subject have involved public safety personnel, of which the following are a sample:

**No BFOQ Found**

**Example:** A city cannot force its firefighters to take mandatory retirement at age 55 and assert authorization for its policy in the federal government's rule requiring retirement for federal firefighters at age 55, declared the U.S. Supreme Court, striking down Baltimore's retirement policy for firefighters. The deviations from the ADEA that Congress reserved for certain federal workers-such as firefighters-were never based on bona fide occupational qualifications for those jobs, the court said. Rather, these exceptions were based on specific problems of federal workers in those categories, not on occupational qualifications (Johnson v. Mayor and City Council of Baltimore, [37 FEP Cases 1840] 37 FEP Cases 1840 (U.S. 1985)).

**Example:** A mandatory retirement age of 65 for uniformed fire department employees violates the ADEA when applied to the job of district fire chief, the U.S. Court of Appeals for the Eighth Circuit ruled. The age requirement could be a proper BFOQ for other departmental jobs, the court said, but it did not meet the BFOQ requirements when applied to the district chief’s job. Noting that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age," the court pointed out that the plain meaning of the phrase "bona fide occupational qualification" indicates that age can be considered relevant in an occupation within the particular business. It would be inconsistent with the purpose of the ADEA, the court concluded, "to allow a city to retire a fire chief or police chief who was completely able to fulfill his duties because he was unable to fulfill the duties of another position within the department, such as fire captain or patrolman" (EEOC v. St. Paul, [28 FEP Cases 312] 28 FEP Cases 312 (8th Cir. 1982)).

**Example:** A city fire department that forced its assistant fire chief to retire at age 55 violated the ADEA, the U.S. Court of Appeals for the Seventh Circuit ruled. The court also found that because the
city "knew or should have known" that its actions were illegal a federal magistrate's award of double damages to the employee should be upheld.

Rejecting the city's contention that the age limit was a BFOQ, the court stressed that the city had presented no medical or scientific testimony to support its argument that medical reasons justified the age-55 cutoff. The court noted that to prove the validity of the age-55 limit the city would have to demonstrate that either all or most persons older than 55 would be unable to safely and effectively perform firefighting duties or that at least some employees older than 55 possessed a disqualifying trait that could not be ascertained on a case-by-case basis, thus justifying the automatic blanket exclusion (Orzel v. Wauwatosa, Wis., Fire Dep't, [30 FEP Cases 1070] 30 FEP Cases 1070 (7th Cir. 1982), cert. denied, [33 FEP Cases 440] 33 FEP Cases 440 (U.S. 1983)).

Example: Age cannot be considered a BFOQ for Pennsylvania state troopers when the state failed to require its younger officers to meet minimum levels of physical fitness, the U.S. Court of Appeals for the Third Circuit ruled, striking down the state's age-60 mandatory retirement rule. Since the state had not developed minimum physical fitness standards for troopers at all age levels, it could not "justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs" reasonably necessary to carry on state police business (EEOC v. Pennsylvania, [44 FEP Cases 1470] 44 FEP Cases 1470 (3d Cir. 1987)).

Example: A private school that discharged a 65-year-old bus driver, arguing that age was a BFOQ, failed to prove any factual basis for believing that all or substantially all persons older than 65 would be unable to perform job duties safely and efficiently or that it was impossible or highly impractical to deal with older employees on an individualized basis, the U.S. Court of Appeals for the Eleventh Circuit held (Tullis v. Lear, [50 FEP Cases 1] 50 FEP Cases 1 (11th Cir. 1989)).

Valid BFOQ Found

Example: Missouri's mandatory retirement age for patrolmen and maximum hiring age for patrolmen and radio operators did not violate the ADEA, the U.S. Court of Appeals for the Eighth Circuit ruled. Stressing that some deference is owed to the state legislature's judgment that the age restrictions are in the best interests of the patrol and the people it serves, the court said the mandatory retirement policy is justified in view of the "physically and emotionally strenuous activities" performed by the officers. In addition, the court said, the mandatory retirement age can also be upheld because of Congress's authorization of a general mandatory retirement age for federal law enforcement personnel. Pointing out that Congress acted out of concern for the youth and vigor of its personnel, the court said that "it is no less valid for the State of Missouri to be concerned with the youth and vigor" of its personnel (EEOG v. Missouri Highway Patrol, [36 FEP Cases 401] 36 FEP Cases 401 (8th Cir.1984)).

Example: An upper age limit of 45 for new campus police officers was a bona fide occupational qualification and thus did not violate the ADEA, the U.S. Court of Appeals for the Fifth Circuit ruled. The court agreed with the university's contention that the age limit was justified because "older individuals lack the acute physical and mental agility and stamina required to serve effectively as rookie campus officers" and that "younger officers are more qualified because they relate' better to college-age students" (EEOG v. University of Tex. Health Science Ctr. at San Antonio, [32 FEP Cases 944] 32 FEP Cases 944 (5th Cir. 1983)).
Example: A Massachusetts law requiring the retirement of uniformed state police officers at age 50 does not violate the ADEA, the U.S. Court of Appeals for the First Circuit decided. The court reversed a district court ruling that the complainant's particular job - as a telecommunications officer - did not make him a likely candidate for strenuous duty and thus, age-50 retirement was not a BFOQ as applied to him. The appeals court said that its reading of the words "occupational qualification" finds it to mean "more of a recognized and discrete vocation" rather than a certain assignment within the occupation. The court noted that when an individual "signs up in a paramilitary uniformed force, where one is subject to generally unrestricted reassignment and performance of the most strenuous duties in any emergency," it would be difficult "to equate particular 'assignments,' even if of long duration, to 'occupations'" (Mahoney v. Trabucco, [35 FEP Cases 97] 35 FEP Cases 97 (1st Cir. 1984), cert. denied, [36 FEP Cases 464] 36 FEP Cases 464 (U.S. 1984)).

Example: Mandatory retirement at age 55 for New Jersey state police is valid as a bona fide occupational qualification under the ADEA, a federal district court ruled, citing the risk of heart attack in people older than 55. The court said that the mandatory retirement policy was "reasonably necessary" to the performance of the duties of the state police. "An individual aged 55-64 is 80 times more likely to die of heart disease" than is a person aged 25 to 34, the court stressed, adding that the health risk "is directly associated with the arduous function for which all members of a paramilitary organization such as the New Jersey State Police are required to be ready" (EEOG v. New Jersey, [40 FEP Cases 1219] 40 FEP Cases 1219 (D.N.J. 1986), aff'd., [43 FEP Cases 653] 43 FEP Cases 653 (3d Cir. 1987)).

BFOQ for Airline Personnel

Several courts, including the U.S. Supreme Court, have ruled on the question of whether age should be considered a BFOQ for airline flight crew personnel.

Example: Trans World Airlines violated the ADEA when it refused to allow 60-year-old captains to "bump" into flight engineer positions, the U.S. Supreme Court held. The court said that the ADEA does not require TWA to "grant transfer privileges to disqualified captains." However, the court declared, if the airline does grant some disqualified captains the privilege of bumping less senior flight engineers, it may not deny this opportunity to others because of their age (Trans World Air Lines v. Thurston, [36 FEP Cases 977] 36 FEP Cases 977 (U.S. 1985)).

Example: An airline policy that required mandatory retirement at age 60 for flight engineers was struck down by the U.S. Supreme Court. Rejecting the argument made by the airline that "deference" should have been given to its selection of flight engineer qualifications because they are "reasonable in light of the safety risks," the court declared that it was "Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law." Pointing out that "the process of psychological and physical degeneration caused by aging varies with each individual," the court held that an employer's restrictive job qualifications had to be more than "convenient" or "reasonable"; they had to be "reasonably necessary to the particular business" (Western AirLines v. Criswell, [37 FEP Cases 1829] 37 FEP Cases 1829 (U.S. 1985)).

Example: An airline's rule barring anyone over 35 from consideration for a flight officer's job was not based on a bona fide occupational qualification, said the U.S. Court of Appeals, for the Fourth Circuit. The court rejected the company's claim that the rule was based on safety considerations because the hiring of older pilots would have impeded its crew operations and raised the risks of medical
emergencies during flights. To justify a refusal to hire under the BFOQ exception, the court said, the employer must show that the BFOQ is reasonably necessary to the essential operation of its business and that there is reason to believe that substantially all persons over the age limit would be unable to perform the job or that it would be impractical to deal with persons over the age limit individually. The employer did not provide sufficient evidence to prove that employing flight officers older than 35 would violate air safety standards, the court found, pointing out that the airline's physical examination program could effectively detect potentially disabling medical conditions (Smallwood v. United Air Lines, [26 FEP Cases 1655] 26 FEP Cases 1655 (4th Cir. 1981), cert. denied, [28 FEP Cases 1656] 28 FEP Cases 1656 (U.S. 1982)).

Example: American Airlines' policy against hiring anyone older than 40 for a flight officer position was upheld by the U.S. Court of Appeals for the District of Columbia, which decided that the limit was based on valid safety considerations and was "reasonably necessary to the normal operations" of the airline. The court accepted the airline's contention that the safest captain "will be experienced [and have had] as much of that experience as possible" with American and stressed that an airline must be accorded "great leeway and discretion" in determining safe operating procedures (Murnane v. American Airlines, [26 FEP Cases 1537] 26 FEP Cases 1537 (D.C. Cir. 1981), cert. denied, [28 FEP Cases 712] 28 FEP Cases 712 (U.S. 1982)).

UNLAWFUL DISCHARGES

Employees age 40 and older are protected by the ADEA from adverse personnel actions based on age rather than performance. Moreover, an employer's cost-cutting motive is not, in itself, a justifiable reason for discharging or demoting an older worker.

Example: A discharged employee in the protected age group is entitled to recover under the ADEA if the worker's age made "a difference" in the employer's termination decision, the U.S. Court of Appeals for the Ninth Circuit decided, upholding a $2.3 million age discrimination jury award to three former department store executives in their fifties. In ADEA cases, the court said, there may be more than one factor in a decision to terminate an older worker, but the employer has violated the ADEA if age is a factor that made a difference in the employment decision (Cancellier v. Federated Dep't Stores, [28 FEP Cases 1151] 28 FEP Cases 1151 (9th Cir. 1982), cert. denied, [31 FEP Cases 704] 31 FEP Cases 704 (U.S. 1983)).

Example: Cost-cutting is not a "legitimate, non-discriminatory reason" for discharging an older employee while retaining younger, lower-paid employees, the U.S. Court of Appeals for the Seventh Circuit ruled. Although acknowledging that "employers must control costs if they are to remain competitive," the court rejected the idea that "an older employee can be fired and replaced by an equally proficient younger employee merely because the older employee happens to be earning more money at the moment." Such an action would "defeat the intent" of the ADEA, the court concluded, adding that "less burdensome measures" should be tried before "industrial capital punishment" is brought into play (Metz v. Transit Mix, [44 FEP Cases 1339] 44 FEP Cases 1339 (7th Cir. 1987)).

However, basing decisions during a reorganization and cutback in part on high salary is not necessarily age bias, the U.S. Court of Appeals for the Second Circuit ruled. There is nothing in the ADEA "that prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions" and concluding that a particular employee's salary is too high, the court said. High salary and age may be related, but as long as the employer's decision views each
employee individually, no general rule that disparately affects older workers is imposed, and decisions are based solely on financial considerations, the ADEA is not violated (Bay v. Times Mirror Magazines, [56 FEP Cases 407] 56 FEP Cases 407 (2d Cir. 1991)).

Example: An employer did not violate the ADEA when it discharged a 49-year-old manager whose responsibilities had been greatly diminished, rendering his salary economically unjustified. An employer is not required to continue an employee at a salary that is not commensurate with his responsibilities simply because he is older than 40, the court said (DiCola v. SwissRe Holding (N. Am.) Inc., [62 FEP Cases 124] 62 FEP Cases 124 (2d Cir. 1993)).

RIFS AND REORGANIZATIONS

Courts will not second-guess employers' business judgments in cases of reductions-in-force and reorganizations, even if employment actions adversely affect older employees, as long as the actions are carried out in a nondiscriminatory manner and the reasons for the actions are not pretexts for age discrimination.

Example: An employer that conducted a reduction-in-force among its supervisory staff did not violate the ADEA, the U.S. Court of Appeals for the Fourth Circuit ruled, finding that the employer "attempted to achieve its overall reduction-in-force objectives in a fair and legitimate way." Rejecting the claim that older workers were disproportionately selected for demotion, the court ruled that the employer presented legitimate business reasons, "grounded on qualifications and geographical considerations" for the demotions (EEOC v. Western Elec. Co., [32 FEP Cases 708] 32 FEP Cases 708 (4th Cir. 1983)).

Example: An employer's reduction-in-force explanation for terminating two older, higher-paid employees could have been a pretext for age discrimination, according to the U.S. Court of Appeals for the Seventh Circuit, finding that a jury verdict against the employer was justified, based on the following facts: One 47-year-old manager with consistently positive performance evaluations was replaced by a 29-year-old. When the other manager, who was 62, was terminated, his work was split up and taken over by two younger managers. In addition, the court said, since the employer knew or should have known that age bias is illegal, the jury was entitled to find that the discrimination was willful (Graefenhain v. Pabst Brewing Co., [44 FEP Cases 180] 44 FEP Cases 180 (7th Cir. 1987)).

Example: A supervisor's remark to a 61-year-old television station employee who was terminated during a RIF that the business had become "complex" and that employees were under "great pressure" created a "reasonable inference" that the older worker was terminated because of his age, said the U.S. Court of Appeals for the Seventh Circuit. The court ruled that the employee was entitled to a trial on his claim that the employer's reasons for firing him were pretextual, thereby violating the ADEA (Oxman v. WLS-TV, [46 FEP Cases 1392] 46 FEP Cases 1392 (7th Cir. 1988)).

Replacement Over Age 40

Age bias claimants need not show they were replaced by a worker younger than age 40-outside the class protected by the ADEA-to pursue their claims, the U.S. Supreme Court held, overturning a decision of the U.S. Court of Appeals for the Fourth Circuit ([67 FEP Cases 1859] 67 FEP Cases 1859 (1995)), which had affirmed the dismissal of the lawsuit of a regional general manager who was discharged at age 56 and replaced by a 40-year old. The ADEA prohibits discrimination on the basis of
age, not class membership, the court said, explaining that "there can be no greater inference of age discrimination when a 40-year-old is replaced by a 39-year-old than when a 56 year-old is replaced by a 40 year-old." The fact that a replacement is substantially younger is a far more reliable indicator of age discrimination than is the fact that the claimant was replaced by someone outside the protected class, the court concluded (O'Connor v. Consolidated Coin Caterers, [70 FEP Cases 486] 70 FEP Cases 486 (U.S. 1996); see also EEOC Enforcement Guidance on O'Connor, 405:7421)).

**LAYOFFS AND SEVERANCE PAY**

In paying severance benefits to employees when layoffs occur, employers must face the problem of how to handle employees who are eligible for pensions without violating the ADEA. Several courts have addressed this issue in evaluating the legality of companies' procedures for selecting employees for layoff.

**Example:** An employer that required pension-eligible employees to defer their pension benefits to participate in a severance pay plan offered as part of a reduction-in-force did not violate the ADEA, the U.S. Court of Appeals for the Fourth Circuit decided. Finding that the employer did not deprive older employees of a benefit or privilege available to younger workers, the court noted that "no older employees have lost their jobs or been deprived of any benefit of employment in a discriminatory manner under the program" (Britt v. E.I. DuPont de Nemours & Co., [38 FEP Cases 833} 38 FEP Cases 833 (4th Cir. 1985)).

**Example:** Severance plans that precluded or limited the opportunity for laid-off retirement-eligible employees to receive severance pay did not violate the ADEA, since the plans did not discriminate with respect to recall or transfer rights and did not require or permit involuntary retirement, the U.S. Court of Appeals for the Third Circuit ruled (EEOC v. Westinghouse Elec., [53 FEP Cases 502] 53 FEP Cases 502 (3d Cir. 1990); see also EEOC v. Westinghouse Elec., [55 FEP Cases 995] 55 FEP Cases 995 (3d Cir. 1991)).

**Example:** A severance pay policy that excluded workers eligible for retirement violated the ADEA, a federal district court ruled, finding that the policy had an adverse impact on workers aged 55 and older. Although the retirement benefits were of greater value than the severance pay, the court noted, the employer improperly substituted the retirement benefits to which the older workers were already entitled for the severance pay benefits granted because of a plant shutdown. Although the policy was neutral on its face, the court decided, it had a disparate impact on older workers because it subjected them to harsher treatment. Rejecting the employer's argument that the older workers did not suffer, because they were entitled to greater benefits than the severance pay, the court concluded that the employees had vested rights to the retirement pay and should not have been denied the benefit (EEOC v. Borden's, [30 FEP Cases 933] 30 FEP Cases 933 (D. Ariz 1982), aff'd., [33 FEP Cases 1708] 33 FEP Cases 1708 (9th Cir. 1984)).

**Example:** An employer violated the ADEA, a federal district court held, when, following a plant shutdown, it denied severance pay to employees older then 55 who were eligible for early retirement under the company pension plan. Stressing that the decision about whether to take early retirement with reduced pension payments is a peculiarly individual one that should be made by the employee free of coercion by the employer, the court observed that many employees-those who were older than 55 and eligible for early retirement under the pension plan-were "given no choice and thus deprived of this right." The court noted that although the employees could take the risk of waiting and defer their
pension benefits until they reached 65 they would be deprived of immediate income following the shutdown (*EEOC v. Great A&P Tea Co.*, [38 FEP Cases 827] 38 FEP Cases 827 (N.D. Ohio 1985)).

Example: An employer that denied lump-sum severance awards to pension-eligible employees when it closed its plant did not violate the ADEA, a federal district court decided. The court ruled that the company did not discriminate against older workers by complying with its union contract, which required that if the plant closed older employees would receive periodic pension payments rather than lump-sum awards. Observing the terms of a bona fide employee benefits plan protected the employer from ADEA liability, the court held. Moreover, the court agreed with the company that the older employees actually received greater overall benefits than the workers who received severance awards. The lump-sum severance awards were different from severance pay, the court said, in that they were a "minimum pension distribution to those employees not eligible for a pension." Since the company could not anticipate that its pension plan would "impact adversely on a protected age group," the court concluded, there was no ADEA violation (*EEOC v. Firestone I* [42 FEP Cases 1328] 42 FEP Cases 1328 (W.D. Tenn, 1987)).

**EARLY RETIREMENT INCENTIVES**

Voluntary early retirement incentive plans are permitted under the ADEA as long as they are consistent with the relevant purposes of the statute (see [29 USC 621 (b)] 29 U.S.C. § 621 (b)). The statute also accepts two specific types of early retirement programs that are not subject to these standards: subsidized early retirement and Social Security "bridge" payments ([29 USC 623(1)] 29 U.S.C. § 623(1)).

Valid early retirement programs do not have to be consistent with every purpose of the ADEA, only the relevant ones. The prohibition against arbitrary age bias is always relevant, however.

An employer that presents an early retirement program to employees in such a way that suggests that the employees will be discharged if they do not accept the offer risks violating the ADEA. To avoid this possibility, employers should be careful to present the offer in a non-coercive way.

Example: An employee who had a choice between early retirement with benefits or discharge without benefits was given nothing more than a discharge because he was not allowed to choose to keep working under lawful conditions, the U.S. Court of Appeals for the First Circuit determined. Since he had not voluntarily quit his job, the employee could proceed with a lawsuit for unlawful age bias, the court ruled (*Hebert v. Mohawk Rubber Co.*, [49 FEP Cases 1051] 49 FEP Cases 1051 (1st Cir. 1989)).

Furthermore, it has been held that employees who accept early retirement packages that include waivers of claims but who later file age bias suits do not have to return their severance benefits before proceeding to court. "Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress," the U.S. Court of Appeals for the Eleventh Circuit ruled (*Forbus v. Sears Roebuck and Co.*, [58 FEP Cases 1019] 58 FEP Cases 1019 (11th Cir. 1992), *cert. denied*, [60 FEP Cases 192] 60 FEP Cases 192 (U.S. 1992)). Other courts have reached the opposite conclusion, however (*see O'Shea v. Commercial Credit Corp.*, [55 FEP Cases 973] 55 FEP Cases 973 (4th Cir. 1991), *cert. denied*, [56 FEP Cases 1488] 56 FEP Cases 1488 (U.S. 1991), and *Grillet v. Sears Roebuck and Co.*, [55 FEP Cases 709] 55 FEP Cases 709 (5th Cir. 1991)).
The issue of whether an employee must return payments received under a waiver that does not comply with the requirements for releases of claims under the ADEA was resolved by the U.S. Supreme Court in early 1998 (see discussion of Oubre v. Energy Operations below).

**Early Retirement Incentives Upheld**

**Example:** An employer did not violate the ADEA when it gave a group of over-55 employees 15 days to decide whether to accept an early retirement offer, ruled the U. S. Court of Appeals for the Fifth Circuit. Rejecting the workers' claim that they were constructively discharged, the court pointed out that the employees who declined the offer kept their jobs. Although 15 days was not a "generous" deadline for deciding whether to retire, the court acknowledged, "a struggling business often has to take rapid and decisive action to stem losses" (Bodnar v. Synpol, [46 FEP Cases 1086] 46 FEP Cases 1086 (5th Cir. 1988)).

**Example:** An employer's offer of a benefit package to induce a group of older workers to accept early retirement did not violate the ADEA, the U.S. Court of Appeals for the Seventh Circuit decided. The employer gave two months' notice of a one-time-only special retirement benefits package for workers older than 55 who would accept early retirement. Rejecting a later claim by some of the workers that the retirement plan violated the ADEA, the court said that an early retirement incentive "is a benefit to the recipient, not a sign of discrimination" (Henn v. National Geographic Society, [43 FEP Cases 1620] 43 FEP Cases 1620 (7th Cir. 1987); cert. denied, [45 FEP Cases 520] 45 FEP Cases 520 (U.S. 1987)).

**Example:** An early retirement plan that pays equal monthly benefits to all qualified employees does not violate the ADEA even though younger retirees receive greater total benefits than older retirees under the plan, the U.S. Court of Appeals for the Seventh Circuit decided. Under the employer's "Rule of 75" plan, employees whose age plus total years of service equaled at least 75 were eligible to receive $600 a month in retirement pay until age 62. The plan, which selected employees on the basis of both age and years of service, showed a preference for older workers in determining which employees were eligible for benefits, the court said. The plan's different impact on younger and older workers did not make it illegal, the court ruled, observing that the payment of equal monthly benefits instead of equal total benefits served one of the ADEA's remedial purposes-providing financial support to unemployed workers and their dependent families (Dorsch v. L.B. Foster Co., [40 FEP Cases 201] 40 FEP Cases 201 (7th Cir. 1986)).

**Early Retirement Plans Found Discriminatory**

**Example:** A company cannot defend its policy of forcing some employees older than 55 to permanently retire while granting younger employees recall rights by saying that the practice was economically necessary to revive a "failing company," the U.S. Court of Appeals for the Sixth Circuit ruled. The company determined that a drastic reduction in its workforce was necessary for its survival and targeted about 50 employees older than 55 for a special early retirement plan "at corporate option." The employees who were forced to retire received the same benefits as those who opted for early retirement, but they were not provided the option of taking "layoff status" as were those employees under age 55. The court pointed out that forced retirements based on economic necessity are unlawful unless there is a real necessity for drastic cost reduction and the forced early retirements are the least detrimental, alternative means available to reduce costs (EEOC v. Chrysler Corp., [34 FEP Cases 1401]...
Example: An employer violated the ADEA by telling an older employee that because of unsatisfactory performance he could either take early retirement or be fired. The employee, who had previously chosen to not accept early retirement, was later offered a retirement package considerably less attractive than the plan he had rejected a few months earlier. Although the employer may have had some legitimate, nondiscriminatory reasons for the discharge, the U.S. Court of Appeals for the Eighth Circuit said, the jury was entitled to adopt the employee's "version of the case" and to find the employer's reasons for the termination pre-textual and its actions discriminatory (Washburn v. Kansas City Life Ins. Co., [45 FEP Cases 169] 45 FEP Cases 169 (8th Cir. 1987)).

WAIVERS OF ADEA RIGHTS

The majority of courts that have ruled on the issue of unsupervised waivers of ADEA rights have held that such waivers were enforceable as long as they were voluntary. The EEOC attempted to incorporate those rulings into its regulations, but Congress suspended the adoption of the proposal for fiscal years 1988 and 1989 and finally declared the rule unenforceable in the Older Workers Benefit Protection Act.

The OWBPA amendments to the ADEA provide that employees may waive rights and claims under the ADEA as long as the waiver is "knowing and voluntary" ([29 USC 626(f)] 29 U.S.C. § 626(f)). Knowing and voluntary requires that:

- The waiver be part of a written, clearly understood agreement between the employee and the employer;
- The waiver specifically refer to rights or claims arising under the ADEA;
- Rights and claims arising after the date of the waiver may not be waived;
- Rights and claims be waived only in exchange for consideration in addition to anything of value to which the employee is already entitled;
- Written advice to consult with an attorney be given;
- A period of 21 days be given for the employee to consider the agreement or, if a waiver is in connection with an exit incentive or other employment termination program offered to a group or class, at least 45 days be given to consider the agreement; and
- The waiver provide for at least 7 days during which the employee can revoke the agreement.

If a waiver is executed in connection with an exit incentive or other employment termination program offered to a group of employees, the employer must inform the employees in writing about the class/unit/group covered by the program, any eligibility factors for the program, and any applicable time limits. The employer must also make clear the job titles and ages of all people eligible or selected for the program and the ages of all people in the same job classification or organizational unit who are not eligible or selected for the program.
Waivers in settlement of EEOC charges must meet the same conditions as other waivers, and complainants must be given a reasonable time to consider the settlement agreement. In a dispute concerning the validity of a waiver, the burden is on the employer to prove that the waiver was knowing and voluntary. No waiver can affect the EEOC's rights and responsibilities to enforce the ADEA (see [29 USC 626(f)(4)] 29 U.S.C. § 626(f)(4) and EEOC Guidance on Waivers Under Civil Rights Laws, 405:7491).

Advisory committee on regulations - Using an advisory committee composed of representatives of employers, employees, older workers' organizations, and unions, among other groups, the EEOC, for the first time, used a negotiated rulemaking procedure to develop regulations governing waivers under the OWBPA's amendments to the ADEA. The advisory committee met several times in 1996 to help draft proposed regulations, and the EEOC's final regulation on waivers of ADEA rights and claims ([29 CFR 1625.22] 29 C.F.R. § 1625.22) became effective July 6, 1998.

Supreme Court Rejects Tender-Back Rule

Waivers that do not comply with the Older Workers Benefit Protection Act's amendments to the ADEA and the retention of payments made under such invalid waivers have no effect on ADEA claims, the U.S. Supreme Court decided. The split among the federal appeals courts about whether an employee's failure to return payments received in exchange for releasing ADEA claims in a manner that did not comply with the OWBPA's requirements constituted a ratification of the release and prevented the employee's lawsuit was resolved in favor of the employee in Oubre v. Energy Operations ([75 FEP Cases 1255] 75 FEP Cases 1255 (U.S. 1998)).

The case involved a scheduler at a power plant who, after getting a bad performance review, was offered a severance agreement that included a release of all claims against her employer. The release did not comply with the OWBPA's amendments to the ADEA for knowing-and-voluntary waivers of claims ([29 USC 626(f)(1)] 29 U.S.C. § 626(f)(1)). She was not given 45 days to consider the agreement or seven days to revoke it after signing, and the release did not specifically refer to the ADEA. She signed the release on the last day of the 14-day period she was given, after collecting $6,258 in severance pay throughout four months, and sued her employer, alleging constructive discharge under the ADEA. The employer argued that her failure to return the money constituted a ratification of the release. The district court ruled that a waiver that was defective under the ADEA could be ratified under contract law principles by retention of the benefits and dismissed her lawsuit without a trial. That ruling was affirmed by the U.S. Court of Appeals for the Fifth Circuit ([74 FEP Cases 416] 74 FEP Cases 416 (1996)).

The ADEA set up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law, the Supreme Court said, reversing the Fifth Circuit. The ADEA creates a series of prerequisites for knowing-and-voluntary waivers and imposes affirmative duties of disclosure and waiting periods, the court continued. The OWBPA's amendments to the ADEA govern the effect under federal law of waivers or releases on ADEA claims and incorporate no exceptions, the court pointed out, foreclosing the employer's defense based on general contract principles.

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The tender-back rule proposed by the employer would frustrate the "practical purpose" and "formal command" of the ADEA, the court reasoned, adding that in many instances a discharged employee will likely have spent the money and lack the means to return it. "These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions knowing it will be difficult to
repay the monies and relying on ratification," the court explained. Because neither the release, nor the retention of money under the release, conforms to the statute, they barred the employee's ADEA claims, the court concluded.

**EEOC Issues Tender-Back Rule**

The EEOC, having determined that it was important to include the prohibition against tender back in regulations on waivers under the ADEA, issued [29 CFR 1625.23] Section 1625.23, effective Jan. 10, 2001. In a fact sheet contemporaneously issued, the EEOC summarized the main points of its regulation:

- The contract principles of tender back and ratification do not apply to ADEA waivers. An older worker may retain severance or other benefits even if the worker challenges the validity of a waiver agreement under the ADEA ([29 CFR 1625.23(a)] §1625.23(a)).

- Employers cannot avoid the "no tender back" rule by using other means to limit an older worker's right to challenge a waiver agreement or by penalizing an older worker for challenging a waiver agreement. ADEA covenants not to sue-agreements in which a worker promises not to bring an ADEA lawsuit and to pay damages and attorneys' fees to the employer if the worker does-are the functional equivalents of waivers and are subject to the restrictions of the ADEA ([29 CFR 1625.23(b)] §1625.23(b)).

- Employers can recover money they paid for a waiver if the older worker successfully challenges the waiver, proves age discrimination, and obtains a monetary award. However, an employer's recovery may not exceed the amount it paid for the waiver in the first place or the amount of the award if it is less. For example, if an older worker received benefits valued at $15,000 in exchange for a waiver and obtained $10,000 in monetary benefits after proving age discrimination, the court could reduce the award by up to $10,000. If the older worker obtained $30,000 in monetary benefits from the lawsuit, the court could not reduce the award by more than $15,000, the amount received in exchange for the waiver ([29 CFR 1625.23(c)] §1625.23(c)).

- An employer may not, on its own, avoid the duties to which it agreed, even if the waiver is challenged. An employer is still obligated to make the retirement or other payments it agreed to provide to the older worker ([29 CFR 1625.23(d)] §1625.23(d)).

- Waivers that are valid under the ADEA serve as an affirmative defense to ADEA claims. The burden is on the employer to prove in court that the waiver is valid ( [29 USC 626(f)(3)] 29 U.S.C. §626(f)(3)). If the employer can prove the waiver's validity, the older worker's lawsuit will be dismissed.

**WILLFUL VIOLATIONS**

A violation of the ADEA is willful, according to the U.S. Supreme Court, when the employer either knows that its conduct is discriminatory or shows reckless disregard for whether its conduct is discriminatory (Trans World Airlines v. Thurston, [36 FEP Cases 977] 36 FEP Cases 977 (U.S. 1985)).

In Hazen Paper Co. v. Biggins ([61 FEP Cases 793] 61 FEP Cases 793 (U.S. 1993)), the U.S.
Supreme Court unanimously reaffirmed the foregoing standard, explaining that employers who knowingly rely on age in reaching employment decisions do not invariably commit a knowing or reckless violation of the ADEA. The act is not an unqualified prohibition on the use of age, the Supreme Court said, pointing to the BFOQ defense and various exemptions available under the act. "If an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed," the court explained.

Once a willful violation has been shown, an employee need not also demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was a predominant factor in the employment decision, the court also ruled in *Hazen Paper*.

Earlier decisions clarifying what constitutes a willful violation of the ADEA follow:

**Example**: An employer has acted willfully for purposes of being liable for double damages under the ADEA if it consciously and deliberately does what it knows or must know that the ADEA prohibits, the U.S. Court of Appeals for the Seventh Circuit ruled (*Brown v. M&M/Mars*, [50 FEP Cases 497] 50 FEP Cases 497 (7th Cir. 1989)).

**Example**: That an employer's action is willful if it deliberately, intentionally, on purpose, and knowingly violated the ADEA or if it showed reckless disregard for whether its conduct violated the law were proper instructions to give a jury, the U.S. Court of Appeals for the Second Circuit found (*Benjamin v. United Merchants*, [49 FEP Cases 1020] 49 FEP Cases 1020 (2d Cir. 1989)).

**Example**: In the case of a 58-year-old worker who was asked to resign by her supervisor, statements that the company needed "younger people that were more qualified" were sufficient to show willfulness, and the appeals court upheld a jury award of double damages (*Spanier v. Morrison's Mgmt. Services*, [44 FEP Cases 628] 44 FEP Cases 628 (11th Cir. 1987)).

**Example**: Firing a highly paid 65-year-old salesman and replacing him with a 34-year-old employee did not amount to employer willfulness, ruled the U.S. Court of Appeals for the Fourth Circuit. Although the employer knew it was "generally illegal" to discharge employees because of their age, the court said, the company had taken no "affirmative steps" to comply with the ADEA, such as consulting an attorney. Because of economic considerations surrounding the discharge, there was no basis for a finding of willful violation, the court concluded (*Gilliam v. Armtex*, [44 FEP Cases 113] 44 FEP Cases 113 (4th Cir. 1987)).

**Example**: Denying a promotion to a 51-year-old employee who was told by a company vice president that the company would be looking for a younger person for the job made a company liable for double damages for a willful violation of the ADEA, the U.S. Court of Appeals for the Eleventh Circuit decided. Double damages were appropriate, the court said, to "punish and deter violators" of the ADEA (*Lindsey v. American Cast Iron Pipe Co.*, [43 FEP Cases 143] 43 FEP Cases 143 (11th Cir. 1987)).

**Example**: A violation of the ADEA is willful if age is the "predominant" factor in the employment decision, rather than merely one of "possibly several determinative factors," said the U.S. Court of Appeals for the Tenth Circuit. Every intentional violation of the ADEA is not necessarily a willful violation, the court stressed; "something more" is required before an employer may be held liable for double damages (*Cooper v. Asplundh Tree Expert Co.*, [45 FEP Cases 1386] 45 FEP Cases 1386 (10th Cir. 1988)).
Age-based claims of a hostile work environment can be brought under the ADEA, the U.S. District Court for the Northern District of Illinois held in 2002 (Alexander v. CIT Tech. Fin. Services, No. 01 CV 7217 (N.D. Ill. Jan. 18, 2002)).

An employee described as more than 40 years old sued her company for, among other allegations, violating the ADAA. The company moved to dismiss the ADEA counts to the extent that they sought recovery for hostile-environment harassment based on age. Without any precedent from a higher court controlling the district court's decision, it turned to a ruling from the U.S. Court of Appeals for the Sixth Circuit for guidance.

In Crawford v. Medina General Hospital, 96 F.3d 830, [72 FEP Cases 1737] 72 FEP Cases 1737 (6th Cir. 1996), the Sixth Circuit noted the similarities between the ADEA and Title VII, including "[t]he broad application of the hostile-environment doctrine in the Title VII context" and "the general similarity of purpose" between the two statutes.

The district court agreed with the Sixth Circuit, noting that all the federal courts of appeal that have faced the issue have assumed or recognized without deciding that such claims are valid. Those courts are the First, Second, Fourth, Seventh, Ninth, and Eleventh circuits. In addition, all the district courts in Illinois, which is within the Seventh Circuit, have proceeded as if hostile-work environment claims are viable under the ADEA.

STATE LAWS

The ADEA does not preempt state age discrimination in employment laws and many states have enacted age bias statutes modeled after the ADEA ([29 CFR 1625.10(g)] 29 C.F.R. § 1625.10(g)). Most states have amended their laws to conform to the ADEA amendment that removed the age-70 cap on coverage. Provisions in those states that have not amended their laws are superseded by the ADEA's requirement. Some states have adopted broader age bias statutes than the ADEA, providing protection for all workers age 18 or older. For age bias coverage under state laws, see the chart at 451:58.

Even in the absence of state age discrimination legislation, older employees may be able to challenge age-related decisions under general principles of state law.

Example: The Vermont Supreme Court condemned discharges based solely on age in a case involving a car dealership that replaced its older employees with "young go-getters" to beef up declining sales. Although there was no legislative protection for the employees when they were fired-Vermont had not yet enacted its statute prohibiting age discrimination against workers 18 and older-the court nevertheless ruled that "the discharge of an employee solely on the basis of age is a practice so contrary to our society's concern for providing equity and justice that there is a clear and compelling policy against it" (Payne v. Rozendaal, [41 FEP Cases 1748] 41 FEP Cases 1748 (Vt. 1986)).