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(3) A matter published and specifically designated as such in the FEDERAL REGISTER.

(b) An opinion letter issued pursuant to paragraph (a)(1) or (a)(2) of this section, when issued to a specific addressee, has no effect upon circumstances beyond the situation of the specific addressee.

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

Subpart A—Interpretations

Sec.

Subpart B—Substantive Regulations

Subpart C—Administrative Exemptions

AUTHORITY: 29 U.S.C. 621–634; 5 U.S.C. 301; Pub. L. 99–502, 100 Stat. 3342; Secretary's Order No. 10–68; Secretary's Order No. 11–68; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807; Executive Order 12067, 43 FR 28967.

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

Subpart A—Interpretations

§ 1625.1 Definitions.

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

§ 1625.2 Discrimination prohibited by the Act.

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

[72 FR 36875, July 6, 2007]

§ 1625.3 Employment agency.

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

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

§ 1625.4 Help wanted notices or advertisements.

(a) Help wanted notices or advertisements may not contain terms and

phrases that limit or deter the employment of older individuals. Notices or advertisements that contain terms such as *age 25 to 35*, *young*, *college student*, *recent college graduate*, *boy*, *girl*, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as *over age 60*, *retirees*, or *supplement your pension*.

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

[72 FR 36875, July 6, 2007]

§ 1625.5 Employment applications.

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

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

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

§ 1625.6 Bona fide occupational qualifications.

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

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

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

§ 1625.7 Differentiations based on reasonable factors other than age.

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

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or

(e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

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

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

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

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

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

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

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

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

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

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

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

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

[46 FR 47726, Sept. 29, 1981, as amended at 77 FR 19095, Mar. 30, 2012]

§ 1625.8 Bona fide seniority systems.

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

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

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

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

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

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The ''bona fides'' of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

[53 FR 15673, May 3, 1988]

§ 1625.9 Prohibition of involuntary retirement.

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

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

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

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

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

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

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

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

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

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

amendment is effective on the termination of the agreement or January 1, 1990, whichever comes first.

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

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

§ 1625.10 Costs and benefits under employee benefit plans.

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

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

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

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

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

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

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

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

(b) *Bona fide employee benefit plan.* Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered ''bona fide'' if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An ''employee benefit plan'' is a plan, such as a retirement,

pension, or insurance plan, which provides employees with what are frequently referred to as ''fringe benefits.'' The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An ''employee-pay-all'' employee benefit plan is one of the ''terms, conditions, or privileges of employment'' with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the extent and according to the same principles as apply to other plans under section 4(f)(2).

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

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

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

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

(i) *Benefit-by-benefit basis.* Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance

coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See paragraph (f)(1) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) *Long-term disability.* Under a benefit-by-benefit approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost—based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Reductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. An employer

which provides long-term disability coverage to all employees may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

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

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

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

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

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

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

(iii) A benefit package approach shall not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach. Such benefits appear to be of particular importance to older workers in meeting ''problems arising from the impact of age'' and were of particular concern to Congress. Therefore, the ''benefit package'' approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. Any greater reduction would be a subterfuge to evade the purpose of the Act.

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

(v) Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified. Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their

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

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

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

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

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

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

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

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

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

The term *institution of higher education* means an educational institution in any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time, or (B) is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

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

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

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

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

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

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

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

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

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

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

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

or not they are continued in their duties at the institution.

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

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

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

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

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

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

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

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

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

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

(d)(1) In order for an employee to qualify as a ''bona fide executive,'' the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in § 541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of § 541.1 must be satisfied, regardless of the level of the employee's salary or compensation.

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

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

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

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

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

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

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

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

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

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

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

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, ''immediate'' means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question.

The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

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

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

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

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

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

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

Subpart B—Substantive Regulations

§ 1625.21 Apprenticeship programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623. Age limitations in apprenticeship programs are valid only if excepted under sec. 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), or exempted by the Commission under sec. 9 of the Act, 29 U.S.C. 628, in accordance with the procedures set forth in 29 CFR 1625.30.

[80 FR 60540, Oct. 7, 2015]

§ 1625.22 Waivers of rights and claims under the ADEA.

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

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

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

(4) The rules in this section apply to all waivers of ADEA rights and claims,

regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

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

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

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

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

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

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

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

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

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

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

(B) The question of the existence of a ''program'' will be decided based upon the facts and circumstances of each case. A ''program'' exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or

more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

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

(D) A ''program'' for purposes of the ADEA need not constitute an ''employee benefit plan'' for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

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

(E) All accountants.

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

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

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

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

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

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

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

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

(ii) Information regarding ages should be broken down according to

the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as ''age 20–30'') does not satisfy this requirement.

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

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

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

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

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

(A) The decisional unit is the Construction Division.

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

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

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

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

Job Title	Age	No. Selected	No. not selected
	Etc., for all ages		

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

> A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—
>
> (A) Subparagraphs (A) through (E) of paragraph (1) have been met; and
>
> (B) The individual is given a reasonable period of time within which to consider the settlement agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[63 FR 30628, June 5, 1998, as amended at 79 FR 13547, Mar. 11, 2014]

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

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

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

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

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

(d) No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

[65 FR 77446, Dec. 11, 2000]

Subpart C—Administrative Exemptions

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

§ 1625.30 Administrative exemptions; procedures.

(a) Section 9 of the Act provides that,

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

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

§ 1625.31 Special employment programs.

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

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

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

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

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

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

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

(b) *Exemption.* Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the Act, and in accordance with the procedures provided therein and in §1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

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

APPENDIX TO §1625.32—QUESTIONS AND ANSWERS REGARDING COORDINATION OF RETIREE HEALTH BENEFITS WITH MEDICARE AND STATE HEALTH BENEFITS

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

A1. The Commission recognizes that while employers are under no legal obligation to offer retiree health benefits, some employers choose to do so in order to maintain a competitive advantage in the marketplace—using these and other benefits to attract and retain the best talent available to work for their organizations. Further, retiree health benefits clearly benefit workers, allowing such individuals to acquire affordable health insurance coverage at a time when private health insurance coverage might otherwise

be cost prohibitive. The Commission believes that it is in the best interest of both employers and employees for the Commission to pursue a policy that permits employers to offer these benefits to the greatest extent possible.

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

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

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

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

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

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

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

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

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

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

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

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

[72 FR 72945, Dec. 26, 2007]

PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

Sec.

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

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