The Effect of the Age Discrimination in Employment Act Employee Benefit Plan Exception on Small Businesses

This comment focuses on the impact on small businesses of the 1978 amendment to the employee benefit plan exception of the Age Discrimination in Employment Act (ADEA). The comment discusses the guidelines issued by the Department of Labor and the EEOC, the interplay of ADEA with ERISA and the approach the courts may take in interpreting the ADEA exception. In addition, the comment makes suggestions for compliance regarding specific employee benefit plans.

INTRODUCTION

Compliance with government regulation has become an increasingly difficult problem for small businesses.\(^1\) Such regulation is extensive, confusing and often conflicting. The burden of government regulation, while a costly nuisance to a large business, is often an insurmountable obstacle to a small company.\(^2\) The federal Age Discrimination in Employment Act (ADEA or the Act)\(^3\) is one of the growing list of federal statutes which, though enacted with the best of intentions, hampers the ability

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\(^1\) In a survey conducted by the U.S. Chamber of Commerce a sampling composed of several thousand small businesses ranked government regulation as their most serious problem. Inflation, taxes, government paperwork, labor unions and federal deficit spending followed government regulation. U.S. News & World Report, Dec. 20, 1976, at 24. The Commission of Federal Paperwork estimates that it costs small business $15 billion a year to do the paperwork imposed by federal agencies. United States Small Business Administration, Annual Report 4 (1978)[hereinafter cited as Annual Report].


of small business to survive in the American economy. Congress passed the ADEA in 1967 to eliminate employment problems of older Americans. Congress articulated three purposes of the Act: to promote employment of older persons based on ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers solve problems arising from the impact of age on employment.

The Act protects persons between the ages of forty and seventy, who are employed by businesses with twenty or more employees, from arbitrary discrimination based on age. The De-
Department of Labor was originally charged with the Act's enforcement. However, on July 1, 1979, the President's Reorganization Plan transferred responsibility and authority for enforcement of the Act from the Department of Labor to the Equal Employment Opportunity Commission (EEOC).

The Act permits some differential treatment based on age. It allows age discrimination based upon a bona fide occupational qualification, where reasonable factors other than age justify differential treatment, or when the requirements of an em-

§ 631 (Supp. II 1978).

The Act takes on added significance as the average age of American workers increases with each passing year. By the year 2000, 50% of the work force will be 40 years or older. Drucker & Moore, Mandatory Retirement: Past, Present and Future of an Anachronism, 5 W. St. U. L. Rev. 1, 1 (Fall 1977). This increased average age is due both to a declining birth rate and a greater life expectancy among Americans. For a discussion of increased life expectancy, see C. Edelman & I. Siegler, Federal Age Discrimination in Employment Law: Slowing Down the Gold Watch 11 (1978).


12 The bona fide occupational qualification (BFOQ) exception permits an employer to discriminate on the basis of age where age is a bona fide occupational qualification reasonably necessary to the normal operation of the business. Id. § 623(f)(1). The language of this exception is similar to that found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). This exception is construed narrowly and the burden is on the employer, employment agency or labor organization to prove that age is a BFOQ. Examples of bona fide occupational qualifications include: commercial airline pilot age restrictions (29 C.F.R. § 860.102(d)(1979)), actors required for youthful roles and advertisements aimed at a specific group, 29 C.F.R. § 860.102(3)(1979). For a discussion of the BFOQ exception under the ADEA, see C. Edelman & I. Siegler, supra note 8, at 99-108.

13 Apparently, the exemption for reasonable factors other than age, 29 U.S.C. § 623(f)(1)(1976), was included to clarify that employers could continue to differentiate on other bases. The regulations repeat that it was not the intent of Congress to require employment regardless of age, but to ensure that differential treatment is not based on an arbitrary age limit. 29 C.F.R. § 860.103(c)(1979). These factors are considered on a case by case method. Lawful factors include: uniformly applied physical standards providing they are reasonably necessary for the work and educational standards. See C. Edelman & I. Siegler, supra note 8, at 108-16.
ployee benefit plan justify the differentiation.\textsuperscript{14}

The exception for employee benefit plans allows an employer to observe the terms of a bona fide employee benefit plan so long as the plan is not a subterfuge to evade the purposes of the Act.\textsuperscript{15} Absent this provision, employers would be required to

\textsuperscript{14} 29 U.S.C. § 623(f)(2) (1976). In addition, Congress made two exceptions to the prohibition of mandatory retirement prior to age 70. First, executives or those in high policy making positions entitled to retirement benefits of $27,000 or more per year may be required to retire at age 65. Second, until June 30, 1982, tenured professors or teachers may be required to retire at age 65. 29 U.S.C. § 631(c) (Supp. II 1978); 29 U.S.C. § 631(d)(Supp. II 1978).

\textsuperscript{15} 29 U.S.C. § 623(f)(2)(1976). When employers assert that they are following the terms of a bona fide employee benefit plan, the issue of whether that plan is a subterfuge to evade the purposes of the Act arises. The meaning of "subterfuge" remains unclear. Prior to the passage of the 1978 amendments, several cases dealing primarily with plans which allowed for mandatory retirement before age 65 discussed the term.

In United Air Lines v. McMann, 434 U.S. 192 (1977), the Supreme Court stated that a plan enacted in good faith prior to the Act's passage could not be a subterfuge. \textit{Id.} at 203. This decision was contrary to the lower court holding that an employee benefit plan established prior to the enactment of the ADEA could be deemed a subterfuge if it evades the purposes of the Act. McMann v. United Air Lines, 542 F.2d 217, 220 (4th Cir. 1976).

The Wage and Hour Division of the Department of Labor subsequently stated that in determining whether a plan is a subterfuge, it is irrelevant whether the plan or provision became effective before or after the original enactment of the ADEA or the 1978 amendments. Proposed Amendment of Sept. 22, 1978 to the Interpretive Bulletin of the Age Discrimination in Employment Act of 1978, 43 Fed. Reg. 43,262, 43,269 (1978). The Equal Employment Opportunity Commission reaffirmed this view in its recently proposed interpretations of the Act. 44 Fed. Reg. 68,858 (Nov. 30, 1979); see note 37 \textit{infra}.

One writer suggests that the subterfuge clause logically applies to any age based plans which draw an arbitrary age cut-off, \textit{i.e.}, plans or provisions which discriminate on the basis of age where such discrimination is not necessary to the economic viability of such plans. These plans arguably do not come within the exception since their arbitrariness makes them a subterfuge. \textit{See comment, Age Discrimination in Employment Act}, 50 N.Y.U. L. Rsv. 924, 949-51 (1975).

Although it is now clear that a plan drafted prior to passage of the ADEA can be deemed a subterfuge, the definition of the term is still questionable. This definition is critical in determining whether an employee benefit plan fits within the exception. Lower federal courts have given subterfuge several meanings: a plan is deemed a subterfuge if used to retire an employee without the payment of substantial benefits, Dunlop v. Hawaiian Tel. Co., 415 F. Supp. 330, 331 (D. Haw. 1976), \textit{aff'd}, 575 F.2d 763 (9th Cir. 1976); Zinger v. Blanchette, 549 F.2d 901, 909 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978); any plan which arbitrarily denies benefits because of age is a subterfuge, McMann v. United Air Lines, 542 F.2d 217, 220 (4th Cir. 1976), rev'd, 434 U.S. 192
provide the same benefits to all employees regardless of their age unless the employers based such restrictions on one of the other two exceptions. However, Congress recognized that the cost of providing certain benefits to older workers is significantly higher than the cost of providing those same benefits to younger employees. Thus, Congress enacted the employee benefit plan exception to allow employers to avoid the prohibitive costs of providing identical benefits to both younger and older employees where age is a significant factor in the increased expense.

In 1978 Congress amended the Act in several significant ways. One provision amended was the employee benefit plan exception. The amended provision makes it clear that an employer may not use a bona fide pension plan to retire an employee prior to age 70. However, the amendment does not clar-


17 See notes 11 - 13 and accompanying text supra.
19 In addition to raising the protected age to 70, 29 U.S.C. § 631 (Supp. II 1978), and outlawing mandatory retirement pursuant to a bona fide pension plan, Id. § 623(f)(2), the 1978 amendments made various procedural changes. Among these are changes in the procedure for bringing suit, Id. § 626(c)(1), and a right to jury trial. Id. § 626(c)(2).
20 Pub. L. No. 95-256, § 2(9), 92 Stat. 189 (codified at 29 U.S.C. § 623(f)(2)(Supp. II 1978)). Initially, it was unclear whether the exception allowed mandatory retirement of persons pursuant to the terms of a bona fide employee benefit plan. See Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978); McMann v. United Air Lines, 542 F. 2d 217 (4th Cir. 1976), rev'd, 434 U.S. 192 (1977); Brennan v. Taft Broadcasting, 500 F.2d 212 (5th Cir. 1974). The language of the exception allowed an employer, employment agency or labor organization to observe the terms of a bona fide employee benefit plan which was not a subterfuge to evade the purposes of the Act. The only express restriction was that an employer could not refuse to hire an individual based on the terms of such a plan.


ify which age related distinctions an employer may make regarding employee benefit plans. Another area of uncertainty is the relationship between the ADEA and the Employee Retirement Income Security Act (ERISA), 22 the other major statute in the employee benefit field.

Because of the confusion in this area, employers must choose among several unsatisfactory alternatives in deciding how to distribute benefits to older workers. Employers can provide identical benefits to all workers regardless of age, they can attempt on their own to decide which distinctions are permissible, or they can consult experts such as lawyers or personnel consultants. This is particularly troubling to the small employer who can afford neither the cost of consulting specialists23 nor the additional costs of providing identical benefits to all workers.24 Thus,


23 Generally small employers use outside consultants to do the administrative work on employee benefit plans. However, as the difficulty of such administration increases so do the fees of the consultants. While this increase has little effect on a plan with 10,000 participants it can be disastrous for smaller plans. See Weil, A Pension Consultant Recommendations to Amend ERISA with Special Emphasis for Small Plans, 4 J. PENS. PLAN. AND COMP. 99 (1978).

24 43 Fed. Reg. 43,264 (1978). An employer's costs for providing identical pension, retirement or insurance benefits for older workers would be significantly higher than that of providing those same benefits to younger workers since the employer's contribution is usually determined by actuarial figures. Age Discrimination in Employment: Hearings on H.R. 3651 before the Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 498 (1967) (statement by The American Life Convention, the Health Insurance Association of America and the Life Insurance Association of America). The costs of retirement, pension or insurance plans would become prohibitive if employers could not continue to observe their terms and conditions as established in accordance with sound actuarial formulas. As Senator Javits explained during passage of the original bill in 1967, the employee benefit plan exception is "particularly significant . . . since in its absence employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain benefits to them." S. Rep. No. 723, 90th Cong., 1st Sess. 113 CONG. REC. 31254 - 31255 (1967).
small employers are forced to guess what differential treatment is permissible, increasing the risk that they will violate the ADEA.

The purpose of this comment is to clarify the employee benefit plan exception and to help small employers determine permissible differential treatment based on age. The comment focuses on the interplay between the ADEA and ERISA and the methods small employers should use in determining permissible age-based reductions in employee benefits. In addition, the comment suggests reductions in the four most common benefit plans. Finally, the comment discusses the approaches the EEOC may take in enforcing the Act and the position a court may assume toward an asserted violation.

I. THE INTERPLAY BETWEEN ADEA AND ERISA

An employer does not approach the ADEA in a vacuum. Numerous and often conflicting government regulations affect the treatment of older workers. A small employer should give special consideration to the Employee Retirement Income Security Act and the tax implications involved when designing and maintaining employee benefit plans to comply with the ADEA.

Congress enacted ERISA in 1974 to protect the financial security of employees by insuring that expected retirement and welfare benefits would be available when needed. Almost all employee benefit and pension plans come within the penumbra of ERISA. The law mandates minimum vesting requirements, sets fiduciary standards for trustees of employee benefit plans, establishes rules for funding employee plans and provides plan termination insurance for employees participating in private

27 See notes 31 and 32 and accompanying text infra.
28 See Dunigan, ERISA Misfire - The Small Employer, 4 J. PENS. PLAN. AND COMP. 252 (1978). Benefits of private pension plans which have qualified for favorable tax treatment under the Internal Revenue Code are guaranteed by the Pension Benefit Guarantee Corporation established within the Department of Labor by Title IV of ERISA. See 29 U.S.C. §§ 1301-1381 (1976 & Supp. II 1978).
pension plans.\textsuperscript{30} The Internal Revenue Service and the Department of Labor have joint enforcement powers for ERISA.\textsuperscript{31} Furthermore, the IRS gives favorable tax treatment to plans which fulfill ERISA's requirements.\textsuperscript{32} For example, the income of a trust fund set up under a qualified employee benefit plan is exempt from federal income taxation.\textsuperscript{33} The Department of Labor has broad investigatory powers as well as the power to enjoin ERISA violations.\textsuperscript{34} Unfortunately, confusion regarding the meaning of ERISA and extensive reporting and disclosure requirements\textsuperscript{35} have forced many employers to abandon smaller plans.\textsuperscript{36}

An employer who continues to maintain a plan under ERISA must now ascertain whether the plan complies with ADEA. Additionally, an employer changing the plan to take advantage of the ADEA benefit plan exception must make sure such changes do not disqualify the plan under ERISA.

Immediately prior to transferring enforcement of ADEA to the EEOC, the Department of Labor issued a bulletin offering

\textsuperscript{30} Id. at 708-710
\textsuperscript{33} I.R.C. §§ 501(a), 501(c)(18).
\textsuperscript{34} 29 U.S.C. §§ 1132, 1134 (1975).
\textsuperscript{35} For a discussion of these requirements, see Murphy, Reporting & Disclosure Duties Under ERISA, 22 PRAC. LAW. 37 (July 1976).
\textsuperscript{36} There is some controversy over whether the ERISA requirements have caused the demise of numerous pension plans since 1974. One study indicates that the majority of plans fold for other reasons, while several other studies indicate that the excessive disclosure and reporting requirements of ERISA have caused the majority of the plans to fold. See Dunigan, supra note 28, at 252-58. Specialists urge that smaller plans must be treated differently than large plans to insure their continued existence and fulfill ERISA's purpose by protecting employees. Otherwise employees will be denied benefits which an employer would be willing to provide but for ERISA. Weil, supra note 23, at 100.
guidelines for compliance with ADEA. In that bulletin the Department rejected suggestions that ADEA use the same definition for employee benefit plans as that used in ERISA. The ADEA employee benefit plan exception applies solely to those plans in which age is an actuarially significant factor in plan design. On the other hand, the ERISA definition encompasses such plans as vacation benefits and prepaid legal services, the costs of which bear no relation to the age of the employee participant. The Labor Department felt that allowing differentiation based on age for these types of plans would clearly be the kind of arbitrary discrimination which the ADEA is intended to prohibit. The Department therefore eliminated the need to discuss plans in which age is not a significant factor by simply excluding them from its definition of employee benefit plans.

The setting of a “normal retirement age” is addressed under both ERISA and ADEA. Under the ADEA, pension plans may

37 44 Fed. Reg. 30,648 (1979) (to be codified in 29 C.F.R. § 860). The Wage and Hour Division of the Department of Labor published two bulletins which discuss the 1978 amendments to the ADEA. The first was a proposed amendment to the existing interpretive bulletin published September 22, 1978, 43 Fed. Reg. 43,264 (1978), which gave notice of a hearing in regard to the final interpretation and solicited comments as to the proposals. The second bulletin was the finalized version of the amendment to the Interpretive Bulletin published May 25, 1979. 44 Fed. Reg. 30,648 (1979).

On July 1, 1979 responsibility for enforcement of ADEA transferred from the Department of Labor to the Equal Employment Opportunity Commission, see note 10 supra, which indicated it would follow the interpretations and opinion letters of the Wage and Hour Division until it published interpretive guidelines of its own. 44 Fed. Reg. 37,974 (June 29, 1979). Recently the EEOC published proposed guidelines for interpreting ADEA, 44 Fed. Reg. 68,858 (November 30, 1979), however, it left the Department of Labor guidelines for employee benefit plans intact, incorporating them by reference. Id. at 68,862.


39 44 Fed. Reg. 30,649-50 (1979). There is a single limited exception to the requirement that age be a factor in plan design. This exception allows differential treatment for defined contribution and benefit plans though age is not actuarially significant. See Proposed Rules, 43 Fed. Reg. 43,265 (1978) and text accompanying notes 108-30 infra.

40 “The term employee benefit plan or plan means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” 29 U.S.C. § 1002(3)(1976).


contain a nonmandatory normal retirement age after which benefit accrual and employer contributions may cease. ERISA defines normal retirement age as the age set by the retirement plan; or if the plan does not designate a normal retirement age, then either age sixty-five or the tenth anniversary of participation in the plan, whichever is later. However, the Department of Labor's Interpretive Bulletin for the ADEA indicates that it will closely scrutinize any unusually low age since a low normal retirement age decreases the benefits to older workers. Therefore, if an employer has set an extremely low normal retirement age for the purposes of ERISA, that age should be raised to insure ADEA compliance.

The fact that ADEA allows differential treatment on the basis of age in areas where ERISA prohibits differentiation further complicates compliance with both ERISA and ADEA. The ADEA allows an employer to exclude older employees from certain benefit plans if cost can justify the exclusion. However, ERISA permits such an exclusion only when the hirer began employment not more than five years before the plan's "normal retirement age." The ADEA also allows employers to exclude employees hired after normal retirement age from participation in "defined contribution" pension plans. This exclusion appears contrary to the ERISA mandate prohibiting exclusion of employees from pension plan participation on the basis of age. Conversely, ERISA allows practices forbidden under ADEA such as discontinuance of benefit accruals for so-called "supplemen-

45 43 Fed. Reg. 43,267 (1978). This position is contrary to the one taken by the IRS in Rev. Rul. 78-120, 1978-1 C.B. 117, which permits great flexibility in setting normal retirement age (NRA) under a defined benefit pension plan. This difference in treatment of NRA is probably a reflection of the different objectives of tax laws and the ADEA. Since ADEA is aimed at full employment and equal treatment for older workers, it is reasonable that any unusually low NRA would be scrutinized closely.
47 See Seeberg, supra note 32, at 70.
48 See notes 110-12 and accompanying text infra. The Department of Labor recognized this confusion in its final bulletin. 44 Fed. Reg. 30,655 (1979). The Department stated that any specific determinations as to ERISA compliance must be made by the Internal Revenue Service.
tal" benefit plans.\textsuperscript{50} While a violation of ADEA will not disqualify a plan under ERISA,\textsuperscript{51} any changes to comply with ADEA may violate ERISA requirements.\textsuperscript{52} Therefore, any plans which are altered for purposes of ADEA should be submitted to the Secretary of Treasury for ERISA requalification.\textsuperscript{53}

A small employer who labors through the extensive reporting and disclosure materials to insure favorable tax treatment under ERISA should not jeopardize the plan's qualification by assuming that the requirements of both Acts coincide. Designing employee benefit plans necessitates concern for both ERISA and ADEA compliance. Employers should also take special care to insure that the benefit plan changes do not disqualify the plan under ERISA.

II. Permissible Methods for Reducing Employee Benefits of Older Workers

While not comprehensive, the Department of Labor's administrative interpretations give some guidance as to permissible age based differential treatment under ADEA. These guidelines indicate that an employer may reduce benefits based on age where age is an actuarially significant factor in benefit design.\textsuperscript{54} Thus, the guidelines permit differential distribution of benefits where the costs of providing a particular benefit to older workers exceeds the cost of providing that benefit to younger employees. Age is an actuarially significant factor in the cost of providing employees such benefits as long term disability, medical-hospital coverage and life insurance plans.\textsuperscript{55}

\textsuperscript{50} See Seeburg, supra note 32, at 71. See also text accompanying notes 113-15 infra.

\textsuperscript{51} See discussion in Seeberg, supra note 32, at 71.

\textsuperscript{52} Id.

\textsuperscript{53} Any plan amended pursuant to ADEA should be submitted to the Secretary of Treasury for requalification under the deferred compensation chapter of the IRS code, I.R.C. §§ 401, 404 (as amended 1978), to guarantee the retention of favorable tax treatment. See Seeburg, supra note 32, at 70.

\textsuperscript{54} Certain retirement and pension plans, including both defined benefit and defined contribution plans need not be justified by actuarially significant cost considerations. "An employer may maintain a nonsupplementary defined contribution plan or a defined benefit plan which precludes employer contribution after normal retirement age." 124 CONG. REC. H2271 (daily ed. March 21, 1978).

Generally, an employer seeking to reduce employee benefits on the basis of age bears the burden of producing "reasonable" cost data proving that actuarially significant factors necessitate the reduction. Employers may use data which reflect the actual cost of providing a benefit over a period of years. If an employer does not possess such data or if the number of employees is too small to be statistically significant, the employer may use data obtained from a larger group of similarly situated employees. However, the employer may not rely on the cost data of the larger group if the employer's costs differ significantly and would result in substantially lower benefits for older employees. In such an instance, reasonable projections from existing data must be used. It will be difficult for a small employer with minimal support data to make sound projections as to the amount of benefit reduction justified. Because the EEOC has not yet indicated how much data it considers acceptable, small employers should be extremely cautious when reducing benefits without significant supporting data.

The guidelines permit employers to make age related reductions on the basis of age brackets of up to five years. For example, an employer may reduce the amount of group life insurance for employees from ages sixty-five to seventy to a level which approximates the cost of providing greater amounts of insurance for employees ages fifty-five to sixty. Benefit adjustments by

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56 Id. at 30,650.
57 Id.
58 Id. Possible sources for this data are the Social Security Administration, the Society of Actuaries or the Bureau of Labor Statistics. 43 Fed. Reg. 43,265 (1978).
59 The term "similarly situated employees" usually refers to employees in the same position at another company. Thus, because of the seniority or experience rating of the employees in question, the employer may be required to pay higher salaries and make greater contributions toward employee benefits than an employer of similarly situated employees might be required to pay. 44 Fed. Reg. 30,650 (1979). Therefore the employers would have to make projections using what little data they do possess.
61 Id.
62 See note 37 supra.
63 Although the proposed amendment to the Interpretive Bulletin indicated that the Department of Labor would permit reductions in benefits due to age only if determined on a year-by-year (age by age) basis, 43 Fed. Reg. 43,266 (1978), the final version allowed employers to use these age brackets. 44 Fed. Reg. 30,659 (1979).
brackets are less difficult to administer than year to year adjustments. However, this type of adjustment can significantly decrease the amount of benefits for a sixty-five year old employee who is classified in the sixty-five to seventy year bracket.

Two basic methods are used in determining the reductions in benefits due to actuarial factors, the "benefit-by-benefit" and the "benefit package" approach. An increase in the cost of a benefit must justify the "benefit-by-benefit" reduction, regardless of the adjustment in the costs of other benefits. The benefit reduction must directly correlate to the age-based increase in the costs of providing that particular benefit.

The "benefit package" approach, on the other hand, treats all the benefits as an aggregate and correlates the cost of providing the whole package to a younger worker with the cost of the same package to an older employee. This approach allows individual tailoring of fringe benefits based on the particular needs of an employee. For example, an older employee might prefer to lower the level of disability coverage but maintain the present level of life insurance. Under a benefit-by-benefit approach an employer could only lower disability coverage to the extent justified by increased costs. The employer could not shift the age related cost increase in life insurance to further decrease disability coverage. The benefit package approach allows such shifting.

The Department of Labor's Interpretative Bulletin permits the use of the benefit package approach. However, the guidelines significantly limit this approach and severely hamper its usefulness. First, a benefit package may not include a retirement or pension plan. Thus, employees could not elect to reduce their pensions in order to avoid an age based reduction in disability insurance. Second, the Bulletin prohibits a reduction in health care benefits greater than that allowed by the benefit-by-benefit approach, thereby effectively eliminating them from the benefit package. Third, whenever employers reduce other ben-

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66 The benefit-by-benefit approach is also contrary to the concept of group insurance plans which are based on the needs of the average, rather than the individual, employee. See commentators' opinions, 44 Fed. Reg. 30,651 (1979).
67 Id. at 30,651.
68 Id. at 30,656.
69 Id. at 30,656-57.
efits in an amount greater than the reduction allowed by the benefit-by-benefit approach, they must offset this reduction by offering an additional benefit to the same employees.\textsuperscript{70} Finally, the Bulletin requirement that an employer show that any deviations from the benefit-by-benefit approach do not result in less cost to the employer or less favorable benefits to their employees particularly limits the benefit package approach.\textsuperscript{71} Thus, even if the level of benefits to the employee remains constant, an employer cannot use the benefit package plan to reduce costs.

Apparently the Department sanctioned the benefit package approach to allow employers plan design flexibility. At the same time it maintained restrictions in certain primary areas. These areas include health care and pension benefits where a shifting of payments would have the greatest economic impact on older employees. However, the restrictions imposed on the benefit package approach allow little selection, less flexibility, no cost savings, and create severe procedural difficulties.\textsuperscript{72} Congress should amend these restrictions so that employers can use a benefit package approach which results in lower costs to themselves. This approach should be valid as long as it does not result in less favorable benefits to older employees. Until the present restrictions are relaxed, employers, especially small ones, will probably prefer the benefit-by-benefit method with its easily computed deductions.

III. Approaches to Specific Employee Benefit Plans

In order to reward existing employees and attract new ones, employers have created a wide variety of employee benefit plans. Conceivably, many of these plans could be shown to have age as an actuarially significant factor in plan design.\textsuperscript{73} This comment

\textsuperscript{70} Id. at 30,657.

\textsuperscript{71} Id.

\textsuperscript{72} In its proposed amendments the Department of Labor rejected the benefit package approach indicating that the flexibility of the benefit package approach creates a less workable standard of compliance and deprives individual employees of benefits of particular value to them in a way unjustified by age-related costs. 43 Fed. Reg. 43,266 (1978). However, the business sector severely criticized this rejection of the benefit package approach and the Department of Labor reinstated this method in its final bulletin. 44 Fed. Reg. 30,651 (1979).

\textsuperscript{73} Those employee benefit plans listed in the Act and guidelines are intended as examples. Plans not listed may still fall within the Act where age is an actuarially significant factor in plan design. 44 Fed. Reg. 30,653 (1979).
discusses the four most common: life insurance, health insurance, long term disability and retirement plans.\textsuperscript{74}

\section*{A. Life Insurance}

Life insurance plans provided by employers present a major dilemma under the Act. The prolongation of substantial amounts of group life insurance as age increases clearly contradicts the philosophy of group life plans.\textsuperscript{76} Providing identical benefits for all employees threatens the economic viability of such plans because an older worker is more likely to die while covered by the plan. The purpose of group life insurance is to protect beneficiaries against the loss of working income, not add to an estate.\textsuperscript{78} For this reason, an employer should not be required to bear the increased cost of providing identical benefits for older workers.

Continuation of substantial amounts of life insurance may actually encourage older employees to postpone retirement and continue working until death in order to increase the size of their estates. This could cause serious difficulty if the ADEA is amended to protect all workers over the age of forty, rather than just those from ages forty to seventy.\textsuperscript{77} Assuming employers

\footnotesize{\begin{enumerate}
\item These four employee benefit plans are the focus of the Department of Labor's Interpretive Bulletin. \textit{Id.} at 30,653-55.
\item Employers (policy holders) purchase group life insurance for the benefit of employees (insured). Beneficiaries are covered without medical examination or other proof of insurability except that of being employed in non-contributory plans. Life insurance companies usually require 100\% coverage of employees. Where the plan is contributory, life insurance companies usually require 75\% participation. Insurance companies are able to offer such plans at a relatively low cost without the necessity of physical examination because the high cost of intermediaries is eliminated, the lapse rate is low, and the probability of workers dying while covered is relatively low. As the average age of workers increases, the probability of dying while covered by insurance increases, causing the cost of such coverage to increase proportionally. \textit{See} Hasson, \textit{The Reform of Group Life Insurance}, 9 MANITOBA L.J. 119, 121-25 (1969).
\item \textit{Id.} at 127.
\item There is a strong possibility that Congress will eliminate the age 70 cap. The 1978 amendments to the Act specifically require the Secretary of Labor to study the feasibility of eliminating any upper age limitation. 29 U.S.C. § 624(a)(1)(B)(Supp. II 1978). Many commentators argue that there is no statistical justification for limiting the coverage of the ADEA to those 70 and under. \textit{See} Comment, \textit{Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion}, 27 CATH. U. L. REV. 767-84 (1978). Some states, including California, have already eliminated the age 70 cap from their state
\end{enumerate}}
would prefer that older employees retire, an employer would be forced to continue retiree insurance in comparable amounts so that older workers would opt for retirement.\textsuperscript{78}

Because of the problems created by continuing life insurance at a constant level, the Department of Labor permits employers to reduce life insurance coverage to the extent that increased costs justify such a reduction. However, where employees' wages determine the level of group term life insurance an employer may not consider increases in the cost of such coverage for older workers caused by an increase in wages or salary.\textsuperscript{79} Presumably an employer must offer cost data to support any reduction.\textsuperscript{80} However, such data cannot justify a total unexpected cessation of benefits.\textsuperscript{81} An employer may only terminate benefits at age seventy or at separation from service, whichever occurs first.\textsuperscript{82}

\subsection*{B. Health Insurance}

Providing health insurance for older workers presents problems similar to those presented in the area of life insurance. It costs significantly more to provide health and medical insurance to an older worker than to a younger worker.\textsuperscript{83} However, the Department refuses to allow any reduction in total health benefits due to increased costs for employees ages sixty-five through sixty-nine. The total benefits available to workers in this age category must equal the highest level of medical benefit

\textsuperscript{78} Employers enumerate a variety of reasons for preferring that older workers retire. Among the reasons listed are: avoiding stigmatization of the incompetent older worker, opening up greater job and promotion possibilities for women and minorities, and bringing in fresh ideas and motivation. For a discussion of the validity of these and other reasons see Howard, \textit{Mandatory Retirement: Traumatic Evidence of Age Discrimination}, \textsc{Triul Nov. 1977}, at 46.

\textsuperscript{79} The reason for this is that such increases are not directly related to age. See 44 Fed. Reg. 30,653 (1979).

\textsuperscript{80} See notes 56-62 and accompanying text \textit{supra}; but cf. note 82 infra.


\textsuperscript{82} Id. Under the proposed amendment to the Interpretive Bulletin, the Department stated that an eight percent reduction for employees in the 65 through 69 age bracket was allowable without supporting data. 43 Fed. Reg. 43,269 (1978). No such statement appeared in the final bulletin so whether such reduction is allowed is questionable.

provided for employees under age sixty-five. Employers may include Medicare benefits in their health insurance plans to reduce their financial burden and to achieve parity between older and younger workers. However, an employee must not suffer any loss in benefits by going on Medicare. This means that an employer might be required to supplement Medicare benefits with private health insurance.

The Department of Labor allows an employer to reduce the health insurance costs for employees over sixty-five by including Medicare benefits. Therefore, the Department feels that an employer cannot justify any reduction in total health benefits from age sixty-five to age seventy. However, an employer may reduce health benefits due to increased costs for employees under age sixty-five. These reductions cannot concentrate on items which would make the coverage "less attractive to older employees". However, there is no ascertainable definition for this phrase. Finally, as in the case of life insurance, health care benefits may cease at age seventy or on separation from service.

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84 Id. at 30,654.
85 42 U.S.C. § 1395 (1976). Medicare is an insurance program which provides basic protection against hospital and related post hospital costs to persons over 65 plus certain select individuals.
87 Id.
88 Medicare covers inpatient hospital services for up to 150 days for an illness plus post hospital extended care services up to 100 days and post hospital home health visits up to 100 visits. Employers offering health insurance to employees covering longer hospitalization or post hospital treatment must supplement Medicare for workers over 65. Any other benefit provided by the health insurance plan but not covered in Medicare must also be provided to older workers. See 42 U.S.C. § 1395 (1976); 44 Fed. Reg. 30,660 (1979).
89 44 Fed. Reg. 30,653 (1979). This makes sense only if the increased costs of health insurance due to age equal the amount saved by employers who include Medicare. A better approach might be to allow employers an opportunity to show the increased costs due to age are greater than the savings through Medicare. Once this is proven, employers should be able to reduce health coverage to the extent their costs are increased, after offsetting the savings through Medicare.
91 Id. at 30,660.
92 Older workers might be more interested in coverage for private physician visits since Medicare covers hospitalization. However, it is difficult to generalize such a preference to the entire group of employed persons over age 65.
whichever occurs first.\textsuperscript{93}

C. Long Term Disability Plans

The Department of Labor's Interpretive Bulletin also discusses the differential treatment which the benefit plan exception allows under long term disability plans.\textsuperscript{94} In the past, most long term disability plans called for a cessation of benefits at either age sixty-five or the age at which employees become eligible for an actuarially unreduced pension.\textsuperscript{95} Under this procedure, an employer avoided long term disability costs for employees over normal retirement age. The Department of Labor's Interpretive Bulletin declares that the practice of terminating disability benefits at age sixty-five or normal retirement age is generally unlawful.\textsuperscript{96} The Department's position reflects concern

\textsuperscript{94} Id.
\textsuperscript{95} Id. Most plans used age 65 as normal retirement age although some plans outlined other ages which entitled an employee to a full pension.
\textsuperscript{96} Id. Under the proposed interpretation, a plan which provided benefits for life or a set term of years, regardless of age, could not treat older employees differently than it treated younger workers. However, a plan which reduced long term benefits on the basis of the employee's age was permissible only if justified by age-related cost considerations. The Department outlined two possible approaches to long-term disability plans and solicited comments as to the reasonableness of each. 43 Fed. Reg. 43,267 (1978).

The first approach outlined by the Department of Labor prohibited an employer from cutting off long-term disability benefits on the basis of age, if the employee is not over age 70. However, this approach ignores the fact that many employees would have been eligible for full retirement benefits prior to age 70 had they not been disabled. Some of these employees would have voluntarily retired on a full pension before reaching mandatory retirement age. By disallowing the cessation of benefits prior to age 70, the Department would force an employer to absorb the cost of the benefits which arguably should not reasonably be due an employee.

The second approach was promulgated to cover those situations where an employee might normally choose to retire prior to age 70, had he or she not been disabled. Under this alternative, long-term disability payments must continue for at least five years or until age 70, whichever occurs first, for employees disabled after age 60. This approach was based on the assumption that most employees retire at age 65, and most employees age 60 or more have an average remaining work life of five years. These assumptions may prove inaccurate in light of continued inflation and the increase in mandatory retirement age to 70. These proposed alternatives sparked considerable controversy. 44 Fed. Reg. 30,654 (1979). The most recent Bulletin indicates that it is not unlawful to cut off long-term disability benefit payments or coverage on the basis
that the cessation of benefits at age sixty-five will force disabled employees receiving such payments to retire at age sixty-five. The Department fears that cessation of benefits would compel employees to retire to insure a source of income rather than continue receiving disability payments until they are capable of resuming work. In light of the ADEA's purpose and the recent amendment which outlaws involuntary retirement prior to age seventy, this position seems warranted.

An employer may lawfully decrease the long term disability coverage available to older employees. The employer must justify the decrease by showing increased costs supported by adequate cost data. An employer can terminate these benefits when an employee reaches age seventy. Employers may also maintain the level of benefits and decrease the duration of benefit payment. The guidelines permit reducing the duration of payment by dividing employees into two groups: those sixty and under when the disability occurred and those disabled after age sixty. For disabled employees less than sixty years old, benefits may cease at age sixty-five. For employees who are disabled after age sixty, benefits may cease five years after disablement, or age seventy, whichever occurs first. In effect, these exceptions allow employers to terminate benefits prior to age seventy in some instances. This seems contrary to the purposes and language of the Act. Employers should be wary of following this

of some non-age factor such as recovery from disability. Id. at 30,660.

97 Id. at 30,654-55. For example, if an employee was injured on the job at age 64, the disability benefits could be terminated at age 65 even though the employee was planning to return to work at age 66 after the injury had healed. Under the past practice, such an employee would be forced to retire or live without income for a year.

98 Fed. Reg. 30,660 (1979). Note that there is a difference between lowering disability payments because a disabled employee reaches age 65 and lowering the amount of coverage available to workers over age 65. The former seems in clear violation of the Act since there is no basis other than age for lowering the payment. The latter concerns the insuring of older workers against potential disability and reduction could be based on actuarially significant factors, assuming that older workers are disabled more often than younger workers.

99 See text accompanying notes 56-62 supra.

100 Id. at 30,666 (1979).

101 Id.

102 Id.

103 Long term disability benefits for any worker disabled before age 65 will cease between age 65 and 70, thus discriminating against a protected group.
guideline since it allows obvious age discriminations against persons protected by the ADEA.

An employer may also reduce long term disability benefits if the employee receives old-age or disability payments from the government under the social security program.\textsuperscript{104} A high proportion of private benefit plans already adjust their disability benefits if the government pays social security disability.\textsuperscript{105} The guidelines seem to permit reducing disability benefits to offset government-paid benefits even if these benefits are based on age.\textsuperscript{106} Thus, if the employee becomes eligible for old-age benefits at sixty-five which are higher than the government disability benefits\textsuperscript{107} the employer could correspondingly reduce private disability coverage. However, the total level of employee benefits must at least be equal to that payable to a younger employee.\textsuperscript{108}

\textbf{D. Pension Plans}

The employee benefit plan exception also allows for differential treatment of older workers by pension plans. A pension plan is an employee retirement plan which provides financial support to employees or their beneficiaries after retirement. Most plans require an employer to make annual contributions to the pension fund, and entitle an employee to an amount capable of exact calculation on the date of retirement.\textsuperscript{109}

There are two general types of pension plans, the defined con-

\textsuperscript{105} R. Ball, Social Security Today and Tomorrow 171 (1978).
\textsuperscript{106} See 44 Fed. Reg. 30,652 (1979). The interpretation permits a coordination of government and private benefits as long as older employees receive the same benefits as younger employees. \textit{Id}. Clearly, social security disability benefits may be offset against private disability benefits. However, it is questionable whether social security old age benefits received in lieu of social security old age benefits may be used to offset private disability payments. \textit{See} note 107 infra. If old age benefits are substituted for social security disability benefits it seems logical to offset them against private disability benefits. But the EEOC may hold that because old age benefits provide for different needs than disability benefits an offset only to the extent of the social security disability benefit will be permitted.

\textsuperscript{107} Under the Social Security Administration's regulations for employee benefits any individual who is entitled to both disability and old-age benefits is allowed only the larger of the two. 20 C.F.R. § 404.407(c)(1979).
tribution and the defined benefit plans. In the defined contribution plan,\textsuperscript{110} the employer makes an annual contribution based upon a fixed percentage of the employee's income. Upon retirement, an employee receives an amount based upon the employer's annual contributions plus any earnings the fund accumulated through investments. Thus, the benefit reflects the length of employment and the amount of compensation to the employee.

Conversely, the defined benefit plan specifies in advance the exact pension benefit to be paid employees upon retirement. The annual employer contribution is actuarially determined. Several factors including employee turnover, increases in employee compensation and the employee's age determine the required employer contribution.\textsuperscript{111}

The Department of Labor's interpretation indicates that some differential treatment of employees age sixty-five through seventy is permissible, depending upon the type of plan involved.\textsuperscript{112} Under either plan, a normal (but not mandatory) retirement age\textsuperscript{113} below age seventy may be set for the purposes of setting retirement income objectives and contribution rates.\textsuperscript{114}

The Department's interpretation allows an employer to exclude an employee from a defined benefit plan if the person is hired less than five years before or any time after normal retirement age.\textsuperscript{115} Defined benefit plans not covered by ERISA\textsuperscript{116} may exclude employees hired more than five years before normal retirement age if such a decision is based on the increased costs of advanced age.\textsuperscript{117} In addition, the ADEA does not require credit for any service after normal retirement age for purposes of benefit accrual.\textsuperscript{118} The Department does not specifically discuss the

\textsuperscript{110} A defined contribution plan is also referred to by the term "money purchase plan."

\textsuperscript{111} See Schmeyer, supra note 109, at 282.

\textsuperscript{112} 44 Fed. Reg. 30,655-56 (1979). This differentiation between pension plans is not grounded in the language of the statute, although it is mentioned in the legislative history.

\textsuperscript{113} For a discussion of normal retirement age under ERISA see text accompanying note 44 supra.


\textsuperscript{115} Id. at 30,651.

\textsuperscript{116} See text accompanying note 47 supra.


\textsuperscript{118} Id. at 30,661.
issue of benefit increases based on increases in compensation after normal retirement age. Arguably, if service need not be credited for benefit accrual purposes, then neither must increased compensation.

It is not necessary for benefits to commence until actual retirement even though such benefits can be "frozen" at normal retirement age\textsuperscript{119} and the employer may stop further benefit accrual.\textsuperscript{120} Thus, employees opting to continue work beyond normal retirement age may receive the identical pension payment upon retirement that they would have received had they retired five years earlier. A company offering a sizeable pension at normal retirement age without further benefit accrual or actuarial adjustments encourages retirement at the "normal" age. The only economic advantage to continued employment is the excess salary during that period. However, such retirement inducement is not available to the small employer unable to offer a defined benefit plan.\textsuperscript{121}

Differential treatment of older and younger workers under defined contribution plans is also permissible under the employee benefit plan exception.\textsuperscript{122} An employer may not exclude an employee hired prior to normal retirement age from a defined contribution plan. However, no employer contribution is necessary after normal retirement age, provided the plan is not supplemental.\textsuperscript{123} This means that an employer can cease contributions after age sixty-five, or make no contribution at all, should an employee be hired after age sixty-five.\textsuperscript{124}

Employer contributions after normal retirement age are nec-

\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 30,656.
\textsuperscript{121} Employers should remember that any unusually low normal retirement age will be closely scrutinized. \textit{See text accompanying notes 43-45 supra.}
\textsuperscript{123} \textit{Id.} However, such exclusion may violate ERISA. \textit{See note 49 and accompanying text supra.}
\textsuperscript{124} 44 Fed. Reg. 30,661 (1979). Small employers should be aware that excluding older employees from coverage under either a defined benefit or defined contribution plan may jeopardize the qualification of the plan by the IRS. \textit{See notes 27-32 and accompanying text supra.} This situation may arise if the excluded employees make up more than 20% of the work force. I.R.C. § 410(b)(1)(A). \textit{See Kline, Vital Employer Concerns: The 1978 Age Discrimination in Employment Act Amendments and the 1978 Pregnancy Disability Amendments, 5 J. PENS. PLAN. AND COMP. 137, 146 (1979).}
sary if the defined contribution plan is supplemental. The supplemental plan concept is not found in the Act. The Department of Labor introduced the concept in its proposed amendments to the Interpretive Bulletin. A defined contribution plan is considered supplemental if both a defined contribution and defined benefit plan cover an employee, or if two or more defined contribution plans cover an employee. In the latter case, all but one of the defined contribution plans are considered supplemental. Because contributions after normal retirement age are required, employees covered by supplemental defined contribution plans acquire greater benefits when they opt to continue working beyond normal retirement age.

Employers may desire to restructure their retirement packages to avoid continuing contributions. For example, an employer could consolidate a supplemental plan with a defined contribution plan. This would allow the cessation of employer contributions to the supplemental plan at normal retirement age. The EEOC may deem such restructuring “subterfuge to evade the purposes of the Act.” However, the Bulletin indicates that a plan combining defined contribution elements with other benefits not tied to the employee’s income will not necessarily be considered two plans under the exception. Thus, the Bulletin does not require employer contributions for the “supplemental” portion of such a plan. Combining two plans would also seem to fall within the parameters of this wording. However, the Department was unwilling to state a general rule concerning schemes which allow a cessation of employer contributions. Therefore, employers restructuring their plans to avoid making contributions after normal retirement age should proceed cautiously.

The guidelines indicate areas where the Act permits differen-

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129 44 Fed. Reg. 30,655 (1979). These plans are sometimes called “floor” plans. They have a defined contribution component. However, if benefits from that component fall below a certain “floor” level the plan provides extra benefits up to that level.
130 Id.
131 Id.
tial treatment. In some areas, the reductions, justified by age related cost increases, coincide with the purposes of the Act. Other areas, however, allow arbitrary age discrimination without actuarial justification. Although the legislative history may support such discrimination,\textsuperscript{132} this discrimination is contrary to the Act's express purposes. Finally, certain potential benefit reductions are in need of clarification. In drafting its guidelines, the EEOC should not only clarify permissible conduct but take care that such conduct falls within the express purposes of the Act.\textsuperscript{133}

IV. THE ROLE OF THE EEOC AND THE JUDICIARY

Because of the complicated and ambiguous nature of the ADEA, employers who attempt in good faith to comply with the Act may still encounter compliance problems. For example, employers who reduce life insurance to the extent justified by increased costs\textsuperscript{134} could be found in violation of the Act if the courts or EEOC choose to disregard the Department's interpretation. The potential for litigation presents a particular threat to small business. The defense of an ADEA suit is both expensive and time consuming. Small employers without in-house attorneys must retain counsel, compile cost data which comply with the guidelines and bear the usual costs associated with litigation. Employers with a working knowledge of the Act as well as the possible approaches of the EEOC and the courts should be able to minimize some of these problems.

An enforcement action under the ADEA is initiated when an employee files a complaint alleging age discrimination with the EEOC.\textsuperscript{135} Once the complainant files a charge, the EEOC has the power to investigate, conciliate and sue employers to obtain relief.\textsuperscript{136} Since the EEOC encourages voluntary compliance\textsuperscript{137}

\textsuperscript{133} Any permissible differentiation which is not based on actuarially significant factors (e.g. the treatment under pension plans) should be clarified by Congress through amendments, not through EEOC interpretations.
\textsuperscript{134} See text accompanying notes 75-82 supra.
\textsuperscript{137} See, B. Babcock, A. Freedman, E.H. Norton & S. Ross, Sex Discrimination and the Law 371 (1975) (citing Cooper and Rabb, selections from Equal Employment Law and Litigation, Materials for a Clinical Law Project,
with all equal employment opportunity laws, the agency will not file a complaint against an employer until it makes an attempt to conciliate.\textsuperscript{138} Thus, in most cases an employer will have notice and an opportunity to voluntarily rectify any alleged violation and thereby escape the necessity of paying damages or back-pay to the complainant.\textsuperscript{139}

While administrative guidelines and actions indicate the EEOC’s concerns, the courts are the ultimate interpreters of the Act’s meaning. A suit under the ADEA may be brought in federal district court in one of two ways. First, the EEOC, after investigating and attempting to conciliate, may file suit against the employer.\textsuperscript{140} However, such action against a small business is unlikely. The EEOC’s tremendous case backlog\textsuperscript{141} coupled with the desire of its present director to focus on the larger patterns of discrimination\textsuperscript{142} makes big corporations more obvious targets of enforcement suits by the Commission. If the EEOC chooses not to sue, the complainant may request a “right to sue” letter and proceed directly against the alleged violator.\textsuperscript{143} Complaintants alleging ADEA violations are more likely to arrive in court via this method.\textsuperscript{144}

The outcome of an ADEA suit is difficult to predict. Past court decisions indicate considerable disagreement as to the

\begin{footnotes}
\item[138] Id.
\item[139] Id.
\item[140] A charging party may not request a right to sue letter when the EEOC has filed a civil action based on the charge in federal court. The private party may intervene in the EEOC action, but may not file a separate action. B. Babcock supra note 137, at 371.
\item[141] In 1970, the EEOC had a backlog of 25,000 cases; in 1974, 98,000 cases and in 1977, 130,000 cases. R. Greenman & E. Schmertz, Personnel Administration & The Law 122 (1977).
\item[142] In 1977, Eleanor Holmes Norton was appointed chairperson of the EEOC. She intends to shift the overall emphasis of the agency to root out systematic patterns and practices of discrimination by monitoring corporate behavior. Id. at 123.
\item[143] B. Babcock, supra note 137, at 371.
\item[144] The right to sue letter may be obtained as a matter of right if the EEOC has not taken any action within 180 days. 42 U.S.C. § 2000e-5(f)(1) (1975). Because of the tremendous backlog of cases and the new focus of the agency, it seems likely that a charge against a small business for violating the ADEA would not be processed within 180 days and an aggrieved individual desiring redress would have to proceed on an individual cause of action.
\end{footnotes}
proper interpretation of the ADEA. This confusion will likely continue as courts attempt to outline employer actions allowed by the employee benefit plan exception.

Several issues remain unresolved. Courts have not adequately delineated the impact of judicial interpretations of Title VII on the interpretation of the ADEA. Nor is it clear whether the courts will follow the administrative interpretation of the term "subterfuge". In analyzing the ADEA, courts have been reluctant to give the interpretive bulletins much weight. If this

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146 In addition to the precedential role of Title VII cases (see discussion accompanying note 147 infra.) and the meaning of "subterfuge," issues which are still unsettled under the ADEA include the question of whether state remedies must be exhausted before bringing a suit under the ADEA and the future of the tenured professor, 29 U.S.C. § 631(d) (Supp. II 1978) and executive exemptions, 29 U.S.C. § 631(c) (Supp. II 1978).

147 Because the terms of the ADEA are similar to those of Title VII, some commentators feel that cases brought under the ADEA may be analogized to those brought under Title VII. However, the concerns underlying the two statutes differ significantly, suggesting that such an analogy should not be made. See notes 7, 8 & 12 supra.

148 Generally, courts give greatest deference to regulations promulgated by an agency charged with enforcement of a statute. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (EEOC guidelines interpreting section of Civil Rights Act entitled to great deference); Udall v. Tallman, 380 U.S. 1, 16 (1965) (regulation of Interior Department stating that executive order does not bar oil and gas leases on Alaska land must be given cedence); Brennan v. Root, 8 Empl. Prac. Dec. 9351, at 5335 (E.D.N.C. 1974) (Deport of Labor regulation holding that a business is an employment agency for ADEA purposes if it regularly procures employees for at least one employer entitled to great weight) but cf., Dobbins v. Costle, 559 F.2d 946, 948 (5th Cir. 1977)(deference need not be given a regulation promulgated by the Environmental Protection Agency which is plainly wrong); Hoover v. United States, 348 F. Supp. 502 (C.D. Cal. 1972) (Treasury regulations cannot be allowed to distort obvious statutory language).

Interpretive bulletins are given less deference but courts often look to them for guidance in interpreting legislation. See Ford Motor Credit Co. v. Dennis Milhollin, 48 U.S.L.W. 4145, 4148 (1980); see generally Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, 138-45 (1976). However, in analyzing the ADEA, courts have shown reluctance to give the interpretive bulletins much weight. For ex-
reluctance continues, small employers could be charged with violating the ADEA even though their actions complied with the guidelines.

In the final analysis, courts will give an interpretive bulletin weight only if it is logical, thoroughly considered, and the court is persuaded that such an interpretation is correct. An inquiry into the preparation of the Department of Labor’s bulletins indicates that there was much uncertainty as to permissible differential treatment. Furthermore, the history of the guidelines’ publication does little to inspire confidence. In September, 1978 the Department of Labor published a proposed amendment to the original Interpretive Bulletin issued in 1968. The Department planned to issue final amendments in December and invited comments from interested parties. However, the Department of Labor published no Bulletin amendments until May 25, 1979, little more than a month before enforcement of the

ample, in Brennan v. Paragon Employment Agency, 356 F. Supp. 286 (E.D. Wis. 1973), aff’d mem., 489 F.2d 752 (2d Cir. 1974), a district court refused to follow an interpretive bulletin promulgated by the Department of Labor which stated that help wanted ads containing such phrases as “college student” and “recent graduate” violated the Act. The court held that where the interpretive bulletin is inconsistent with the Act’s purpose it will not be followed. 356 F. Supp. at 288-89. “The purpose of the Act was to prevent persons aged 40 to 65 from having their careers cut off . . . it was not intended to prevent their children and grandchildren from ever getting started.” Similarly, in Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1971) a district court refused to hold that mandatory retirement pursuant to a bona fide pension plan was in violation of the Act despite the urging of the Secretary of Labor because to do so would be “to use legislative history to override the unambiguous language of the statute.” Id. at 217.

Brennan v. Paragon Employment Agency, 356 F. Supp. 286, 289 (E.D. Wis. 1973), aff’d mem., 489 F.2d 752 (2d Cir. 1974). “Legislative rules” generally have the force of law, while the weight given interpretive rules varies. The weight given “interpretive rules” may depend on factors such as judicial confidence in the agency, knowledge of the subject matter, and skill of administrators in relation to that of judges. For a discussion of the differences between “legislative rules” and “interpretive rules” and the effect of such rules on the court’s opinion, see K. Davis, Administrative Law and Government 119-20 (2d ed. 1975); K. Davis, Administrative Law 200-01 (1951).


43 Fed. Reg. 43,264 (1978). The Department invited comments as to the effect, feasibility, and fairness of the proposed amendments to the Bulletin.

ADEA was transferred to the EEOC. The EEOC issued a statement that it would follow the guidelines, at least for the present time, but it is still questionable whether the EEOC will parallel this interpretation when it issues its own rules.

Given the administrative history of the Bulletin, the courts may choose to look solely to the "plain meaning" of the statute and the 1978 amendments. In that case, a court could rule al-

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154 The transfer of enforcement from the Department of Labor to the EEOC pursuant to the President's Reorganization Plan of 1978, supra note 10, may well be detrimental to the enforcement of ADEA. The transfer's purpose was to consolidate enforcement of the various equal opportunity laws. Of particular concern were past deficiencies in enforcement, inconsistent compliance standards, repetitive paperwork and investigative efforts, intra-agency conflicts with respect to dual responsibility for enforcement of a particular statute, and confusion among workers as to where and how to seek redress.

Unfortunately, the transfer is unlikely to result in more effective and efficient enforcement and administration. Congress originally established the ADEA as a separate statutory scheme with enforcement in the hands of the Wage and Hour Division of the Department of Labor because it felt that the concerns regarding age discrimination differed markedly from the concerns of sex and race discrimination. Also, Congress felt that the EEOC was unable to handle additional complaints effectively. See Duppelt, The Retirement Plan Exemption in the Age Discrimination in Employment Act of 1978: Will the Exception Swallow the Rule?, 53 CHI. KENT L. REV. 597, 597-99 (1976-77).

Concerns about inefficiency do not warrant transferring ADEA enforcement to the EEOC. Inconsistent compliance standards for ADEA and Title VII will continue due to the differing concerns of the two statutes. Intra-agency conflicts may arise from the competing interests of minorities and older workers.

Finally, lack of accountability will not be redressed by shuffling statutes between agencies but rather through a more active role by the executive branch.

The transfer of enforcement to the EEOC does end a potential plaintiff's confusion as to which agency to approach in filing a discrimination complaint. However, knowing where to go is of little value if the appropriate agency is incapable of providing assistance.

155 See note 37 supra.

156 Some commentators feel that the EEOC is likely to be more conservative regarding possible discrimination than was the Department of Labor. Shapiro, Age Discrimination - Final Regulations, 5 J. PENS. PLAN. AND COMP. 350, 353 (1979).

157 The "plain meaning" of a statute is often in doubt. However, courts sometimes use this term as a basis for ignoring agency interpretations or legislative history. A good example of the confusion this can engender are the cases of Brennan v. Taft Broadcasting, 500 F.2d 212 (5th Cir. 1974), and the lower court decision in McMann. McMann v. United Air Lines Inc., 542 F.2d 217 (4th Cir. 1976). Both courts rested their decisions on the "unambiguous language" of § 623(f)(2) of the ADEA and came up with totally contradictory results.
most any differential treatment under employee benefit plans a
violation of the Act. For example, a court could hold that an
employer's decision to offset a health insurance plan with Medi-
care for employees over sixty-five, or refusal to contribute to a
defined benefit plan for an employee past normal retirement
age, discriminates on the basis of age even though allowed by
the Bulletin. This lack of deference to the administrative
guidelines seems unlikely where age is an actuarially significant
factor such as in life insurance plans. However, in areas where
there is no actuarial justification, such as defined benefit and
contribution plans, the court may not allow differential treat-
ment of older workers even though the guidelines indicate such
treatment is permissible.

A conceivable role for the Bulletin is that of a good faith de-
fense in a suit alleging noncompliance with the statute. The
Act releases employers from liability if they can show good faith
reliance on written administrative regulations, rulings, orders,
approvals or interpretations. This defense is valid even if the
court modifies or rescinds the administrative agency's inter-
pretation of the statute. A successful good faith defense requires
proof of employer reliance upon some disclosed agency action.
The employer must actually and reasonably believe that he or
she was acting in conformity with an administrative interpreta-
tion. Considering the statute's uncertainty and the possible
infirmity of the Bulletin, courts may be willing to extend this

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168 Conceivably, almost any practice could be held to be a subterfuge to
evade the purposes of the Act.
169 See text accompanying notes 85-88 supra.
the 1947 Portal-to-Portal Act which states that employers are not subject to
liability or punishment if they plead and prove they acted in good faith, in
conformity with and reliance on any written administrative regulation, order,
ruled, approval, or interpretation.
161 29 U.S.C. § 259 (1976). However, this release of liability for employers
relying on agency interpretations could make it difficult to obtain advice from
agency personnel who, fearing that this good faith defense may be extended to
verbal comments on their part, refuse to give guidance on ADEA compliance.
163 Id. § 259(a).
165 See Brown v. Dunbar & Sullivan Dredging Co., 189 F.2d 871, 876 (2d Cir.
1951) (interpreting 29 U.S.C. § 259 (1976)).
164 The good faith belief is measured both subjectively and objectively. See
Annot., 21 A.L.R.2d 1327, 1370 (1952) (discussing the good faith provision of
the Portal-to-Portal Act, 29 U.S.C. § 259 (1976)).
defense beyond its normal scope to protect those employers who at least make some attempt at statutory compliance.\footnote{185}

Employers may feel that the Bulletin's lack of clarity and the enforcement agency's case backlog make compliance unnecessary. This is not the case. For example, it is extremely likely that the EEOC will pursue any charge of mandatory retirement before age seventy.\footnote{186} However, until the EEOC issues final guidelines, interpretation of ADEA is somewhat unpredictable. Furthermore, employers have few indications of how courts will interpret the ADEA. This confusion leaves employers even more dependent on consulting firms and attorneys for direction. For small employers unable to afford extensive litigation costs, promulgation of clear compliance guidelines is essential.

**Conclusion**

In enacting the Age Discrimination in Employment Act of 1967 and in the 1978 amendments, Congress focused on the problems of hiring and retaining older Americans in the workforce. Thus, it is not surprising that Congress inadequately discussed the peripheral problem of employee benefits. Clearly, Congress intended some differential treatment, especially for those who work beyond normal retirement age. However, it did not specify the permissible extent.

The Department of Labor guidelines offer some assistance when interpreting the Act. The guidelines permit reduction of employee benefits when age is an actuarially significant factor in plan design. These reductions may be made either on a benefit-by-benefit basis, reducing each benefit only to the extent justified by cost increases of the particular benefit, or by treating all employee benefits as a benefit package. However, the guidelines place serious restrictions on the benefit package method, making

\footnote{185} In Standard Oil v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978) the court affirmed a district court ruling in favor of 15 oil companies involving the interpretation of price control regulations by the Federal Energy Administration. The court cited the ambiguity of the regulations and confusion within the enforcing agency as factors precluding finding a violation of the regulations by the oil companies. The court quoted with approval the Director of Compliance for the Federal Energy Administration stating, "[i]t would seem unfair to require refiners to make a retroactive adjustment (to prices) when they followed (the regulations) in good faith." *Id.* at 1054 n.63.

\footnote{186} Clear violations of the Act could easily be pursued by the employee even if the EEOC did not process the claim.
it unattractive to employers. Employers reducing benefits to older employees should compile adequate cost data to support such reductions in case the validity of the reductions is later challenged.

While employee benefits may generally be reduced if justified by increased costs, there are some significant exceptions to this rule. Reductions in health benefits for those over age sixty-five are generally not allowed even though age has increased benefit costs. On the other hand, employer contributions to certain pension plans may be reduced even though the reduction is based solely on the age of the employee. An employer reducing benefit plans without actuarial justification should proceed cautiously.

Employers changing employee benefit plans to comply with ADEA should be wary of possible ERISA violations. Employers should not assume that the provisions of the two acts coincide. Some actions permitted by ADEA are not permitted by ERISA and vice versa. An employer who changes benefit plans to comply with ADEA or to take advantage of permitted ADEA reductions should submit these plans to the Secretary of the Treasury for ERISA requalification.

Until the EEOC issues final guidelines it is difficult to predict what approach it will take regarding reductions in employee benefits. Assuming the EEOC does adopt the present guidelines of the Department of Labor it is doubtful that the courts will strictly adhere to these guidelines. It is probable that the courts’ interpretation of permissible conduct will vary to a degree, especially where actuarial cost increases do not justify reductions. However, an employer who has relied on the guidelines when making reductions will be able to assert this reliance as a good faith defense.

Since Congress acknowledged that the continued economic viability of businesses necessitates some differential treatment of older workers, it is essential that the parameters of permissible differential treatment be clearly outlined. In addition, Congress, the EEOC and the courts should recognize that the concerns of the small employer differ from those of a larger corporation. While the small employer should not be allowed to intentionally discriminate, any efforts at compliance which indicate an intent to follow the dictates of the Act should be given great deference in processing a complaint.

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