SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: DISCRIMINATION IN EMPLOYEE BENEFIT PLANS

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SECTION 4(f)(2) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: AGE DISCRIMINATION IN EMPLOYEE BENEFIT PLANS

KENNETH S. COHEN*

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I. INTRODUCTION

In 1978, Congress amended the Age Discrimination in Employment Act (ADEA).1 The Department of Labor's Wage and Hour Division and the Equal Employment Opportunity Commission (EEOC) subsequently promulgated in 1979 interpretative regulations concerning those amendments.2 The combined legislative


Another important regulation considers § 12(c)(1) which constitutes the principal exception to the general requirement of the 1978 amendments establishing 70 as the mandatory retirement age. 29 U.S.C.A. § 631(c)(1) (West Cum. Supp. 1979) (amending 29 U.S.C. § 631 (1976)). Section 12(c)(1) permits the mandatory retirement at age 65 or later of bona fide executives and high policymaking employees receiving annual retirement benefits of $27,000 or more. The Department of Labor published its proposed interpretation of § 12(c)(1) in December 1978. 43 Fed. Reg. 58,147 (1978). The EEOC republished it with minor modification in November 1979 as a final in-
and regulatory actions require significant changes in the personnel practices of, and the employee benefit plans\(^3\) sponsored by, private sector employers. Although the 1978 amendments became effective for most employers on January 1, 1979,\(^4\) it is the recent interpretation. 44 Fed. Reg. 66,791 (1979). For a discussion of the § 12(c)(1) exception see text accompanying notes 248-92 infra.

Another exception to the mandatory retirement age of 70 is ADEA § 12(d), 29 U.S.C.A. § 631(d) (West Cum. Supp. 1979) (amending 29 U.S.C. § 631 (1976)), which provides a temporary exception until July 1, 1982 for employees age 65 to 70 serving under a contract or similar arrangement of unlimited tenure, at an institution of higher education. The Department of Labor proposed its interpretation of § 12(d) in December 1978. 43 Fed. Reg. 58,153 (1978). The EEOC republished it with minor modification in November 1979 as a final interpretation. 44 Fed. Reg. 66,791 (1979). The § 12(d) exception is of limited interest and is not further considered in this article.

Finally, the EEOC has proposed an interpretation of involuntary retirement: 44 Fed. Reg. 68,858 (1979). For a discussion of involuntary retirement see text accompanying notes 238-47 infra.


For employees whose mandatory retirement was required or permitted by a collective bargaining agreement in effect on September 1, 1977, the mandatory retirement age of 65 expired on the earlier of January 1, 1980 or the termination date of the collective bargaining agreement. Id.


publication of the Department of Labor’s Interpretative Bulletin concerning age discrimination in employee benefits, rather than the amendments to the statute, which will cause employers to consider revising their pension and welfare benefit plans to conform to the new requirements. The Interpretative Bulletin was published on May 25, 1979. Its finality, however, has been diminished by the transfer of jurisdiction over ADEA to the EEOC which is planning to publish its own guidelines. While the EEOC is considering further changes in its guidelines for retirement, it supports the general principles and most of the specific rules expressed by the Department of Labor in the final Interpretative Bulletin.

The promulgation of the Interpretative Bulletin represents the most significant expansion of federal regulation affecting employee benefit plans since the enactment of the Employee Retirement Income Security Act (ERISA) in September 1974. The Department of Labor and the EEOC, however, have published interpretations with only slim authority in statute or the legislative history of the ADEA and the 1978 amendments. Many attorneys and most employers are unaware of the new regulations and have not reviewed

U.S.C.A. § 623(f)(2) (West Cum. Supp. 1979), Interpretative Bulletin did not appear until five months after the January 1, 1979, effective date, the Department of Labor and the EEOC made limited concessions as to the date on which compliance was required. 44 Fed. Reg. 30,647 (1979). See text accompanying notes 121-300 infra.

5. 29 C.F.R. § 860.120 (1979).

6. Section 2 of Presidential Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807, transferred on July 1, 1979, all functions relating to the administration and enforcement of the ADEA, as amended by the 1978 amendments, from the Secretary of Labor to the EEOC. Although the EEOC concurred with the Department of Labor’s Interpretative Bulletin on ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1976), as amended by 29 U.S.C.A. § 623(f)(2) (West Cum. Supp. 1979) (in fact, the EEOC staff participated in its drafting), the EEOC announced in July 1979 that it will not adopt the Department of Labor’s Interpretative Bulletins and will publish its own guidelines on the ADEA. Compare 44 Fed. Reg. 30,657 (1979) with id. at 37,974. (EEOC announcement of intent to issue new guidelines). The EEOC announced that employers may continue to rely upon Department of Labor Interpretative Bulletins and Wage and Hour opinion letters until new guidelines are published by the EEOC. Id. at 37,974.


9. See notes 18-20 infra.
their employee benefit plans in light of them. Perhaps this inaction indicates a growing indifference to the ever increasing federal regulation of the private sector.

This article has four focuses. The first section focuses on the degree of deference which the Interpretative Bulletin and future EEOC Guidelines are entitled to in light of the ADEA, its legislative history and other laws affecting employee benefit plans. The second section considers the general principles expressed in the Interpretative Bulletin. The third section analyzes in detail the application of the Interpretative Bulletin to specific employee benefit plans. The fourth and final section suggests how employers and their attorneys should approach their task of reviewing their employee benefit plans.

II. DEPARTMENT OF LABOR'S INTERPRETATIVE BULLETIN AND EEOC'S GUIDELINES—A CRITICAL PERSPECTIVE

The ADEA, since its original enactment in 1967, has prohibited employers from discriminating against employees on the basis of age. Prior to the enactment of the 1978 amendments, the prohibitions against employment discrimination were limited to individuals 40 to 65 years of age, the so-called “protected age group.” The principal changes made by the 1978 amendments were to strike down involuntary retirements because of age and to extend the upper limit of the protected age group to 70. Otherwise, the Act is essentially the same as when originally enacted.

The Act forbids an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”

12. In 1974, the ADEA was amended to include within the scope of its coverage federal, state and local government employees (other than elected officials and certain aides not covered by civil service) and to expand coverage from employers with 25 or more employees to employers with 20 or more employees. ADEA § 28(a)(1)-(4), 29 U.S.C. § 630(b), (c), (f) (1976).
4(f)(2) of the ADEA is the key exception to this broad protection against employment discrimination based on age. Prior to the enactment of the 1978 amendments, section 4(f)(2) provided:

(f) It shall not be unlawful for an employer, employment agency, or labor organization . . . (2) 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. . . .

The reason for the 1978 amendment to section 4(f)(2) was to overturn legislatively the United States Supreme Court's decision in United Air Lines, Inc. v. McMann. The Court permitted the involuntary retirement because of age of an employee within the protected age group if the retirement was pursuant to a bona fide employee benefit plan. As part of the 1978 amendments, Considered include any business engaged in an industry affecting interstate commerce with at least 20 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Id. § 11(b), 29 U.S.C. § 630(b) (1976). Whether affiliated businesses are considered one employer or several distinct employers is a question of fact turning on the degree of control exercised by one affiliate over the others. See, e.g., Woodford v. Kinney Shoe Corp., 369 F. Supp. 911 (N.D. Ga. 1973); Brennan v. Ace Hardware Corp., 362 F. Supp. 1156 (D. Neb. 1973), aff'd, 495 F.2d 368 (8th Cir. 1974).

There are three other important exceptions to the general prohibition against discrimination based upon age. First, employers with less than 20 employees are not subject to ADEA. ADEA § 11(b), 29 U.S.C. § 630(b) (1976). Second, an employer may discriminate based upon age “where age is a bona-fide occupational qualification reasonably necessary to the operation of the business . . . .” Id. § 4(f)(1), 29 U.S.C. § 623(f)(1) (1976). An employer who seeks to use age as a bona fide occupational qualification (BFOQ) must show (i) that the BFOQ is reasonably necessary to the essence of the employer's business and (ii) have a factual basis for believing that older applicants would be unable to perform the job or that it is impractical for the employer to judge the individual ability of each job applicant on an individualized basis. See generally Arritt v. Grissell, 567 F.2d 1267 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976); Aaron v. Davis, 414 F. Supp. 453, reconsidered, 424 F. Supp. 1238 (E.D. Ark. 1976). The proposed EEOC Interpretation simply states that the BFOQ exception involves a facts and circumstances issue which is to be narrowly construed and the burden of proof of establishing the BFOQ is the employer’s who relies on it. Proposed Interpretation 29 C.F.R. § 1625.6 (1979). Third, an employer may discharge an employee for “good cause.” ADEA § 4(b)(3); 29 U.S.C. § 623(b)(3) (1976).

Prior to the enactment of the 1978 amendments, most employers had retirement plans establishing the age of involuntary retirement at age 65, the normal retirement age under their retirement plans. Since age 65 was outside of the then protected age group of 40 to 64, the question of age discrimination because of involuntary retirement within the protected age group rarely arose. A few employers,
gress superseded the *McMann* decision by adding a new final clause to section 4(f)(2). It provided: "[N]o such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title [an employee between the ages of 40 and 70] because of the age of such individual."\(^{18}\)

In order to take advantage of the section 4(f)(2) exception and provide lesser benefits to older workers, an employer must demonstrate: (i) The plan is bona fide; (ii) the lower benefits are provided in observance of the terms of a plan; (iii) the plan is not a subter-

however, established retirement plans with a normal retirement age of less than age 65. The issue arose as to whether § 4(f)(2) exempted the employer from the general prohibition against discrimination in employment. Three circuit courts of appeals addressed this issue. The United States Court of Appeals for the Fifth Circuit construed § 4(f)(2) to permit the involuntary retirement, solely on the basis of age, of the employee within the protected age group, although the employer could not establish the economic costs to the plan. *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). In *Brennan*, the Fifth Circuit held that retirement based solely on age was permitted by the terms of an employee benefit plan which was established prior to the ADEA thereby "eliminating any notion that [the plan] was adopted as a subterfuge for evasion." *Id.* at 215. The United States Court of Appeals for the Third Circuit reached a contrary conclusion in *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), upholding an involuntary retirement under an employee benefit plan based upon forced retirement of an employee within the protected age group was permitted by § 4(f)(2) only if "legitimate considerations other than an employer's preference for youth justified the forced retirement[s]." *Id.* at 222. An involuntary retirement provision, the Court said, must have "some economic or business purpose other than arbitrary age discrimination." *Id.* at 221. The third and most important case to consider the issue was *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976), *rev'd*, 434 U.S. 192 (1977). The United States Court of Appeals for the Fourth Circuit held that § 4(f)(2) resolved in the negative the issue of whether an employee within the protected age group can be mandatorily retired pursuant to the terms of a bona fide non-subterfuge employee benefit.

In order to resolve these conflicting interpretations of § 4(f)(2), the Supreme Court granted certiorari in *McMann*. The Supreme Court in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), held that the ADEA was not intended to invalidate retirement plans instituted in good faith before its enactment. *Id.* at 203. The Court further rejected any requirement for employers to demonstrate a business or economic purpose to justify involuntary retirement pursuant to such plans. *Id.* After the Supreme Court's decision, the 1978 amendments, including an amendment to § 4(f)(2), were enacted. The Conference Committee Report clearly indicated a Congressional intent to invalidate involuntary retirement pursuant to a plan within the protected age group. *H.R. REP. NO. 950*, 95th Cong., 2d Sess. 8, *reprinted in* [1978] 3 *U.S. CODE CONG. & AD. NEWS* 528-29. While resolving one issue concerning employee benefit plans, Congress created a host of new legal issues for employee benefit plans by raising the protected age group to 70.

fugue to circumvent the Act; and (iv) the plan cannot excuse a refusal to hire or a forced retirement prior to age 70 because of age.

Section 4(f)(2) has been generally interpreted to permit employers to offer different and lesser employee benefits to older workers. Concomitantly, it has been understood that a refusal to hire someone in the protected age group violates the ADEA. Thus, while it is illegal for an employer to refuse to hire an older worker, it is legal to pay lesser benefits to that older worker once hired. As a result of the 1978 amendments, involuntary retirement because of age of any employee within the protected age group is illegal.

Section 4(f)(2) is, however, unclear as to whether a plan which pays reduced benefits to older workers is a “subterfuge to evade the purposes of the Act,” if the benefit differential cannot be justified by age related cost considerations. The Department of Labor’s consistent position has been that reduced benefits may be paid to older workers if the cost of providing the benefit is at least equal to the cost of providing benefits to younger employees. Specifically, in 1969 the Department of Labor issued what has become known as the equal cost or equal benefit interpretation of section 4(f)(2). It said:

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 on behalf of a younger worker, even though the older worker may thereby receive a lesser amount of [pension or retirement] benefits or insurance coverage.19

In other words, the Department of Labor has permitted an older worker to be paid a lesser benefit than a similarly situated younger worker only if the cost of providing the benefits to both workers is equal.20

There is no statutory basis for the proposition that a plan which does not provide equal benefits or require equal employer

19. 29 C.F.R. § 860.120(a) (1977) (emphasis added).
20. The 1969 Interpretative Bulletin, while indicating that a plan meeting the equal cost or equal benefit standard would be deemed to be nondiscriminating, did not rule out the possibility that a plan not meeting the equal cost or equal benefit test would satisfy § 4(f)(2). In effect, the 1969 Interpretative Bulletin appears to have established the equal cost or equal benefit rule as a “safe harbor.” Only after the 1978 amendments were enacted did the Department of Labor set forth the proposition that, with the exception of retirement plans, equal cost or equal benefit is the sole test for discrimination in employee benefit plans. 43 Fed. Reg. 43,265 (1978). In fact, the legislative history of the 1978 amendments is not clear on the issue and certainly does not justify this more restrictive interpretation. See note 22 infra.
costs is a "subterfuge" which fails to satisfy section 4(f)(2). The legislative history of the 1967 Act\textsuperscript{21} and of the 1978 amendments\textsuperscript{22} is

\textsuperscript{21} The lack of a clear legislative history occurred because Congress focused in 1967 on the hiring of older workers and in 1978 on the involuntary retirement of older workers rather than amount of benefits to be provided under employee benefit plans. There are, however, scattered references to employee benefit plan discrimination in both the 1967 and 1978 legislative history.


While the 1967 legislative history indicates that a total cutoff of benefits to older workers is permitted, the Department of Labor has interpreted § 4(f)(2) to permit \textit{lesser} benefits. Thus, the Department of Labor recently summarized the original Congressional intent in 1967 as follows:

\begin{quote}
In fashioning the Section 4(f)(2) exception with respect to employee benefit plans, Congress explicitly recognized that the cost of providing certain benefits to older workers is greater than providing the same benefits to younger workers. To require that the same benefits be provided to all workers without regard to age, Congress feared, would discourage the employment of older workers or would unduly burden the employer and thereby jeopardize the continued maintenance and operation of such plans.
\end{quote}


While the difference between \textit{excluding} an older worker and paying a \textit{lesser} benefit to older workers may seem to be a subtle shift in interpretation, it is critically important. The Department of Labor and the EEOC now interpret benefit reductions to be nondiscriminatory only when they are cost justified. Differences in costs of benefits, however, are rarely so great as to justify a total cutoff of benefits (\textit{i.e.}, the exclusion of an older worker). Since the 1967 legislative history authorized a total cutoff in benefits, it seems doubtful that Congress interpreted § 4(f)(2) in 1967 as requiring an equal cost or equal benefit justification.

\textsuperscript{22} In the legislative history of the 1978 amendments, there are a number of references to an economic cost justification being required for welfare benefit plans. Nowhere, however, is there a statement that equal costs or equal benefits is the \textit{sole} justification.

In fact, the legislative history supports the status quo. The Senate Report, for example, indicates that employee benefit plan practices which were lawful prior to the 1978 amendments were not to be disturbed: "Presently some employers reduce coverage for older workers under [welfare benefit] plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices." S. REP. No. 493, 95th Cong., 1st Sess. 5 (1977).

Congressman Hawkins (D., Cal.) indicated during the floor debate that either an economic purpose or a business purpose was sufficient. 124 CONG. REC. H2270 (daily ed. March 21, 1978).

Congressman Pepper (D., Fla.) cautioned that "a total cutoff of benefits" would not be permitted "without full economic justification." \textit{Id.} at H2275. Similarly Congressman Weiss (D., N.Y.) said § 4(f)(2) required providing "reasonable benefits to . . . older employees." \textit{Id.} at H2276.

The most explicit statement of the equal cost or equal benefit principle is contained in a colloquy between Senators Javits (R., N.Y.) and Williams (D., N.J.). \textit{Id.} at S4450-51 (daily ed. March 23, 1978).
not clear about whether equal employer costs are the sole permissible justification for paying a lower benefit to an older employee. Moreover, the requirement that the plan not be a subterfuge has been the subject of surprisingly little litigation. In fact, one of the few court decisions which considers the issue of whether a cost justification is required as a condition of satisfying section 4(f)(2) is McMann. In McMann, the Supreme Court did not require a cost justification. It held that to be a subterfuge an employer’s intent to violate the law must be demonstrated. The Court defined a subterfuge to be “a scheme, plan, stratagem, or artifice of evasion.” As indicated previously, the McMann decision interpreted section 4(f)(2) to permit a forced retirement at age 60 under the terms of an employee benefit plan. Specifically, the Court indicated that a pension plan provision in effect prior to the enactment of the ADEA which required retirement prior to age 65 could not be considered to be a subterfuge to evade the purposes of the Act. The logic of the decision was that a pension plan provision written in 1941 could not possibly have been adopted by the employer in order to circumvent the antidiscrimination requirements of the ADEA. “To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes, at the very least, a re-

The Javits-Williams colloquy, in effect, quotes with approval the 1969 Department of Labor Interpretation which established the equal cost or equal benefit principle and states that the 1978 amendments were not intended to alter existing practices. Id. Paradoxically, the Department of Labor quotes the Javits-Williams statement for support in the 1979 Interpretative Bulletin which dramatically altered its interpretations of § 4(f)(2). 44 Fed. Reg. 30,649 (1979). The Department of Labor, however, only acknowledged that the “old interpretation was less specific than the new.” Id. at 30,657.

The 1969 Department of Labor Interpretative Bulletin does not state that equal cost or equal benefits is the sole justification for a discriminatory employee benefit plan under § 4(f)(2). It is at least implicit in the 1969 interpretation that other justifications were possible. Furthermore, the Supreme Court in McMann v. United Air Lines, Inc., 434 U.S. at 192, explicitly recognized that noneconomic justifications were possible. Given that: (1) there was no change in the relevant statutory language (i.e., bona fide and subterfuge) in 1978, (2) the legislative history of the 1978 amendment is ambiguous at best, and (3) there is an express rejection of the cost justification as the exclusive rule in McMann, how much validity has the Department of Labor’s general interpretation, first articulated in September 1978, that the sole justification for age based reductions in employee benefit plans is actuarially significant cost considerations?

23. 434 U.S. at 192.
24. Id. at 203.
25. Id.
26. Id.
markable prescience to the employer." 27 More importantly, the Court also ruled that treating older employers less advantageously than younger employees is not a per se violation of section 4(f)(2) "requiring an employer to show an economic or business purpose in order to justify the subterfuge language of the Act." 28

While Congress did amend section 4(f)(2) to prohibit involuntary retirement of employees within the protected age group, it did not amend section 4(f)(2) with respect to the definition of a "subterfuge." Consequently, one can argue that the Court's statement in McMann defining "subterfuge" as requiring an intent to evade the purposes of the Act is still good law. It effectively rejected a per se rule of equal employer costs. In summary, while the Department of Labor and the EEOC require a cost justification, the Supreme Court in McMann did not. One can anticipate that some employers will choose not to comply with the equal cost or equal benefit interpretation which is the key to the federal enforcement position. In so doing, employers will defiantly cite McMann as a defense to their actions. 29

Another element of uncertainty concerning the reliability of the Department of Labor's interpretations of the ADEA has been introduced as the result of the transfer of jurisdiction for administration and enforcement of the ADEA from the Department of Labor to the EEOC. This transfer was effective July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978. 30 The preamble to the May 25, 1979, Interpretative Bulletin indicates that the EEOC concurred with the Department of Labor's interpretations and enforcement policies as expressed in the Bulletin. 31 In fact, the EEOC staff participated with the Wage and Hour Division of the Department of Labor in the development of the Interpretative Bulletin. 32 After the publication of the Interpretative Bulletin and the transfer of jurisdiction, the EEOC announced that while the De-

27. Id.
28. Id.
29. There are no court decisions yet considering the effect of McMann on employee benefits after the passage of the 1978 amendments. One significant issue is whether the McMann language rejecting economic justification as a per se test for involuntary retirement is dicta and was not intended to be applied generally to employee benefit issues.
32. Leach's Speech, supra note 7.
partment of Labor’s interpretations may be relied on temporarily by employers, the EEOC intends to publish its own guidelines. This turnabout in the EEOC’s policy raises the possibility that the EEOC’s enforcement position will differ from the interpretations expressed in the Department of Labor’s Interpretative Bulletin. The EEOC is probably contemplating more stringent guidelines relating to retirement plans.

In summary, the current state of the law interpreting the reasoning of “subterfuge” in section 4(f)(2) is: The equal cost or equal benefit rule which is the key interpretative principle for both the Department of Labor and the EEOC is open to question. Further, the Department of Labor and the EEOC do not always appear to agree on its application. Given this unsettled state of the law, it is questionable how much attention should be given the regulatory interpretations.

The Interpretative Bulletins and the EEOC’s guidelines represent the enforcement position of the federal government. There is, however, no statutory expression of the deference which should be paid by employers to the Department of Labor’s Interpretative Bulletins or to EEOC’s guidelines. The Supreme Court in Skidmore v. Swift & Co. stated:

[Such interpretations do provide informative guidance.] While not controlling upon courts by reason of their authority, [they] do constitute a body of experience and inform judgment to which courts and litigants may properly resort for guidance. The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

One should note, by way of comparison, instances in which Congress has delegated to a regulatory body the power to promulgate regulations, such legislative regulation is subject to less scrutiny. Judicial review of legislative regulations is limited to insuring consistency with underlying statutes, promulgation procedures and the Constitution. Additionally, consideration should be given to

34. See text accompanying notes 196-221 infra.
35. 323 U.S. 134 (1944).
whether the interpretative regulation was made contemporaneously with, or shortly following, the enactment of the statute\(^3\) and whether the statement is one of long standing which has continued in effect during a reenactment of the underlying statute.\(^4\) As noted above, the Department of Labor has consistently required an equal benefit or an equal cost justification since 1969. Whether the equal benefit or equal cost principle will be upheld under the Skidmore standard is impossible to predict. One can anticipate, however, that employers, at a minimum, will seek to litigate the more objectionable and unsupported positions derived from the equal benefit or equal cost analysis taken in the Interpretative Bulletin and in EEOC's guidelines.

Employers who choose to rely in good faith on the Department of Labor's Interpretative Bulletin will be protected from liability for violations of the ADEA in suits by the EEOC, and also possibly in private lawsuits.\(^5\) The EEOC has stated that until its new rules are issued, employers will be protected if they comply with the Interpretative Bulletin.\(^6\) Thus, the Interpretative Bulletin represents a "safe harbor," albeit a temporary safe harbor, in which employers may choose to rely. Employers who follow such safe harbor provisions may not be exposed to retroactive liability if a court subsequently determines that the positions taken by the Department of Labor in the Interpretative Bulletin were incorrect.

One final cautionary note is in order. Since its enactment in 1967, the ADEA has permitted states to pass their own age discrimination laws,\(^7\) which most states have done.\(^8\) In many instances, their provisions differ significantly from the federal law.


\(^8\) See Appendix A (listing of state age discrimination laws and key provisions).
For example, while the ADEA does not protect individuals less than 40 years old, some state laws have no lower age limit.\textsuperscript{44} Likewise, while the ADEA does not apply to any employer having fewer than 20 employees, some state laws do not require a minimum number of employees.\textsuperscript{45} Coinciding with the enactment of the 1978 amendments, several states have amended their state antidiscrimination laws to expand protection of their employees to age 70.\textsuperscript{46} Some states even have removed the maximum protected age limit altogether.\textsuperscript{47} Certain state laws, however, do not contain an exemption equivalent to the bona fide plan exemption found in section 4(f)(2) of ADEA.\textsuperscript{48} Consequently, employers will have to examine carefully state antidiscrimination laws to determine whether their employee benefit plans satisfy state law requirements which may be more stringent than federal law requirements.\textsuperscript{49}

To complicate compliance further, the ability of states to pass more stringent antidiscrimination laws is limited indirectly by ERISA. ERISA does not preempt any federal law but does supersede all state laws which pertain to an employee benefit plan.\textsuperscript{50} The failure of state laws to include a bona fide plan exception may cause the state antidiscrimination law to conflict with ERISA. Although a state law may be enacted as an antidiscrimination law, it may, in fact, be a prohibited state law regulating employee benefit plans.\textsuperscript{51}

\begin{thebibliography}{99}
\bibitem{44} \textit{Id.}
\bibitem{45} \textit{Id.}
\bibitem{46} \textit{Id.}
\bibitem{47} \textit{Id.}
\bibitem{48} \textit{Id.}
\bibitem{49} \textit{Id.}
\bibitem{50} \textit{Id.}
\bibitem{51} \textit{Id.}
\end{thebibliography}
In summary, employee benefit plans should be reviewed in light of the 1978 amendments, the legislative history and the Interpretative Bulletin. The Interpretative Bulletin, however, is not controlling upon courts. It is a safe harbor for employers. While employers may choose to ignore some of the more unsupported positions in the Interpretative Bulletin, they may be forced to litigate the issues involved. In addition to federal law, employee benefit plans should be reviewed in light of applicable state age discrimination laws. Employers must decide whether to ignore state laws to the extent such laws are preempted by ERISA. The review and decisionmaking process will require careful judgment of specific benefits. Section III of this article will assist the reader in judging how these benefits can be provided.

III. DEPARTMENT OF LABOR'S AND EEOC'S
INTERPRETATIONS OF SECTION 4(f)(2)—
THE GENERAL PRINCIPLES

As previously indicated, section 4(f)(2) of the ADEA provides that it is not an unlawful employment practice for an employer to observe the terms of any bona fide employment benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the Act. In absence of this section 4(f)(2) exception, a reduction in employee benefits by an employer on the basis of age violates the ADEA because it clearly discriminates against an individual with respect to his or her terms, conditions or privileges of employment. The Interpretative Bulletin sets forth the equal cost or equal benefit position of the Department of Labor and describes in great detail the extent to which section 4(f)(2) authorizes certain reductions in employee benefits on the basis of age.52

52. The Department of Labor's Interpretative Bulletin on § 4(f)(2) appeared in final form on May 25, 1970 and is the key interpretation of permissible discrimina-
According to the Interpretative Bulletin, benefits provided to older workers may be less than those provided to younger workers only if every element required by section 4(f)(2) is "clearly and unmistakably met."\(^53\) The three key elements of section 4(f)(2) are:

1. The plan is a "bona fide employee benefit plan";
2. The lower benefits are provided in "observ[ance of] terms of" such plan; and
3. The plan or plan provisions are not a "subterfuge to evade the purposes of the Act."\(^54\)

All three elements must be satisfied in order for the employee benefit plan to be considered in compliance with the ADEA in an employee benefit plan in which an older worker receives a lesser amount of benefits or insurance coverage. The Interpretative Bulletin notes that the three elements are to be construed narrowly. The burden is on the employer to demonstrate compliance.

### A. Bona Fide Employee Benefit Plan

The Interpretative Bulletin defines an "employee benefit plan" as a plan which provides employees with fringe benefits.\(^55\) For example, a retirement, pension or insurance plan would be so categorized. The section 4(f)(2) exception is inapplicable to wages or salaries.\(^56\) The Interpretative Bulletin discusses the application of section 4(f)(2) to a number of specific types of employee benefit plans. The description of plans discussed in the Interpretative Bulletin and affected by the ADEA is apparently for illustrative purposes only. The Interpretative Bulletin discusses only pension, ...
group life and health insurance and group long-term disability insurance plans. Other plans, such as insured sick leave plans, life insurance and disability plans funded by individual insurance products also constitute employee benefit plans which are subject to the ADEA. All employer provided fringe benefits fall within this definition. More surprising is that "employee pay-all" benefits are subject to the ADEA.

An employee benefit will be considered bona fide only if two prerequisites are met. First, its terms must be accurately described in writing to all employees. Second, it must actually provide benefits in accordance with the terms of the plan. In addition, employers are obliged to notify employees of any changes in the plan. Satisfying the participant disclosure requirements of ERISA and its regulations are deemed to be sufficient for ADEA purposes.

The written disclosure requirement of ADEA will create problems for plans which are exempted from ERISA disclosure requirements. Requiring written disclosure for ADEA purposes for plans which have already been granted statutory or regulatory exempt-

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57. While all fringe benefit plans or programs are considered employee benefit plans for ADEA purposes, the only class of plan which can discriminate against older workers without the Department of Labor considering the plan to be a "subterfuge" is a plan in which age is an actuarially significant cost factor. The "subterfuge" requirement is considered at length. See text accompanying notes 71-120 infra.

58. Id. See also 44 Fed. Reg. 30,648 (1979) (preamble to Interpretative Bulletin). The rules for employee pay all plans are considered at length. See text accompanying notes 102-120 infra.

59. 29 C.F.R. § 860.120(b) (1979). The 1969 Interpretative Bulletin had no written disclosure requirements. Id. at § 860.120 (1969).

60. 29 C.F.R. § 860.120(b) (1979).


62. Certain employee benefit plans are exempted from the disclosure requirements of ERISA, 42 U.S.C. §§ 1021-1030 (1976), by statute or Department of Labor regulation. Congress exempted plans sponsored by government or church organization and certain nonqualified deferred compensation plans. ERISA § 4(b)(1), (2), (5), 29 U.S.C. § 1003(b)(1), (3), (5) (1976). In addition, the Department of Labor has exempted certain employee pay all plans, bonus plans, supplemental retirement benefit plans, tax sheltered annuities and individual retirement annuity programs from, among others, ERISA disclosure requirements. 29 C.F.R. §§ 2510.3-1, -2, -3 (1979). One irony is that the Department of Labor, Pension-Welfare Benefits Administrator, exempted certain fringe benefit plans from ERISA disclosure requirements although there is specific statutory authority to require them, while the Department of Labor, Wage and Hour Division, imposed disclosure requirements to all employee benefit plans, without exception, although there is no explicit statutory authority to impose such requirements. Id.
tions from disclosure under ERISA is inconsistent policymaking. Furthermore, the requirement of a written plan and notice to employees goes beyond judicial interpretations of the bona fide requirement.63 For example, the Supreme Court in *McMann* appeared to require only that the plan exist and pay benefits in order to satisfy the bona fide requirement.64

B. "To Observe the Terms" of a Plan

The Interpretative Bulletin makes clear that the section 4(f)(2) exemption protects actions which might otherwise be discriminatory only if the action is taken in accordance with the express terms of the plan.65 Unwritten procedures which provide a reduction in benefits for older workers are not protected by section 4(f)(2).66 For example, an oral promise by the employer to pay benefits will not satisfy this requirement although the employer, in fact, pays the benefits promised. In addition, the Interpretative Bulletin requires that the discriminatory provision must not be an optional term subject to employer discretion.67 Thus, many informal employee benefit plans will have to be reduced to writing in order to continue providing reduced benefits to older workers.

Some courts have rejected the notion that the discriminatory policy must be a written mandatory term of a plan.68 The basis for the Department of Labor's position is that employees must have some opportunity to know of a discriminatory policy and to plan, or protest, accordingly.69 In addition, the mandatory application of the plan provision assures that the discriminatory provision will be equally applied to all employees of the same age.70

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64. 434 U.S. at 194.
65. 29 C.F.R. § 860.120(c) (1979).
66. Id.
67. Id.
69. 29 C.F.R. § 860.120(c) (1979).
70. Id.
C. "Not a Subterfuge"

In order to provide older workers lesser benefits under a bona fide employee benefit plan pursuant to section 4(f)(2), the plan must not be a subterfuge to evade the purposes of the Act. The Department of Labor and the EEOC take the position that an employee benefit plan, other than a retirement plan, which prescribes lower benefits for older workers is not a subterfuge if such lower benefits are justified by actuarially "significant cost considerations."71 Actuarially "significant cost considerations" simply means that an employer providing unequal benefits must be prepared to show that the actual costs for benefits of younger and older employees are equal. A plan which provides lower benefits for older workers is not a subterfuge when the actual amount of payment made, or the cost incurred on behalf of an older worker, is equal to the actual amount of payment or cost incurred on behalf of a younger worker, even if the older worker receives a lesser amount of benefits or insurance coverage.72 Age must be a significant cost factor.73 Consequently, the preamble to the Interpretative Bulletin concludes that an uninsured paid sick leave plan, like a paid vacation plan, does not fall within section 4(f)(2) because age is not an actuarially significant cost factor in such a plan. The preamble takes the position, however, that an insured paid sick leave plan, unlike a short term disability plan, may fall within section 4(f)(2). This would happen when the employer can prove that the expenditure for the older workers' benefits is more costly.74 Although age

71. 29 C.F.R. § 860.120(a)(1), (d) (1979). While the EEOC has not yet published its interpretation of § 4(f)(2), it is clear that the EEOC subscribes to the general principle of permitting lower benefits for older workers only where justified by "actuarially significant cost considerations."


73. Id.

74. 44 Fed. Reg. 30,648, 30,649-50 (1979). The preamble comments confuse two separate issues. The first is whether age is an actuarially significant cost factor in an uninsured paid sick leave plan. The second is whether an uninsured paid sick leave plan is an employee benefit plan described in § 4(f)(2). As indicated in the text
should be a significant cost factor, the distinction between an insured and an uninsured plan is nonsensical. Benefits from a sick leave plan can be funded either by insurance contracts, through trusts or directly out of the general assets of the employer. Whatever the funding vehicle, however, the cost of maintaining such a plan does increase with the age of the employee participant. Older workers tend to experience longer and more serious sicknesses than younger workers. This is true whatever the funding method. An uninsured sick leave plan should be within the section 4(f)(2) exception to the same extent as an insured sick leave plan.

The Interpretative Bulletin's general introduction is unclear about how precise the equivalency in cost for an older worker and a younger worker must be. At one point, the Interpretative Bulletin states that benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. In the next sentence, however, the Department of Labor states that an employee benefit plan will comply with the statute when the actual amount of payment made, or the cost incurred, on behalf of an older worker is equal to that made on behalf of a younger worker. There is a distinct difference between approximate equivalency in cost and precise equivalency in cost.

The Interpretative Bulletin in its discussion of cost data, however, makes clear that the equivalency need only be approximate. Specifically, the Department of Labor requires that cost data must be valid and reasonable in order to justify a reduction benefit for older workers. This standard is met if the employer has cost data which shows its actual cost for providing a particular benefit over a "representative period of years." In addition, an employer may rely on cost data for a "larger group of similarly situated employees." If reliable cost data is not available, an employer may rely above the Department of Labor incorrectly concludes that age is not a significant cost factor. The preamble comment also concludes that an uninsured paid sick leave plan is not an employee benefit plan described in § 4(f)(2). This conclusion is at odds with the Interpretative Bulletin itself which defines employee benefit plan as an employer provided program which provides "fringe benefits." 29 C.F.R. § 860.120(b) (1979). This broad definition should encompass a broad range of plans, including uninsured sick leave plans.

75. 29 C.F.R. § 860.120(a)(1) (1979).
76. Id.
77. 29 C.F.R. § 860.120(d)(1) (1979).
78. Id.
79. Id. The proposed Interpretative Bulletin had a more rigid rule requiring an
on reasonable projections made from existing data. If an employer, either noninsured or experience rated by an insurance company, incurs costs which significantly differ from costs for a group of similarly situated employees, the employer may not rely on cost data for the similarly situated employees when such reliance will result in significantly lower benefits for older workers. Precisely what is meant by "valid and reasonable," "representative period of years," "larger group of similarly situated employees" and "significantly differ" is unclear. What is clear, however, is that the Department of Labor decided to permit an employer to make adjustments in benefits on the basis of any reasonable data on benefit costs.

As a practical matter, most employers probably will look to insurers to determine whether cost data will justify benefit reductions for older workers under insured plans. The compliance obligation, however, is the employer's not the insurer's. Furthermore, it is not at all clear under existing case law whether an employer is legally entitled to rely on the insurance carrier. Employers, consequently, may wish to seek letters of representation from their insurers that the insurance contracts being issued to them satisfy the cost requirements of the Interpretative Bulletin.

1. Determination of Cost Incurred

Two methods are permitted under the Interpretative Bulletin to justify cost differences in employee benefit plans. The first method, the "benefit by benefit basis," requires cost reduction to be separately justified for each individual benefit. In the benefit

employer to sue its own cost data except when such data did not exist or was statistically unreliable, in which case any reasonable actuarial data or benefit cost for similarly situated employees could be used. 43 Fed. Reg. 43,269 (1978); id. at 43, 265 (preamble to the Proposed Interpretative Bulletin).


82. ADEA § 4 prohibits age discrimination by employers, employment agencies and unions, but not by insurance companies. ADEA § 4, 29 U.S.C. § 623 (1976), as amended by 29 U.S.C.A. § 623 (West Cum. Supp. 1979). But see Spirt v. TIAA-CREF, 475 F. Supp. 1298 (S.D.N.Y. 1979), stating that an insurance company is an employer in a title VII sex discrimination case where the terms of the pension plan were in the insurance company's control in a functional sense. Id. at 1308.


by benefit approach, adjustments must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher long-term disability costs for older employees may justify a reduction in the amount of disability benefits for older workers on the basis of age, but not a reduction in any other benefit, such as a retirement benefit. The benefit by benefit approach does not justify the substitution of one form of benefit for another. This is so even though both forms of benefit are designed for the same contingency, such as death or income replacement. For example, if an older worker becomes disabled, he or she might be entitled to both retirement benefits and long-term disability benefits in order to provide for income replacement. Under the benefit by benefit approach, an employer would not be justified in reducing a retirement benefit because of the increased cost of providing a disability benefit.

The Department of Labor never clearly defines “benefit.” It does, however, reject the broad notion of benefit as being all payments made upon the occurrence of a certain event such as retirement, death or disability. This is known as an event by event test. It also appears to reject the more narrowly defined approach defining a benefit in terms of the employee benefit plan producing the benefit. This is known as a plan by plan test. The Interpretative Bulletin fails to discuss whether all benefits provided under an individual insurance contract constitute a single benefit. The Interpretative Bulletin also fails to discuss the treatment of ancillary benefits. As a result, for those benefits which do not fit neatly into a particular category, questions remain as to how they should be treated.

The second method, the “benefit package approach,” permits cost comparisons to be made in the aggregate for bona fide em-

85. A benefit is vaguely defined in the Interpretative Bulletin as payments made in a specific form upon the occurrence of a specific event or contingency. Id. In the preamble, the Department of Labor itself acknowledges the “flexibility” in the definition. 44 Fed. Reg. 30,651 (1979).
87. Id.
88. For example, how is waiver of premium on account of disability under a life insurance contract to be treated? Is it a life insurance or a disability benefit? How is the accrual of benefits for disability under a pension plan to be treated? Is it a retirement or a disability benefit? How is an accidental death and dismemberment benefit under a life insurance contract to be treated? Is it an accidental death/disability benefit or a death benefit? How is a survivorship benefit under a retirement plan to be treated? Is it a death or a retirement benefit?
employee benefit plans. The benefit package approach requires an employer to maintain an aggregate benefit cost level, but permits the employer to reduce or even eliminate some benefits while maintaining other benefits at higher levels. In theory, the employer's entire fringe benefit package can be justified in the aggregate. Cost justification of individual benefits is unnecessary. The benefit package approach is, however, available only if the overall result is no lesser cost to the employer for the benefits of older workers, and the benefits to employees are not less favorable.

The following example from the Interpretative Bulletin illustrates the application of the benefit package approach. Assume an employer has two employee benefit plans, A and B. Age related cost data would justify a 10% reduction in benefits for older workers under each plan if a benefit by benefit approach was used. Under the benefit package approach, the employer may reduce the benefits under plan B by 20% if the benefits under plan A are unreduced. If the benefits under plan A cost only one-half as much as the benefits under plan B, however, the benefits under plan B may be reduced by only 15% (10% plus 5%) because a greater reduction would reduce total benefit cost to the employer. The example clearly illustrates that the cost of each benefit reduction still must be analyzed under the benefit package approach.

What then, is the advantage of the benefit package approach? The benefit package approach, in theory, offers more flexibility to employers in benefit plan design. An excessive reduction in one benefit can be justified by a modest reduction in another benefit. The Interpretative Bulletin, however, places so many limitations on the benefit package approach that it is unworkable for all but the largest employers. The benefit package approach is of limited value for several reasons.

89. 29 C.F.R. § 860.120(d)(2)(iii) (1979). See preamble to Interpretative Bulletin, 44 Fed. Reg. 30,650 (1979). The proposed Interpretative Bulletin forbade the use of a benefit package analysis. 43 Fed. Reg. 43,266 (1978). The proposal rejected the benefit package approach because an employee might receive a drastic benefit reduction in a benefit of particular value to him. Id. Also, the Department seemed concerned about the complex actuarial analyses which are required under a benefit package analysis. Id.


91. Id. at (f)(2)(v).

92. Many employers criticized the proposed Interpretative Bulletin's failure to permit the use of the benefit package approach claiming that a strict benefit analysis deprives employers and employees of the opportunity to design a fringe benefit package responsive to their needs. 44 Fed. Reg. 30,651 (1979).
First, only plans covered under section 4(f)(2) may be considered. Therefore, the entire compensation package, including salary and non-age related fringe benefits, such as paid vacation plans, group, legal insurance or uninsured sick leave plans, may not be reflected in the computation. For example, an employer cannot justify decreases in long-term disability benefits on the basis of an increase in salary.\textsuperscript{93}

Second, a retirement or pension plan may not be considered under the benefit package approach because such plans are not subject to the general rule requiring equal costs or equal benefits.\textsuperscript{94} The exclusion of retirement plan benefits from use under the benefit package approach is particularly unfortunate since many pension plans provide ancillary disability and death benefits which could otherwise be taken into account. For example, a pension plan providing a death benefit after normal retirement date in excess of the cost of providing a death benefit for a younger worker cannot be used under the Interpretative Bulletin to justify a reduction in group term life insurance for the older employee.\textsuperscript{95} This restriction makes good plan design more difficult. Employers try to coordinate various benefits in order to take into account the needs of their employees at different ages. Employers try to avoid unnecessary duplication of benefits by coordinating different benefits from different plans which are designed to serve the same purpose. In our example, both the survivor income benefit under the pension plan and the group term life insurance benefit provide benefits to the employee's immediate family upon his or her death. Under the Department of Labor interpretation, however, these two benefits may not be interrelated.

Third, the benefit package approach cannot justify reduction in health benefits for older workers in excess of the reduction which would be justified under the benefit by benefit approach.\textsuperscript{96} The Inter-


\textsuperscript{95} The EEOC apparently is considering revising this rule to permit pre-retirement death benefits under a pension, but not a profit-sharing plan to be used to justify reductions in other death benefits provided under a welfare benefit plan. UPDATE, newsletter of Towers, Perrin, Foster and Crosby, Boston, Mass. (July 25, 1979).

interpretative Bulletin justifies this restriction based on legislative
history which emphasizes the fundamental importance of health in­
surance benefits to older workers.97

Fourth, reductions in benefits greater than that justified under
the benefit by benefit approach must be offset by making another
benefit available to the employees affected.98 This restriction pre­
vents employers from trading away a benefit available to all em­
ployees for increased benefits available to relatively few employ­
ees.99

Fifth, employers who use the benefit package approach must
be prepared to produce data to show that reductions are fully
justified.100 Employers will need to retain an actuary to prepare
the cost analysis. Some employers will not be willing, or may not
be able, to incur this additional cost.

Small employers are least likely to use the benefit package ap­
proach. Normally, they will look to insurance companies to present
a benefit plan to them. Insurance companies, in turn, will probably
develop contracts which comply with the Interpretative Bulletin
using the benefit by benefit analysis. The benefit package approach
does not represent a practical marketing alternative for an insur­
ance company because it requires a thorough analysis of all em­
ployee benefit plans sponsored by the employer, some of which
may not be provided by the insurance company involved. Since
insurance companies will market products on the basis that
each product is designed to comply with the benefit by benefit ap­
proach, employers purchasing those products, in turn, will be obli­
gated to justify their plans on a benefit by benefit basis.

2. Age Ranges Used to Calculate Benefit Reductions

The Interpretative Bulletin authorizes benefit cost comparisons
in benefit reductions to be made on the basis of age brackets of up
to five years.101 Under an age bracket analysis, the average cost of

101. The proposed Interpretative Bulletin permitted costs to be calculated only on a year by year basis. 43 Fed. Reg. 43,266, 43,269 (1978). The proposal would have prohibited the five year age bracket analysis customarily used to calculate group life insurance costs. 44 Fed. Reg. 30,652 (1979) (preamble to the Interpretative Bulletin).
a benefit for all employees within an age range must be equal to or greater than the average cost of a benefit for all employees in the immediately preceding age bracket of equal duration. For example, benefits for employees 60 to 65 years of age may be reduced only to the extent necessary to achieve cost equivalency with employees 55 to 60 years old. Benefits for employees 65 to 70, however, may not be reduced to the extent necessary to achieve equivalency in cost with benefits for all employees within an age range of more than five years, for example, 18 to 64 years old. While the age range analysis is primarily used to determine benefit costs for group term life insurance, under the Interpretative Bulletin, age ranges may be used to analyze costs and benefit reductions for any employee benefit.

3. Employee Contributions

Many employee benefit plans require employees to pay some or all of the costs of providing benefits under a plan sponsored by the employer. In the Interpretative Bulletins, these plans are divided into two classes. The first class comprises those plans in which employees are required to contribute some or all of the cost of providing benefits under the plan as a condition of employment. Section 4(a)(1) of the ADEA prohibits discrimination in “terms, conditions, or privileges of employment” in addition to prohibiting discrimination in compensation. The Interpretative Bulletin takes the position that an older employee cannot be required as a condition of employment to make greater contributions in order to receive the same level of benefits as a younger employee. The preamble to the Interpretative Bulletin justifies the Department of Labor’s position by pointing out that if participation in the employee benefit is involuntary, requiring an older employee to make greater contributions does discriminate in compensation on the basis of age. The employee has no option but to receive less take home pay than a similarly situated younger worker.

The second class includes those contributory plans in which participation by employees is voluntary. The Interpretative Bul-

105. 44 Fed. Reg. 30,652 (1979); cf. City of Los Angeles, Dep’t of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (requiring female employees to contribute more than male employees to a retirement plan violates title VII because the female’s take home pay would be less than a similarly situated male employee).
letin takes the position that benefit plans sponsored by employers which require employee contributions as a condition of participation and receipt of benefits are subject to the ADEA. If participation is voluntary, a plan will not be lawful when the cost of participation to older workers is discriminatory on the basis of age.\textsuperscript{107} The Interpretative Bulletin further divides voluntary employee contribution plans into three categories, applying separate rules to each category. The first category is the voluntary employee pay-all plans.\textsuperscript{108} Older workers, like younger workers, may be required to contribute the full amount of increased cost for their age as a condition of participation. At the same time, the Interpretative Bulletin prohibits an employer from excluding older employees from participation in such plans or requiring older employees to contribute more than the amount of the cost increase justified by increased age. The Department of Labor never clearly states why voluntary employee pay-all plans are subject to the ADEA. Since participation is voluntary, older workers are free to avoid reductions in take home pay by declining to participate in the plan. Consequently, there is no discrimination in compensation. Since an employee can decline to participate in a plan, the plan certainly is not a term or condition of employment. Apparently, the Department considers the right of an older employee to participate in a voluntary employee pay-all plan on an equal basis with a younger employee to be a privilege of employment.\textsuperscript{109}

The second category of voluntary plans is a noncontributory or employer pay-all plan.\textsuperscript{110} Where no employee participant is required to make any contribution to a plan, there is obviously no age based discrimination against older workers. The Interpretative Bulletin provides, however, that when participation is voluntary and the employer pays all costs for younger workers, the employer cannot require older workers to contribute towards any age related cost increase.\textsuperscript{111} The Department of Labor's position is contra-

\textsuperscript{109} ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) (1976), prohibits employer discrimination in "compensation, terms, conditions or privileges of employment because of an individual's age." \textit{Id}. The Department of Labor has taken an inconsistent position on voluntary employee pay-all plans by exempting them from the requirements of Title I of ERISA. See 29 C.F.R. §§ 2510.3-1,-2,-3 (1979).
\textsuperscript{111} \textit{Id}. 

dicted by the legislative history of the 1978 amendments which permits any additional costs to fund benefits for older workers to be borne by the older workers.\footnote{112} The third category of voluntary employee contributory plans includes \textit{contributory plans} in which the employer and the employees share in the plan costs.\footnote{113} The Interpretative Bulletin takes the position that when participation in the benefit program is voluntary and the employee bears part of the cost for providing the benefit, the employer can require an older employee to bear a proportionate share of the increased cost as a condition of participation in the plan.\footnote{114}

In so doing, the Interpretative Bulletin gives employers two alternatives. The employer and the older worker can be required to share in the increased cost of providing the same benefit to older workers as is provided to younger workers. This would be appropriate so long as employee contributions are a fixed percentage of the total cost of their benefit. In the alternative, the employer may make the same dollar contributions for both older and younger workers causing a reduced benefit to be paid to the older worker. The Interpretative Bulletin notes that the older employee may be given the option to make additional contributions necessary to receive the same level of benefits as the younger employee.\footnote{115}

\footnote{112} "Presently some employers reduce coverage for older workers under [welfare benefit] plans or increase the required employee contribution as workers advance in age. This bill would not alter existing law with respect to these practices." S. REP. NO. 493, 95th Cong., 1st Sess. 5 (1977).


\footnote{114} 29 C.F.R. § 860.120(d)(4)(ii)(C) (1979); 44 Fed. Reg. 30,653 (1979) (preamble to Interpretative Bulletin). The preamble to the Interpretative Bulletin gives the following example: Assume that the cost of a contributory group insurance plan increases in total monthly premium from $20 to $30 per month for each covered employee as the employee moves from a lower to a higher five year age bracket range. Further assume that employer and the employee each contribute 50\% of the monthly premium. The employer can increase the employee's monthly contribution from $10 to $15. The employer's contribution, however, could not be less than $15 per month (such as $10) because this would require the older employee to match employer contributions more than dollar for dollar, something that younger employees are not required to do. In the alternative, the employer may choose to reduce the level of benefits so that the total premium remained at $20, of which the older employee paid $10. 44 Fed. Reg. 30,653 (1979) (preamble to Interpretative Bulletin).

4. Coordination with Government Sponsored Benefits

Many employee benefit plans reduce benefits by considering government provided benefits such as social security or Medicare benefits. This approach is called "integration." Integration permits an employer to fix the total amount of benefit from all sources which an employee will receive. Concomitantly, it reduces employer costs.

The Interpretative Bulletin permits government sponsored benefits, such as Medicare and social security, to be integrated with employer provided plan benefits so long as older employees enjoy no lesser total benefit than younger employees.\footnote{29 C.F.R. § 860.120(e) (1979); 44 Fed. Reg. 30,652 (1979) (preamble to Interpretative Bulletin).} Integration with government sponsored benefits is permitted although the availability of such benefits may be based on age and the application of integration may make employer costs for older employees less than for younger employees. For example, Medicare benefits are only available to employees age 65 or older.\footnote{42 U.S.C. § 1395(c), (o) (1976). Part A (§ 1395(c)) entitlement is also available to employees under age 65 who have been entitled to monthly cash benefits for at least 24 months for disability under social security or the railroad retirement program. Part A also provides hospital insurance benefits. Part B (§ 1395(o)) is a voluntary contributory supplement benefit program covering physicians services and other expenses not covered under Part A (§ 1395(c)).} Health care benefits may be offset by Medicare benefits. Once Medicare benefits are considered for older workers, the cost of providing health care benefits for younger workers may actually be less than the cost of providing health care benefits for older workers.\footnote{The specific rules for integrating Medicare benefits with health care plans are discussed. \textit{See} text accompanying notes 159-176 infra.}

5. Discrimination Against Retirees

One issue not discussed in the Interpretative Bulletin is whether an employee welfare benefit plan may exclude or provide a reduced benefit which is not justified by age related cost considerations to retired employees. Employer provided welfare plan benefits such as group term life insurance and group health insurance are sometimes provided to retirees.\footnote{D. GREGG & V. LUCAS, LIFE AND HEALTH INSURANCE HANDBOOK 375, 437-38 (3d ed. 1973); S. HUEBNER & K. BLACK, LIFE INSURANCE 403 (9th ed. 1976).} Since the ADEA only prohibits discrimination in the context of an employer-employee relationship,\footnote{ADEA § 4(a)(1); 29 U.S.C. § 623(a)(1) (1976).} employers need not provide welfare plan benefits.
to former employees or may provide benefits reduced in excess of reductions justified by age related cost considerations.

IV. DEPARTMENT OF LABOR'S AND EEOC'S INTERPRETATIONS OF SECTION 4(f)(2)—THE RULES FOR SPECIFIC TYPES OF EMPLOYEE BENEFIT PLANS

A. Application of Section 4(f)(2) to Welfare Benefit Plans

In formulating its rules for welfare benefit plans, the Department of Labor has consistently applied its general principle that age based reductions in employee benefit plans must be justified by actuarially significant cost considerations. Since the EEOC supports this general principle, few changes are likely to be made by EEOC interpretations for welfare benefit plans.

1. Group Term Life Insurance

The common practice of life insurance companies has been to market group term life insurance policies which provide life insurance benefits at a constant level unless the insured had attained a specified age, frequently age 65. At that time, the benefits either would be reduced to a percentage (usually 50%) of the amount payable through age 65 or would cease entirely.

The cost of providing life insurance coverage increases with age because of the increased likelihood of mortality. The Interpretative Bulletin permits the amount of life insurance coverage to be reduced to the extent justified by an increase in insurance costs under either the benefit by benefit approach or the benefit package approach. The proposed Interpretative Bulletin requires the cost comparison to be calculated on a year by year basis. The final Interpretative Bulletin modifies this rule and permits cost comparisons to be made by comparing average costs for periods of up to

121. Welfare benefit plans are employee benefit plans other than deferred compensation or retirement plans. Welfare benefit plans, as defined by ERISA, include a plan which provides medical, surgical or hospital care or benefits in the case of sickness, accident, disability, death or unemployment; such plans may also include other benefits such as vacation or scholarship plans. ERISA § 3(1); 29 U.S.C. 1002(1) (1976).
122. See note 71 supra.
124. 29 C.F.R. § 860.120(f)(1)(i) (1979) (benefit by benefit); id. at § 860.120(f)(2) (benefit package).
125. 43 Fed. Reg. 43,269 (1978) (to be codified in 29 C.F.R. § 860.120(d)(3)).
five years. This modification was made because of the insurance industry's longstanding practice of calculating premiums for group life insurance on the basis of average cost for five-year age brackets, rather than on yearly cost. Whatever age bracket is used for purposes of cost comparison, comparisons of cost must be made for the immediately preceding age group even if the coverage is equal for all years up to age 65. While age based reductions are permitted, a total cut off of life insurance benefits at any age within the prohibited group cannot be justified under the benefit by benefit approach because the cost of providing life insurance coverage does not increase so greatly in any one year as to justify a total cessation of coverage. The Interpretative Bulletin, however, makes clear that life insurance coverage may cease at the earlier of separation from service or age 70.

If the employer adopts a group term life insurance plan which is designed to provide year by year reductions, there will be an annual reduction in life insurance coverage beginning at a specified age, probably at age 65. The preamble to the Interpretative Bulletin makes clear that reductions in benefit levels can commence at any age, not only at 65. The proposed Interpretative Bulletin stated that the Department of Labor believed standard actuarial tables justified a benefit reduction of 8% each year for employees between 65 and 70. This "safe harbor" was deleted from the final version of the Interpretative Bulletin without explanation. It may have been dropped because the Department of Labor was not sure of the accuracy of the figure. At least one major life insurance company has determined that the annual increased cost of coverage for its group term life insurance between the ages of 65 and 70 jus-

129. "[A] total denial of life insurance, on the basis of age would not be justified under a benefit by benefit analysis." 29 C.F.R. § 860.120(b)(1)(i) (1979). Similarly, the proposed Interpretative Bulletin stated that "expulsion from a life insurance plan, on the basis of age, would never be justified." 43 Fed. Reg. 43,269 (1978).
132. 43 Fed. Reg. 43,269 (1978). Although the proposed eight percent "safe harbor" was deleted, the final Interpretative Bulletin does state that "all the employee benefit practices specifically permitted under the proposed interpretation published September 22, 1978, would be in compliance with the final interpretation published now." 44 Fed. Reg. 30,648, 30,657 (1979).
tifies an increase of approximately 8%. Utilizing this alternative, a
group term life insurance program might provide a constant benefit
of 100% payable through age 64. There would be an 8% reduction
in death benefits at ages 65 through 69. Consequently, the death be­
nefit at age 69 would be approximately 66% of the death benefit pay­
able at age 65. 133 No death benefit would be payable after age 70.

The Interpretative Bulletin alternatively permits cost justified
benefit reductions on the basis of average costs in five-year age
brackets, rather than on the basis of yearly costs. 134 Utilizing this
alternative, the group term life insurance benefit would be a con­
stant amount until age 65. One major life insurance company has
determined that a reduction of 33% for insureds between the ages
of 65 and 69 can be justified on the basis of five-year age brackets.
Thus, the death benefit between ages 65 and 69 would be 65% of
the benefit payable prior to age 65. No death benefit would be
payable on or after age 70. This single coverage reduction is easier
to administer and simpler to communicate to employees. Addition­
ally, there may be a financial advantage. If most active employees
retire on or before age 67½, the single reduction should be less ex­
pensive for the employer when compared to the costs of a year by
year reduction beginning at age 65.

Other variations in reductions are possible. It is permissible
and more expensive for an employer to provide a fixed unreduced
death benefit until age 70. Furthermore, any other variation in
group term life insurance costs which is more generous than that
justified by age related cost considerations is also permitted.

Often the amount of group term life insurance benefit payable
is based on employee wages or salaries or a multiple thereof, such
as two times annual compensation. 135 The preamble to the Inter­
pretative Bulletin notes that increases in the cost of coverage for
older workers which are generated by increases in wages or salaries
cannot be taken into account for purposes of calculating age based
increases in cost. 136 Consequently, when life insurance coverage is
expressed as a multiple of salary for employees age 64 or less, the
multiple and not the dollar amount of coverage must be reduced

133. The eight percent reduction is eight percent of the prior year's amount.
      Thus the death benefit to age 64 would be 100%; at age 65, 92%; at age 66, 84.64%;
      at age 67, 77.87%; at age 68, 71.64%; and at age 69 or later, 65.91%.
135. D. GRECC & V. LUCAS, supra note 119, at 358; S. HUEBNER & K. BLACK,
supra note 119, at 404.
for older employees. Increases in salary for employees 65 or older must generate increased life insurance coverage. The reason for this rule is that salary generated increases are not directly related to age.

In addition to the death benefit, two ancillary benefits customarily provided under a group life insurance contract were not addressed specifically in the Interpretative Bulletin. There is confusion as to how these benefits should be treated. The first of these ancillary benefits is a waiver of premium benefit. Typically, employers will discontinue premium payments on an employee whose active employment has terminated due to total disability. Furthermore, disabled persons are frequently unable to convert their group term life insurance into individual life insurance for financial reasons. A waiver of premium protects the benefits of disabled employees. The typical waiver of premium benefit will permit the disabled employee’s life insurance coverage to remain in force if the employee becomes totally disabled while covered under the group insurance plan and remains disabled until death.137 Waiver of premium provisions, however, typically require the employee to be under age 60 at the date of commencement of his total disability.138 If disability occurs after age 60, the employer may treat the disabled employee as an active employee and continue paying the necessary monthly premiums to the insurer. More likely, the employer will stop paying premiums for the disabled employee and coverage will cease. If the waiver of premium benefit is considered a disability benefit, then by analogy to the rules pertaining to long-term disability benefits described below,139 it is unlawful to cut off disability waiver of premium benefits when an employee reaches age 60. On the other hand, the amount of death benefit is not necessarily affected by the existence or nonexistence of the waiver of premium provision. The continuation of the group life insurance death benefit is a function of the employer’s willingness to continue premium payments. The waiver of premium provision is merely a financial arrangement between the employer and the insurer which relates only to the payment of premiums. Therefore, it is not within the scope of section 4(f)(2).

Another common ancillary benefit provided under group term

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138. See note 130 supra.
139. See text accompanying notes 136-158 infra.
life insurance plans is the accidental death and dismemberment benefit (AD&D). The AD & D benefit pays additional amounts of benefit in case of accidental death. It also pays benefits for bodily dismemberment. The most common approach is to express the accidental death and dismemberment benefit as a percentage of the basic group life insurance benefit. This coverage provides a double indemnity feature.  

If AD & D benefits are classified as part of the life insurance benefit, such age based reductions are permissible. The definition of "benefit" under the Interpretative Bulletin, however, leads one to conclude to the contrary. The Bulletin states "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." The Interpretative Bulletin, therefore, appears to classify accidental dismemberment coverage as a health or disability benefit rather than a life insurance benefit since the event requiring payment of the benefits is not death. Similarly, the contingency requiring payment of accidental death benefit is accidental death. Consequently, age based reductions based on the rising incidence of all deaths may be inappropriate.

The Interpretative Bulletin requires, as a general matter, that benefits different in form or payable because of a different contingency be independently justified by age related cost considerations. While the Interpretative Bulletin permits cost justified reductions in the amount of group life insurance benefit, it does not indicate whether corresponding reductions may be made in AD & D benefits. One might conclude that age based reductions in

140. For example, the full principal sum for which the employee is insured under the group life insurance benefit is payable if the employee dies as a result of an accident. For the loss of a hand at or above the wrist, or the loss of a foot by severance at or about the ankle, or for irrevocable loss of the sight of an eye, only one-half of the principal sum is payable. For the loss of more than one member in any one accident, the full principal sum is available. Multiple benefits are payable as a result of any one accident, but not in excess of the principal sum. Thus, the amount of benefit payable upon accidental death or dismemberment is a function of the percentage of group term life insurance benefit upon which the accidental death and dismemberment benefits are based, for example, 100% or 50% of the life insurance benefit. When a group life insurance contract reduces the amount of term life insurance death benefit payable starting at a specified age, there will be a corollary reduction in the amount of accidental death and dismemberment benefits payable. See D. Gregg & V. Lucas, supra note 119, at 386-88; S. Heubner & K. Black, supra note 119, at 407.

141. 29 C.F.R. § 860.120(d)(2)(i) (1979) (emphasis added).


143. Although the Department of Labor was requested to clarify the treatment
AD & D benefits, which are a function of life insurance reductions, are not permitted by the Interpretative Bulletin. Another possibility is that the Interpretative Bulletin was not intended to regulate ancillary benefits.

2. Long-Term Disability

Long-term disability plans are designed to provide partial replacement of earnings during periods of disability caused by accident or sickness. Typically, long-term disability income benefits commence after salary continuance payments cease or after a specified waiting period. The amount of benefit is usually a fixed percentage of the employee’s pay and continues while the employee remains disabled. There is, however, a maximum duration of time. The most common durations of benefits have been five years, ten years, or to age 65.144 Many long-term disability plans provide benefits until the employee reaches age 65. This has been justified traditionally because disabled employees often are entitled at age 65 to normal retirement benefits from an employer-sponsored pension plan and from social security. One source of providing for lost income is replaced simultaneously with another source. Another reason for curtailing disability benefits for ages over 65 is that determination of disability for older employees is difficult. Infirmitiies of age and disability become hard to distinguish.

No age discrimination problems arise when the disability plan covers individuals for a fixed period of time or for life regardless of age.145 Discrimination problems do arise, however, with plans which provide benefits until a specific age less than 70. The Interpretative Bulletin expressly rejects disability plans which cut off disability payments at age 65.146 Under the Interpretative Bulletin, an employer may terminate disability benefits or coverage on the basis of age at 70. Further, reductions on the basis of age prior to 70 may be made either in the level of disability benefits or in the duration of disability benefits. Reduction in either the level of benefits or the duration of benefits, however, must be justified by

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age related cost considerations. Either the benefit by benefit approach or the benefit package approach may be used.

Using a benefit by benefit analysis, four alternative patterns of disability benefits are permitted by the Interpretative Bulletin. The first alternative is to provide long-term disability coverage to all employees until age 70. Since the upper limit of the protected age group is 70, cessation of benefits at that time is obviously permitted.

The second alternative is to provide long-term disability benefits to employees through age 70, concomitantly reducing the level of benefits for older workers. These benefit reductions, however, must be cost justified. The Interpretative Bulletin provides no indication as to what level of reduction would be justified between ages 65 and 70, except to say that a total cut off of disability benefits at older ages is not permissible.

The third alternative is to reduce the duration of benefits for older workers in accordance with a safe harbor rule established by the Department of Labor in its Interpretative Bulletin. Specifically, the duration of disability benefits may be reduced: With respect to disability benefits which occur at age 60 or less, by causing disability benefits to cease at age 65; and with respect to disabilities which occur after age 60, by causing benefits to cease five years after disablement or at age 70, whichever occurs first.

This pattern of benefits is referred to as a safe harbor. The Department of Labor will not require the employer to justify the termination of long-term disability payments on the basis of age related cost factors, if the employer adopts this alternative. The safe harbor alternative was developed because the Department of Labor recognized the unfairness to employers of requiring long-term disability benefits to continue until age 70. Requiring payments until age 70 assumes that a worker who suffered a long-term disability would, in absence of a disability, work until age 70, even though the employee’s entitlement to full retirement benefits begins at an earlier age. Many, if not most, employees would have voluntarily left the work force prior to age 70 had they not become

147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
disabled. The safe harbor rule establishes an assumed probable retirement age for employees who become disabled at various ages. In the preamble to the proposed Interpretative Bulletin, the Department of Labor recognized that its safe harbor is subject to criticism because it relies on age stereotypes.\footnote{153}

The fourth alternative is to reduce the duration of benefits to older employees based upon other patterns of benefits justified by age related cost data.\footnote{154} The preamble to the Interpretative Bulletin gives the following example of the pattern of benefits established by one insurer:\footnote{155}

<table>
<thead>
<tr>
<th>Age of Disablement</th>
<th>Duration of Benefits (in years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>61 or younger</td>
<td>To age 65</td>
</tr>
<tr>
<td>62</td>
<td>3½ years</td>
</tr>
<tr>
<td>63</td>
<td>3</td>
</tr>
<tr>
<td>64</td>
<td>2½</td>
</tr>
<tr>
<td>65</td>
<td>2</td>
</tr>
<tr>
<td>66</td>
<td>1¾</td>
</tr>
<tr>
<td>67</td>
<td>1½</td>
</tr>
<tr>
<td>68</td>
<td>1¼</td>
</tr>
<tr>
<td>69</td>
<td>1</td>
</tr>
</tbody>
</table>

The Department of Labor, however, did not endorse this pattern of disability benefits.\footnote{156} Consequently, it or any other pattern established by an employer or an insurance company still must be justified by age related cost data.

There are significant differences in costs between the various possible alternatives. Obviously, continuing long-term disability benefits unreduced to age 70 is the most expensive alternative. While the Department of Labor’s safe harbor alternative is less expensive, patterns of reduced benefits or reduced duration of benefits offered by various insurance companies may represent the least costly alternatives.

Another important cost saving measure is to have the long-term disability plan offset benefits payable upon disability from other sources. This will serve to reduce the long-term benefits oth-

\footnote{153} Id. at 43,267.
\footnote{155} 44 Fed. Reg. 30,648, 30,655 (1979). This pattern was suggested by “the insurance company [Union Mutual] which provides group long-term disability insurance to more employers than any other insurer in the United States.” Id.
\footnote{156} Id.
erwise payable under the long-term disability policy. Other sources of replacement income which have traditionally been taken into account by long-term disability plans are: Worker's compensation, social security disability and retirement benefits, veterans' pensions, employer's pension plan disability benefits, and individually purchased disability income policies.\textsuperscript{157} Long-term disability plans typically pay large amounts of benefits over extended periods. Thus, integration of disability benefits with payments from other sources is important in order to avoid making the total of replacement income benefits more attractive than an employee's normal earnings. As indicated, the Interpretative Bulletin permits integration with government paid benefits, provided that when government financed benefits are included, older employees enjoy no less of a total benefit than younger employees.\textsuperscript{158} The preamble to the Interpretative Bulletin notes that the principle of integration applies to Medicare, social security disability and retirement benefits, and "other such government provided benefits."\textsuperscript{159} Based on this, it appears that long-term disability plans may continue to account for social security disability income benefits. Presumably, state worker's compensation disability benefits also may be included. The Interpretative Bulletin fails to consider whether disability benefits purchased by the employee may be taken into account. It also fails to consider whether a long-term disability plan may take into account social security retirement benefits as well as social security disability benefits. Since the Social Security Act only pays disability benefits until age 65 and pays retirement benefits after age 65, a long-term disability plan should be able to take into account social security retirement benefits.\textsuperscript{160}

The most serious integration problem created by the Interpretative Bulletin is coordination of employer sponsored retirement plan benefits with employer sponsored long-term disability benefits. Traditionally, long-term disability benefits ceased at age 65 when it was anticipated the employee would commence to receive employee retirement benefits. The Interpretative Bulletin, however, specifically rejects cessation of long-term disability benefits at age 65, unless justified by age related cost considerations, even

\textsuperscript{157}  D. GREGG & V. LUCAS, \textit{supra} note 119.
\textsuperscript{158}  29 C.F.R. § 860.120(e) (1979).
if the employee commences to receive retirement benefits.161 Instead, disability benefits often will be required to continue beyond age 65. The Interpretative Bulletin attempts to deal with the problem of over utilization of benefits which will occur if an employee can claim both disability benefits and retirement benefits concurrently. An obvious and undesirable moral hazard is created whenever total income replacement benefits approximate or exceed an individual’s earnings. The Interpretative Bulletin takes the position that retirement benefits need not commence until disability benefits cease.162 This approach, however, has an ERISA related problem. Internal Revenue Code section 401(a)(14) and ERISA section 206(a) provide that a participant in a pension plan, unless he or she elects otherwise, must commence to receive benefits no later than 60 days after the later of the end of the plan year in which the participant reaches normal retirement age or when the participant terminates service with the employer. The Interpretative Bulletin provides, however, that an employee receiving long-term disability benefits may be deemed by the employer not to have “actually retired,” that is, terminated service. Therefore, benefits need not be paid simultaneously.163 This interpretation resolves the conflict between the Interpretative Bulletin and ERISA. Since the Wage and Hour Division of the Department of Labor has no authority to regulate ERISA or the Internal Revenue Code, however, its resolution of the conflict created by the Interpretative Bulletin remains open to question.

Assuming this coordination of retirement and disability benefits does not violate ERISA, qualified retirement plans could be amended to provide that retirement benefits will not commence until long-term disability benefits cease.164 Long-term disability plans, in turn, might permit an employee to elect voluntarily to

163. 29 C.F.R. § 860.120(f)(1)(iv)(B)(6) (1979). This interpretation is inconsistent with the Department of Labor’s ERISA regulation which requires employers to credit “hours of service” for eligibility, participation and vesting purposes under a pension benefit plan up to a maximum of 501 hours. Id. at § 2530.200b-2(a)(2)(i).
164. Will the amendment of a qualified retirement plan to defer receipt of retirement benefits until disability benefits cease cause an illegal forfeiture under I.R.C. § 411(a)(10)? See Treas. Reg. § 1.411(a)-8(c) (1977) which prohibits indirect reductions in vested benefits through amendments. See also I.R.C. § 411(a)(3)(B) on suspension of benefits upon the reemployment of a retiree. Was I.R.C. § 411(a)(3)(B) intended to be the exclusive rule permitting suspensions?
terminate long-term disability benefits in order that retirement benefits might commence immediately at normal retirement age. An election to terminate long-term disability benefits would be advantageous to an employee whose monthly benefit under the qualified retirement plan was greater than his or her monthly benefit under the long-term disability plan.

There is a second alternative. Long-term disability benefits could be directly offset by the amount of retirement benefits received under the qualified retirement plan. As indicated above, the offset of employee retirement benefits has been fairly common under long-term disability plans. Although this offset approach does not avoid the need to make concurrent payments, it does eliminate the financial incentive to seek classification as a disabled employee at retirement plan. There is no tax qualification problem, since the offset is applied to reduce benefits under the long-term disability plan and not the qualified retirement plan. The offset approach may, however, be in violation of the Interpretative Bulletin. There is a substantial argument that an offset in formula constitutes a benefit package approach and retirement plan benefits may not be coupled with other benefits under the benefit package approach.

Many retirement plans pay long-term disability benefits if an employee becomes totally disabled prior to retirement date. Assuming that the Interpretative Bulletin prohibits an offset of employee pension plan benefits, there appears to be no reason why disability benefits provided under the employer's retirement plan could not be offset under a benefit package approach.

3. Health Insurance

Although the cost of health insurance almost certainly varies by age, the Interpretative Bulletin does not offer any specific guidelines on reduction of health insurance benefits prior to age.

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166. 29 C.F.R. § 860.120(f)(2)(ii) (1979). The author understands that the EEOC is reviewing the "offset" approach to determine whether to permit its use.

167. Qualified pension and profit sharing plans are permitted to provide benefits to a participant who becomes disabled. IRS PUBL. NO. 778 pt. 5(m) (1972); Treas. Reg. § 1.401-1(b)(ii) (1979).
The preamble to the Interpretative Bulletin notes that because health insurance coverage does not ordinarily vary significantly by age up to age 65 and because of the wide variety of health insurance plans currently marketed, the Department of Labor found it difficult to offer guidelines as to when reductions in coverage might be justified. The Interpretative Bulletin simply states that health insurance benefit reductions may not be concentrated in certain items to make coverage less attractive for older workers. Reductions in health insurance, however, only may be justified under the benefit by benefit approach.

The Department of Labor found that health insurance coverage often ceased at the mandatory retirement age of 65. Furthermore, even when coverage continued after age 65 it was reduced because of Medicare. In view of the availability of Medicare starting at age 65, the Interpretative Bulletin takes the position that reductions in total health benefits, that is, Medicare plus employer sponsored health insurance benefits, for employees age 65 to 70 generally are not justified. Consequently, coordination of benefits with government sponsored health plans continues to be permissible.

The insurance industry has developed two general approaches dealing with Medicare coverage. First, the employer’s health ins-


169. 29 C.F.R. § 860.120(f)(1)(ii) (1979). Health insurance plans do not customarily reduce benefit amounts paid to older workers, but do integrate benefits with Medicare. Consequently, the Department of Labor was unable to offer guidance on actuarially justified cost reductions in health insurance plans.

170. Id.

171. Id. at (f)(2)(iii). The prohibition on the use of the benefit package approach for health care benefits is based upon a statement by Representative Waxman (D., Cal.) that reductions in health benefits to older workers should not be made in “the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer.” 124 CONG. REC. H2,227 (daily ed. Mar. 21, 1978), reprinted in 44 Fed. Reg. 30,648, 30,656 (1979) (preamble to the Interpretative Bulletin).


173. 29 C.F.R. § 860.120(f)(1)(ii)(C) (1979). The Interpretative Bulletin however, does not preclude a reduction in total health care benefits for employees ages 65 to 70. The burden is on the employer, however, to produce “sound and specific cost data to justify a reduction.” 44 Fed. Reg. 30,648, 30,654 (1979). This appears to be stricter than the general standard requiring that costs be “valid and reasonable.” See 29 C.F.R. § 860.120(d)(1) (1979).

insurance plan can "carve out" Medicare benefits. Under the "carve out" approach, health insurance plan benefits are directly offset by benefits paid under Medicare. Employees over age 65 receive the same dollar amount of health insurance benefits from the health insurance plan and Medicare as employees under age 65 receive from the health insurance plan alone.

Health insurance contracts utilizing the "carve out" approach contain a general exclusion of any expenses eligible for reimbursement under Medicare or, in some contracts, an exclusion for expenses actually reimbursed under Medicare. The distinction between excluding eligible Medicare expenses and actual Medicare expenses is significant because Part B of the federal Medicare law provides coverage for doctors' and surgeons' fees on an optional basis requiring individual contributions towards the costs.

The second approach is to have the employer's health care plan supplement Medicare. A supplemental plan does not offset Medicare benefits, but rather, it is designed to cover specific expenses not covered under Medicare. Typically, a supplemental plan is a separate health insurance plan distinct from the employer's regular medical plan. This separate plan supplements Medicare benefits payable to employees age 65 or older. Supplemental plans are designed to provide the same total medical benefits with Medicare as is provided to younger employees through the regular medical plan. Since a supplemental plan anticipates which benefits Medicare will pay, it is possible that in certain instances employees over 65 might not receive the same total benefits as employees under age 65.

The Interpretative Bulletin permits employers to coordinate their health plans with benefits provided by Medicare either by a "carve out" approach or by a supplemental plan approach. In

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177. Id. at § 1395(r).
179. The preamble to the Interpretative Bulletin gives the following two examples: If Medicare pays less for professional services than was anticipated by the health insurer in designing the supplemental plan, the over age 65 employee will receive less total benefits. If prescription drugs are not covered under the regular health plan for employees of less than age 65 who are not covered by Medicare, but are covered by the supplemental plan for employees over age 65, then the over age 65 employee will receive more total benefits. 44 Fed. Reg. 30,648, 30,654 (1979).
response, however, to concerns that supplemental plans may not fully anticipate benefits not paid under Medicare, the Department of Labor places two conditions on the use of supplemental plans. First, the supplemental plan must cost the employer no less than a "carve out" plan would. Second, together with Medicare benefits, the supplemental plan must provide no less favorable benefits than a "carve out" plan.180 As a practical matter, an employer will have difficulty demonstrating that he has satisfied both conditions.181 These two conditions make the supplemental plan less desirable to employers than a "carve out" plan.

The Interpretative Bulletin requires any employer sponsoring a health insurance plan which offsets Medicare benefits, including optional Part B benefits, to inform each eligible employee of the need to apply for Medicare coverage and to provide any necessary assistance in the application procedure.182 Yet, the Interpretative Bulletin fails to indicate when and how notice of eligibility for Medicare Part B is to be given.183 More importantly, employers may be required to subsidize fully or partially the employee costs for Medicare Part B. Specifically, when the health insurance plan requires no employee contribution or an employee contribution less than that required for Part B coverage,184 the employer must pay or contribute towards the Part B cost to make the total benefits available on terms which are no less favorable for employees over 65 than for employees under 65.185 The employer's total contribu-

181. There is no standard "carve out" plan with standard costs with which to make a comparison. Costs among "carve out" plans vary from insurer to insurer. The costs of plans of the same insurer may also vary with the claims experience. Also, contract language is not uniform. Deductibles, maximums, coinsurance, exclusions and limitations vary. See D. GREGG & V. LUCAS, supra note 119, at 413-32.
183. Is a general notice posted at a worksite sufficient or is individual notification required? If individual notification is required may the disclosure be made as part of the summary plan description already required by ERISA? ERISA §§ 102, 104(b)(1)-(c), 29 U.S.C. §§ 1022, 1024(b)(1)-(c) (1976); 29 C.F.R. §§ 2520.102-2, -3, -4 to .104b-2 (1979). How long prior to age 65 should the disclosure be made? How much assistance is required?
184. As of July 1, 1979, Part B coverage cost each individual enrolled $8.70 per month; as of July 1, 1980 the cost will rise 90 cents to $9.60. Currently some 28 million people have enrolled in Medicare Part "B." [1979] 1 UNEMPL. INS. REP. (CCH) ¶ 13, 847.
185. 29 C.F.R. § 860.120(f)(ii)(B) (1979). Many health insurance plans provide coverage for dependents, including spouses. The Interpretative Bulletin fails to indicate whether an employer is obligated to pay the spouse's Part B premium if the employer provides coverage for dependents.
tions for Part B in the health insurance plan, however, do not have to be greater than the employer's highest contribution for health benefits for employees of any age under 65. 186

The Interpretative Bulletin's rule on Medicare Part B subsidies is based on the general principle of equal benefits for employees. It may be possible, however, to have an integrated health care plan which satisfies section 4(f)(2) based on the equal cost unequal benefit principle. 187 An employer could establish an employer pay-all health plan which is integrated with Medicare benefits. The employer agrees to pay the full cost of the health insurance premium plus all of the Medicare Part B. Under the equal cost principle, it should be possible to provide age related cost justified reduced coverage under the health insurance plan for the older employee.

B. Application of Section 4(f)(2) to Retirement Plans

Benefits provided under retirement plans 188 are not subject to the otherwise uniform interpretation by the Department of Labor under section 4(f)(2) that age based reductions in employee bene-


186. For example, assume the monthly employee contributions with no dependents for group health insurance coverage for employees of a plan is $10. The employer monthly contribution for employees 65 years of age or older is $15. The employer's highest contribution for health insurance benefits for employees of any age under 65 is $20. The health care plan offsets Medicare benefits including Part B benefits. The monthly premium for Medicare Part B is $8.70. The Interpretative Bulletin requires the employer to pay both the group health insurance contribution for the employee age 65 years or older plus the Medicare Part B premium ($15 plus $8.70 or $23.70). The Interpretative Bulletin provides, however, that contributions for Part B in the health insurance plan do not have to be greater than the employer's highest contribution for health insurance benefits for employees of any age under 65 (here $20). Thus, the employer will have to subsidize $5 of the $8.70 contribution for Medicare Part B ($20 - $15 = $5).


188. Retirement plans include, but are apparently not limited to, retirement plans subject to title I of ERISA, 29 U.S.C. §§ 1001-1144 (1976). See 43 Fed. Reg. 43,264, 43,267 (1978) (preamble to Proposed Interpretative Bulletin). ERISA § 3(2), 29 U.S.C. § 1002(2) (1976) defines employee pension benefit plan to include a plan sponsored by an employer which provides retirement income to employees, or results in the deferral of income by employees extending to termination of employment or beyond. As such, it includes both qualified retirement plans and non-qualified deferred compensation plans. A qualified plan is a plan described in I.R.C. §§ 401-415 and includes pension, profit-sharing, stock bonus, and annuity plans. ERISA further subdivides employee pension plans as being either defined contribution plans or defined benefit plans. ERISA §§ 3(34)-(35), 29 U.S.C. § 1002(34)-(35) (1976). The Interpretative Bulletin and this article separately considers defined contribution and defined benefit plans.
fits must be justified by actuarially significant cost considerations. This departure from the equal cost or equal benefit principle is based on the legislative history of the 1978 amendments. Congress made it clear that the 1978 amendments would in no way interfere with the operation of relevant provisions of ERISA. ERISA, in effect, permits employers to stop pension credits at age 65 or at the normal retirement date of the plan. Specifically, Congress understood that the 1978 amendments would not change the definition of normal retirement age under ERISA. Furthermore, Congress understood that the 1978 amendments would not require the accrual of additional benefits or the payment of the actuarial equivalent of normal retirement benefits to employees who choose to work beyond normal retirement age.

The EEOC is considering changes in the Department of Labor's rules for pension plans because it believes these rules create an employer windfall at the expense of employees working beyond age 65. The EEOC, however, may be reluctant to propose rule changes because such changes will cause conflicts with ERISA, are contrary to the legislative history of the 1978 amendments, and will be at odds with the Interpretative Bulletin in which the EEOC concurred. The changes being considered are more fully described below.

1. Defined Benefit Plans

The greatest cost differences with respect to age can be shown under a defined benefit pension plan. Congress has already ac-


190. S. REP. supra note 112. See also Letter from Asst. Sec. of Labor for Employment Standards, Donald Elisburg to Senator Williams, reprinted in id. at 14-16. An identical letter was also sent to Congressman Hawkins: This letter is reprinted in 123 CONG. REC. H9977 (daily ed. Sept. 23, 1977). (hereinafter cited as the Elisburg letter). The Elisburg letter is the key document in the legislative history of the 1978 amendments on the application of the amendments to defined benefit plans. The Elisburg letter was scrupulously followed by the Department of Labor in the Interpretative Bulletin. The EEOC is now contemplating modification of the approaches set forth in the letter. See text accompanying notes 232-37 infra.

191. S. REP. supra note 112, at 5; Elisburg letter, supra note 190.

192. A defined benefit plan is a pension plan which specifies the retirement benefits payable or the method of determining the benefits but not the employer contributions. For example, a defined benefit plan may promise a specified amount per month at retirement (flat benefit), a stated percentage of compensation (a fixed benefit), or a stated percentage of compensation times years of service (unit benefit). See ERISA § 3(35), 29 U.S.C. § 1002(35) (1976); I.R.C. § 414(j). Employer contributions under a defined benefit plan are determined actuarially on the basis of the re-
knowledged the unfairness of requiring employers to fund the high
cost of benefits for employees hired at older ages as part of ERISA.
Under ERISA, there is an exemption from the minimum participa-
tion requirements permitting employers to exclude from defined
benefit pension plans or from target benefit pension plans any em-
ployee hired at an age less than five years prior to normal retire-
ment age.\textsuperscript{193} Similarly, ERISA is sensitive to employer costs for
older employees under its minimum vesting rules. While ERISA
requires full vesting for employees who reach normal retirement
age,\textsuperscript{194} normal retirement age for vesting purposes is defined as
the earlier of (1) the normal retirement age specified under the
plan, (2) age 65 or (3) the tenth anniversary of the beginning of par-
ticipation.\textsuperscript{195} Consequently, ERISA permits plans to delay full
vesting for employees who begin participation after age 55 for a
ten-year period.

Finally, ERISA provides for three alternative minimum ac-
crued benefit methods. Two methods, the $133\frac{1}{3}\%$ and the frac-
tional methods, permit, but do not require, accruals to cease at
normal retirement age.\textsuperscript{196} The third, the 3\% method, requires ac-
cruals to continue during active employment, including years after
normal retirement age, up to a maximum of $33\frac{1}{3}\%$ years.\textsuperscript{197}

Since there is no explicit statutory statement of the equal cost
or equal benefit principle, the legislative history becomes of critical
importance when judging whether defined benefit plans discrimi-
nate against older employees because their benefits cannot be jus-
tified by age related cost considerations. The most significant as-
pect of the legislative history is a letter from Assistant Secretary of
Labor for Employment Standards Donald Elisburg to Congressman
Augustus Hawkins and Senator Harrison Williams. This letter in-
terpreted the 1978 amendments as not conflicting with ERISA
rules governing defined benefit plans.\textsuperscript{198}

\begin{footnotes}
Reg. § 1.410(a)-4(a)(1) (1979).}
\footnotetext[194]{194. ERISA § 203(a), 29 U.S.C. § 1053 (1976); I.R.C. § 411(a); Treas. Reg. § 1.411
(a)-1(a)(1) (1979).}
§ 1.411(a)-7(b) (1979).}
\footnotetext[196]{196. ERISA § 204(b)(1)(B)-(C), 29 U.S.C. § 1054(b)(1)(B)-(C) (1976); I.R.C. § 411(b)
(1)(B)-(C); Treas. Reg. § 1.411(b)-1(b)(2)(ii)(E)-(3)(ii)(C) (1979).}
\footnotetext[197]{197. ERISA § 204(b)(1)(A), 29 U.S.C. § 1054(b)(1)(A) (1976); I.R.C. § 411
(b)(1)(A); Treas. Reg. § 1.411(b)-1(b)(1)(i) (1979).}
\footnotetext[198]{198. See note 190 supra. The letter was provided by Elisburg in response to}
\end{footnotes}
The Elisberg letter was incorporated into the Senate Committee Report and the Congressional Record as part of the legislative history. Furthermore, both the House and Senate Committee Reports contain statements of legislative intent which express the same view of the 1978 amendments as is expressed in the Elisberg letter. In particular, the Elisberg letter provided: (1) Employers need not credit years of service for purposes of benefit accrual after normal retirement age; (2) employers are not required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond normal retirement age; (3) retirement benefits can be deferred after normal retirement age until actual retirement; (4) an increase in the upper age limit of the protected group to 70 will not increase funding costs for pension plans; and (5) the failure to provide benefit accruals for employees who remain employed after normal retirement age will not constitute age discrimination under the ADEA.

The Interpretative Bulletin harmonizes its rules with the requirements of ERISA and the legislative history of the 1978 amendments. Under the Department of Labor's Interpretative Bulletin, there are five basic rules regarding plan participants who continue in employment after having attained the normal retirement age specified in the plan.

First, defined benefit plans are not required to credit for purposes of benefit accrual those years of service which occur after an employee has attained the normal retirement age specified in the plan. Second, plans are not required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age specified in the plan. Third, all variables used in computing the accrued benefit of an employee may be frozen at normal retirement age. Specifically,

five questions posed by the Senate Committee which was clearly concerned about potential conflict with ERISA. Letter from Senators Williams & Javits to Donald Elisburg, Asst. Sec. of Labor (Aug. 29, 1977), reprinted in S. REP. supra note 112 at 13-14.

199. See note 187 supra.


201. Elisburg letter, supra note 190.


plans may disregard salary increases and benefit improvements occurring after normal retirement age for employees working beyond that age.\textsuperscript{204} While a defined benefit does not have to consider compensation increases in benefit changes after a person reaches normal retirement date, the plan must assure that employees who continue to work beyond normal retirement age are treated as well as similarly situated employees who retire. Thus, if a benefit improvement is given to retirees, such as a cost of living adjustment, the plan must give the same benefit improvement to employees who continue to work beyond normal retirement age.\textsuperscript{205} Similarly, defined benefit plans with social security offset formulas, which do not continue to accrue benefits for service after normal retirement age or which do not provide benefit improvements to employees working beyond normal retirement age, must freeze the amount of social security offset at the time benefit accruals ceased.\textsuperscript{206} Thus, if years of service or benefit accruals in a benefit formula are frozen because of age at normal retirement age, the social security offset must also be frozen at the same age.\textsuperscript{207} Social security retirement benefits are indexed to reflect increases in average wages.\textsuperscript{208} The

\textsuperscript{204} 29 C.F.R. § 860.120(f)(1)(iv)(B)(7) (1979). The proposed Interpretative Bulletin was silent on this point. The final Interpretative Bulletin permits salary and benefit improvements to be frozen at normal retirement age because "[t]he 1978 legislative history indicates an understanding that no adjustment to an accrued benefit under a defined benefit plan is required on account of employment after normal retirement age." 44 Fed. Reg. 30,648, 30,656 (1979) (emphasis added). Defined benefit plans promise to pay a stated benefit at normal retirement age. Treas. Reg. § 1.401-1(b)(1)(i) (1978). This stated benefit is called the normal form of benefit and is usually expressed as a single life annuity. In addition, most plans permit the participant to elect optional forms of benefits of equal value, but different in amount. For example, a married participant must be offered a joint and survivor annuity as the standard form of benefit, unless the participant elects otherwise. ERISA § 205, 29 U.S.C. § 1055 (1976); I.R.C. § 401(a)(11); Treas. Reg. § 1.401(a)-11 (1979). Other common optional forms of benefits include a life annuity certain (an annuity payable for a specified period, such as 5 or 10 years, and after that as long as the participant lives); a modified cash refund life annuity (an annuity payable for life with an agreement to pay a lump sum to the beneficiary in an amount by which the employee provided accrued benefit exceeds the payments made to the employee); and a cash, one sum payment. The quoted statement in the preamble suggests that optional forms may be frozen as well as the normal form. For example, if a participant were entitled to elect a $10,000 cash one sum payment at normal retirement age, the participant is also entitled to elect a $10,000 cash one sum payment at a deferred retirement date.


\textsuperscript{207} See note 206 supra.

Interpretative Bulletin prevents the employer from taking into account any increases in social security benefits to diminish the benefits paid by the employer under the defined benefit plan. ERISA already prevents plans from considering social security increases after an employee's separation from service. Freezing the social security offset at normal retirement date assures equal treatment for employees who continue in employment. They will receive the same dollar benefit upon retirement as a similarly situated employee who retired at normal retirement age.

Fourth, any employee hired less than five years prior to normal retirement age may be excluded from the defined benefit plan, and any employee hired after normal retirement age may be excluded from a defined benefit plan. Fifth, a defined benefit plan may provide, for employees who work beyond normal retirement age, that retirement benefits will commence at the actual date of retirement rather than at normal retirement age. Specifically, employers receiving long-term disability benefits as salary replacement may be deemed not to have "actually retired." Therefore, they need not be simultaneously provided with retirement benefits. This interpretation attempts to resolve the problem of concurrent payment of long-term disability benefits and retirement benefits to employees who have reached normal retirement age.

In summary, the Interpretative Bulletin permits a defined benefit plan to pay at deferred retirement the same amount of monthly benefit to which an employee was entitled at normal retirement date.


210. 29 C.F.R. § 860.120(f)(1)(iv)(A) (1979). All defined benefit plans, whether or not subject to ERISA, may exclude employees hired within five years of normal retirement age. Defined benefit plans, not subject to ERISA, may exclude employees hired more than five years prior to normal retirement age if the exclusion "is justifiable on the basis of cost considerations." Id. Plans subject to ERISA are prohibited from excluding employees hired at earlier ages. See note 193 supra.


213. See text accompanying notes 161-167 supra.
While many of the Interpretative Bulletin's rules have the effect of increasing employer costs to fund plans, the rules relating to defined benefit plans do not increase costs. In many cases, plan costs may be lowered.\(^{214}\) The higher the retirement age, the lower the cost of a given amount of retirement benefit will be. For example, if an employee elects a deferred retirement at age 70 rather than at the normal retirement age of 65, there is an additional five-year period during which the employee may die. The resulting possibility is that he or she will never receive benefits. In addition, retirement at age 70 reduces the length of the benefit period during which retirement benefits are paid. Finally, since the plan is not required to provide for additional accrual of benefits after the participant has reached the plan's normal retirement age, the participant's added years of service between ages 65 and 70 will not increase the ultimate retirement benefit paid or the cost of providing it.

When employers decide to provide deferred retirement benefits which are more favorable than the benefits required by the Interpretative Bulletin, plan costs may not be less. There are essentially four different methods of handling benefits after age 65. The four options are outlined in rough order of increasing cost. First, the benefit level could be frozen at normal retirement age. Thus, an employee would receive the same dollar benefit he or she had earned at normal retirement age. This would be true regardless of how much later he or she actually retired. Second, the benefit could be changed to reflect salary increases, but with no additional credits for service after normal retirement age. Third, the deferred retirement benefit could be increased to reflect service credits as well as salary and social security increases. Fourth, the deferred retirement benefit could be actuarially increased.\(^{215}\)

\(^{214}\) The Elisburg letter, supra note 190, addressed the cost issue: An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until the Act's upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. \textit{Id.}, reprinted in S. REP. supra note 112 at 15-16.

The employer cost savings as a result of the 1978 amendments disturbs EEOC Assistant Commissioner Leach who perceives the cost savings to be at the expense of older workers. \textit{See} note 7 supra: text accompanying notes 232-37 infra.

\(^{215}\) Perrins, Foster & Crosby, actuarial consultants, conducted a survey of 60 New England companies during the week of June 4, 1979. This survey revealed that 65% of all employers intended a total freeze of accrued benefits at normal retirement age.
The EEOC is actively considering changes in the Department of Labor's rules for defined benefit plans.216 The EEOC is considering requiring continued accruals for employees in a plan whose benefits are not fully accrued by the time the employees reach the plan's normal retirement age. The EEOC is also considering requiring the payment of the actuarial equivalent of a normal retirement benefit to an employee who works beyond normal retirement age. Finally, the EEOC is considering requiring that increases in compensation and benefit improvements accruing after normal retirement age be taken into account when calculating a deferred retirement benefit.

The contemplated changes all conflict with the express legislative history of the 1978 amendments.217 The EEOC, however, believes that the changes are justified by the general rule that age based reductions must be justified under ADEA by actuarially significant cost consideration.218

The EEOC position deserves examination. The actuarially significant test is derived from the Department of Labor's original interpretation in 1969 requiring that all employer benefit plans provide equal benefits or demonstrate that differential benefits have equal costs.219 The unequal benefit equal cost half of the principle was further refined by the Department of Labor in its 1979 Interpretative Bulletin. It required the data used to demonstrate equal cost to be cost data in which age is an actuarially significant factor. The EEOC neglects the other half of the principle: equal benefit unequal cost. A defined benefit plan which pays the same dollar amount of monthly benefit at deferred retirement date as is paid at normal retirement date can be justified because of the equal benefit alternative. Reliance on the equal cost alternative is

216. EEOC Vice Chairman, Daniel E. Leach discussed what changes are contemplated in a recent speech. See note 7 supra.
217. See text accompanying notes 198-201 supra.
218. Leach's Speech, supra note 7.
219. Id.
unnecessary. Contrary to the EEOC’s position, freezing benefits at normal retirement age is consistent with the Department of Labor’s historical position of equal benefits or equal costs.

Another point deserves consideration. The equal cost or equal benefit principle is not a clearly established legal interpretation of ADEA’s section 4(f)(2). Equal cost or equal benefits is the Department of Labor’s interpretation of the meaning of the word “subterfuge” in section 4(f)(2). There is no express statutory authority for, or an explicit statement of, the equal cost or equal benefit principle in the legislative history of the ADEA. The principle has been implied by the Department of Labor from a rather ambiguous legislative history, and its interpretation has been rejected by several federal courts including the Supreme Court in the \textit{McMann} decision.

In summary, the Department of Labor in its Interpretative Bulletin has faithfully followed the legislative history of the 1978 amendments with respect to qualified defined benefit plans. Its rules permit accrued benefits to be frozen at normal retirement age. The EEOC is now contemplating a revision of the rules for defined benefit plans to require increases in benefits for employees who defer retirement beyond the normal retirement date. The EEOC’s contemplated revision repudiates the legislative history of the 1978 amendments and overturns a prior final Interpretative Bulletin of the Department of Labor. Under the \textit{Skidmore} standard, an EEOC guideline is judged on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” The EEOC contemplated revision “does not fare well under these standards.”

2. Defined Contribution Plans

The Interpretative Bulletin again follows the legislative history of the 1978 amendments. It states that some, but not all, de-

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220. See note 2 \textit{supra}.
221. 434 U.S. at 192. See notes 20-22 \textit{supra} for the history of the equal cost or equal benefit principle.
222. 323 U.S. at 140. See text accompanying notes 37-39 \textit{supra}.
224. Senator Javits (R. N.Y.) made the following statement with which Senator Williams (D. N.J.) concurred:

[A]n employer will be permitted under the act, as amended, to maintain a defined contribution plan—other than a plan which is merely supplemental.
fined contribution plans may provide for the cessation of employer contributions after normal retirement age and excludes from participation employees at normal retirement age or older. Specifically, any defined contribution plan which is not supplemental is not required to make additional allocations to employees who remain employed after normal retirement date. A supplemental defined contribution plan, on the other hand, may not provide for the cessation of employer contributions after normal retirement age.

Thus, the definition of "supplemental" becomes critical to a determination of whether or not employer contributions are required to continue under a defined contribution plan after normal retirement age. The Interpretative Bulletin adopts a mechanical approach. A defined contribution plan is supplemental with respect to any employee if an employee participates in both a defined benefit plan and a defined contribution plan. When an employer has no defined benefit plans, but two or more defined contribution plans, all but one of the defined contribution plans are supplemental with respect to employees covered by all. The employer has the right to designate which of these plans is not supplemental.

If the employer sponsors only one defined contribution plan, the one plan is nonsupplemental. The test is applied on an em-

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124 CONG. REC. S4450 (daily ed. March 23, 1978). In the House, a substantially identical statement was made by Congressman Dent (D. Pa.) with which Congressman Hawkins (D. Cal.) concurred. 124 CONG. REC. H2271 (daily ed. March 21, 1978). While the Elisburg letter, supra note 190, is not directly on point since it appears only to address the issues relating to qualified defined benefit plans, it is reasonable to assume that both the Department of Labor and Congress intended defined contribution plans to receive parallel treatment with defined benefit plans. See Address by Stephen J. Sacher, Special Counsel to Senate Human Resources Committee, on the legislative history of the 1978 Age Act Amendments, Sept. 18, 1978, reprinted in [1978] PENS. REP. (BNA) No. 207, at R-4 (Sept. 25, 1978). See also 43 Fed. Reg. 43,265, 43,267-68 (1978) (preamble to proposed Interpretative Bulletin).

226. Id.
227. Id. For a number of legitimate reasons an employer may use a combination of plans rather than one plan to provide retirement benefits. The total contributions and benefits that can be provided to any one employee, however, is limited by I.R.C. § 415. See 45 Fed. Reg. 5754-80 (1980) (proposed Treas. Reg. § 1.415). Under the Interpretative Bulletin, if an employee is a participant in a defined benefit plan and a profit-sharing plan, the profit-sharing plan is a supplemental plan.
229. Id.
ployee by employee basis. Specifically, a defined contribution plan is considered supplemental as to any given employee, only if another plan covers that same employee. 230

230. Id; 44 Fed. Reg. 30,648, 30,655 (1979) (preamble to Interpretative Bulletin). This qualification permits an employer to sponsor two plans for different groups of employees, such as union and nonunion, or salaried and hourly, without requiring one plan to be “supplemental.”

The Department of Labor left unresolved the status of floor plan arrangements and target benefit plans. A floor plan arrangement is a defined benefit plan which is designed to provide a floor or minimum benefit. The normal retirement benefit payable under the defined benefit plan is offset by the benefit provided under a separate, but related profit sharing plan. Under the floor plan arrangement, if the profit sharing plan fails to provide an amount of retirement benefit equal to the floor level promised under the defined benefit plan, the defined benefit pension plan will make up the difference. On the other hand, if the profit sharing provides a normal retirement benefit in excess of the floor level, all benefits will be provided under the profit sharing plan. See Rev. Rul. 259, 1976-2 C.B. 111. The Department of Labor was asked to decide whether a floor plan arrangement is one or two plans. If viewed as a single plan, the profit sharing component could cease contributions at normal retirement date. If viewed as two plans, two differing results are possible.

One possibility is that the defined benefit plan be viewed as a supplemental plan in which case the profit sharing plan could cease contributions at normal retirement date. The other possibility and the result imposed by the literal meaning of the Interpretative Bulletin, is that the floor plan arrangement does constitute two plans, and the profit sharing plan, as a defined contribution plan covering the same employees as a defined benefit plan, is supplemental with the result that contributions to the profit sharing plan must continue after normal retirement date.

The Department of Labor also refused to indicate how target benefit plans should be treated under the Interpretative Bulletin. The target benefit plan is a hybrid defined benefit/defined contribution plan. Under ERISA, a target benefit plan is a defined contribution plan, but it is given defined benefit plan treatment for purposes of the maximum age exclusion. See I.R.C. §§ 410(a)(2), 414(i), 415(c); Rev. Rul. 464, 1976-2 C.B. 115. A target benefit plan obligates an employer to make a level contribution each year on behalf of an employee necessary to provide an assumed or target benefit at normal retirement date. The contributions are allocated to an individual account for each employee. If the earnings of the plan are above the assumed investment rate made in calculating the contribution, the participant will receive a benefit at normal retirement in excess of the target benefit. On the other hand, if the actual rate of return to the plan is less than the assumed rate of return, the participant will receive a retirement benefit which is less than the target benefit. Historically, the informal position of the IRS National Office has been that a target benefit plan is a defined contribution plan for purposes of determining whether prohibited discrimination in favor of officers, shareholders or highly compensated employees has occurred. As a result of this position, the IRS National Office has required that contributions to a target benefit plan cease at normal retirement date. The preamble to the Interpretative Bulletin states that defined contribution plan is synonymous with individual account plan. 44 Fed. Reg. 30,648, 30,655 (1979). Since a target benefit plan is an individual account plan, one may assume that the Interpretative Bulletin requires supplemental target benefit plans to continue contributions after normal retirement date. Thus, there appears to be a conflict in policy between the Interpretative Bulletin and the informal position of the Internal Revenue Service with regard to the continuation of contributions after normal retirement date under target benefit plans.
The Interpretative Bulletin also requires that investment gains and losses and employee termination forfeitures be available on the same basis to employees after normal retirement age as they are available to younger employees. This is true whether or not the defined contribution plan is supplemental.\(^{231}\) Thus, it is improper to freeze the value of the participant's individual account as of his or her normal retirement age. The account must continue to be credited with investment gains and losses. In the case of a profit sharing plan, the account must be credited with any employee termination forfeitures which are reallocated to the remaining participants.

The EEOC is contemplating requiring all defined contribution plans to continue contributions after an employee reaches normal retirement age.\(^{232}\) While conflicting with the legislative history,\(^{233}\) requiring continued contributions would result in a less drastic restructuring of existing plans than would a requirement for continued accruals in defined benefit plans. In fact, many defined contribution plans already continue contributions after normal retirement age.\(^{234}\) Furthermore, while the cessation of benefit accruals in a defined benefit plan can be justified as avoiding an employer cost which is directly related to age, no similar age related justification exists for a defined contribution plan. In the typical defined contribution plan, the contribution is a percentage of the participant's salary; the participant's age is immaterial.

Under ERISA, there is some dispute as to whether contributions may cease at normal retirement age if a participant continues to work. The parallel minimum participation standards of ERISA and the Internal Revenue Code can be interpreted as requiring


\(^{232}\) Leach’s speech, supra note 7, although advocating modification of the defined benefit rules also appears to propose revision of the defined contribution rules. Thus, Leach urged “[W]ould it not be more equitable to carry forward the ‘equal cost’ principle and simply require contributions, or credit all post-normal retirement service for purposes of benefit accrual.” (emphasis added). The EEOC staff has more clearly indicated its intent to revise the defined contribution rules. See, e.g., Huffman, supra note 7, at 1.

\(^{233}\) See note 224 supra.

\(^{234}\) For example, financial institutions may offer to employers “master” and “prototype” plans which have been approved as to form by the IRS National Office. See Rev. Proc. 8, 1972-1 C.B. 716. The IRS National Office insists that master and prototype money purchase pension plans and profit sharing plans continue contributions after normal retirement date. See IRS Form M-0161 (10/77) (Defined Contribution, Corporate Listing of Required Modifications Document Provisions 22 & 23).
continued contributions. Specifically, the minimum participation standards contain an express exclusion from participation for persons hired within five years of normal retirement age in a defined benefit or target benefit plan. There is no exclusion for participation from defined contribution plans. Arguably, the failure to exclude employees from participation requires continued accruals. If this position is correct, then the Interpretative Bulletin's rule for nonsupplemental plans contravenes ERISA.

A counterargument, however, is that participation is not synonymous with benefit accrual. While an employee is entitled after normal retirement age to continue as a participant, he or she may not be entitled to receive employer contributions. As a participant, his or her account would continue to share in investment and experience gains and losses. Furthermore, the participant would be entitled to exercise rights under title I of ERISA: To examine plan documents, to receive disclosure materials and to sue in federal courts.

3. Involuntary Retirement

Retirement plans have customarily required involuntary retirement when an employee reaches the plan's normal retirement age. Section 4(f)(2) of the ADEA, however, now prohibits involuntary retirement because of age. Specifically, section 4(f)(2) states: "[N]o such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 238

Many retirement plans still contain normal retirement provisions which permit or require involuntary retirement of an employee at normal retirement age, usually at 65. Many plans also

236. ERISA § 204, 29 U.S.C. § 1054 (1976); 29 C.F.R. § 2530.204-1.204-3; I.R.C. § 411(a)(7), (b); Treas. Reg. § 1.411(b)-1(a) (1979). Prior to ERISA, the Internal Revenue Service permitted employer contributions to cease at normal retirement age under a money purchase pension plan. See Rev. Rul. 73-448, 1973-2 C.B. 136. At the same time the Internal Revenue Service also permitted employer contributions to continue after normal retirement age under a profit-sharing plan. See Rev. Rul. 69-414, 1969-2 C.B. 59; See also IRS Publ. 778 (272) (Guidelines for Qualification of Pension, Profit-Sharing and Stock Bonus Plans, Part 5(g)).
237. How convincing is it to hire an employee who is older than the normal retirement age, classify him as a participant, but credit his individual account with no contributions or reallocated forfeitures?
contain deferred retirement provisions which permit continued employment after normal retirement age only with employer consent. Such provisions must be amended.

Incorporating employment practices into the provisions of employee benefit plans has been commonplace. This practice, however, no longer seems desirable. While the commencement of retirement benefits will often coincide with termination of employment, the entitlement to retirement benefits can no longer be used to determine employment status. In light of the 1978 amendments, separate treatment of retirement benefits and personnel practices seems preferable. While a plan's normal retirement age can no longer be the employer's age of mandatory retirement, normal retirement age continues to be needed for purposes of determining retirement benefits. Consequently, plan provisions must continue to define normal retirement age, but should avoid any suggestion that reaching normal retirement age requires a termination of employment.

The legislative history of the 1978 amendments clearly permits an employer to select a normal retirement age of less than 70. One unresolved issue, however, is whether an employer may choose an unusually low normal retirement age. Under ERISA and the Internal Revenue Code, it is permissible for an employer to select a normal retirement age earlier than 65. There are legitimate reasons other than costs for lowering the normal retirement age.
Lowering the normal retirement age, however, results in lower benefit costs, at the expense of older workers. This happens because employer contributions and benefit accruals can stop after normal retirement age. The Department of Labor noted in the preamble to its proposed Interpretative Bulletin that it would "scrutinize carefully as a potential subterfuge" any unusually low normal retirement age. The statement was deleted without comment in the final version.

Since normal retirement age can no longer be used to terminate older employees, it is imperative for employers to develop satisfactory performance appraisal systems. While it is true that mandatory retirement at normal retirement age forces some competent employees out of work, it is also true that mandatory retirement provided a graceful means of forcing out older employees who were no longer competent. Perhaps the most serious prob-

244. A lower normal retirement age will increase the employer's deductible contribution to a defined benefit plan. But see Rev. Rul. 78-331, 1978-2 C.B. 158.

A lower normal retirement age can also increase the value of the benefit paid to a highly compensated employee under a defined benefit plan. I.R.C. § 415(b)(1) establishes a maximum annual benefit payable to any participant under a defined benefit plan of the lesser of: (i) 100% of the participant's average compensation in his high three consecutive years of employment while he was an active participant, or (ii) $75,000 (adjusted each year for cost of living increases, effective Jan. 1, 1980 to $110,625. 3 PENS. PLAN GUIDE (CCH) ¶ 17,172 at 20,282 (IRS News Release 80-10, Feb. 5, 1980). I.R.C. § 415(b)(2)(C) requires a downward adjustment in the value of the annual benefit where the benefit begins before age 55. See Rev. Rul. 75-481 ¶ 3.04, 1975-2 C.B. 188. The present value of a maximum annual benefit (i.e., a single life annuity) commencing at age 55 is greater than the present value of a maximum annual benefit commencing at age 65. Consequently, a normal retirement age of 55 permits a larger one sum cash distribution option than a normal retirement age of 65. See Burrows, Maximum Benefits and Contributions in Small Corporate Retirement Plans Without Violating Section 415, 5 J. PENS. PLAN. & COMPLIANCE 311, 323-24 (1979).


lem for employers is to establish workable criteria to fire older employees who are no longer physically or mentally capable of doing their jobs.\textsuperscript{247}

4. Involuntary Retirement—Exception for Executive and High Policymaking Employees

Although the 1978 amendments generally prohibit mandatory retirement of employees prior to age 70, there is an exception which permits employers to force individuals employed in a bona fide executive or high policymaking position to retire at age 65.\textsuperscript{248}

In order to qualify for the exemption, an employee must be: (1) Age 65 or older; (2) employed in a bona fide executive or high policymaking position for the two year period immediately before retirement; and (3) 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 which equals in the aggregate $27,000, exclusive of benefit amounts attributable to employee contributions and to rollover contributions. If necessary, the annual retirement benefit payable must be adjusted to equal a straight life annuity with no ancillary benefits.

The EEOC has issued a final Interpretation\textsuperscript{249} concerning the exception for certain executive and high policymaking employees which closely follows an earlier Department of Labor proposal.\textsuperscript{250} This Interpretation provides that the exemption is to be construed narrowly. The burden is on the employer to demonstrate that each element required to satisfy the exemption is met.\textsuperscript{251}

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\textsuperscript{247} The employer's problem is to develop a performance appraisal system which is not vulnerable to a charge that it constitutes or perpetuates discrimination. See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (title VII cases); Griggs v. Duke Power Co., 401 U.S. 424 (1970); McGregor, An Uneasy Look at Performance Appraisal, 50 HARV. BUS. REV. 133 (1972); Gery, Minimizing Bias in Appraisal and Promotion 117, 4 EEO TODAY (1977); Brown, Passed Over Executives are Suing Their Firms to Demand Promotion, Wall St. J., April 29, 1977 at 1, col.1; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 132-81 (1976).


\textsuperscript{249} 44 Fed. Reg. 66,791, 66,796-97 (1979) (to be codified in 29 C.F.R. §§ 1627.17, 1625.12 (EEOC § 12(c) interpretation)).


\textsuperscript{251} 44 Fed. Reg. 66,791, 66,800 (1979) (to be codified in 29 C.F.R. § 1625.12(b)).
The employee may be forced to retire as early as age 65 but only if he was a bona fide executive or high policymaking employee for the entire two-year period prior to retirement. The two-year requirement prevents an employer from placing an employee in such a position just before age 65 in order to force the employee to retire. 252

In order for an employee to qualify as a bona fide executive, the employer must first establish that the employee meets the test for a bona fide executive under the overtime pay provisions of the Fair Labor Standards Act. 253 The Fair Labor Standards Act test which is set forth in implementing regulations 254 provides that a bona fide executive is any employee: (1) Whose primary duty, involving 50% or more of his or her time, consists of the management of a business or a recognized department or subdivision thereof; (2) who customarily and regularly directs the work of two or more employees; (3) who has the authority to hire or to fire other employees, or whose suggestions concerning hiring, firing, promotion or other changes in employment status are given particular weight; (4) who customarily and regularly exercises discretionary powers; (5) who does not devote more than 20% of his or her hours of work in the work week to activities which are not directly and closely related to the performance of work described in one through four above; 255 (6) who is compensated for his or her services on a salary basis at a rate of not less than $155 per week.

In addition to satisfying the Fair Labor Standards Act for a bona fide executive test, the employer also must demonstrate that the employee meets further criteria specified in the Conference Committee Report. 256 The EEOC Interpretation emphasizes that the exemption does not apply to "middle management" employees 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." 257 Similarly, the Conference Report

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255. This fifth condition is not applicable to an employee who is in sole charge of an independent establishment or a physically separate branch establishment or who owns at least 20% interest in an enterprise in which he is employed. 29 C.F.R. §§ 541.113, 114 (1979).
256. H.R. REP., supra note 252.
indicated that the exemption should not be as expansively interpreted as the exemption under the Fair Labor Standards Act and should be applied only to "certain high level executives."\textsuperscript{258} The EEOC Interpretation quotes from the Conference Report statement\textsuperscript{259} suggesting that the following general categories of employees constitute bona fide executives under the ADEA: (1) The head of a significant and substantial local or regional operation of a corporation;\textsuperscript{260} (2) individuals in the higher levels of a corporate organizational structure who possess comparable or greater levels of responsibility than those employees described in (1) above; (3) the head of a major department or division located at corporate or regional headquarters; and (4) in larger organizations, the immediate subordinates of executives described in (3) above, if they exercise responsibility, comparable to or greater than that possessed by those executives described in (1) above.

The high policymaking exemption is distinct from the bona fide executive exemption.\textsuperscript{261} The EEOC Interpretation relies on the Conference Report to establish the meaning of high policymaking position. In fact, the Conference Report is directly quoted in the EEOC Interpretation. The legislative history of the 1978 amendments indicates that the high policymaking exemption is available for individuals who have little or no line responsibility, have a significant role in the development of a corporate policy, and actively recommend implementation of such policy to top executive offices.\textsuperscript{262}

The Conference Report cites a chief economist or chief research scientist of a corporation as an example of an individual who would qualify for the exemption. The Conference Report notes, however, that employees who provide staff support to such individuals would not qualify.\textsuperscript{263}

In addition to being a bona fide executive or high policymaking employee, to qualify under the exemption the employee must be fully vested in benefits of at least $27,000 calculated as a

\textsuperscript{258} H.R. Rep., supra note 252.
\textsuperscript{259} Id.
\textsuperscript{260} Although the Conference Report speaks in terms of employees of "corporations," it is clear that corporation was intended to be synonymous with any business enterprise. Id. See 44 Fed. Reg. 66,791, 66,800 (1979) (to be codified in 29 C.F.R. § 1625.12(d)(2)) (EEOC § 12(c) interpretation).
\textsuperscript{262} Id.
\textsuperscript{263} Id.
straight life annuity, payable immediately. In addition, the benefits must be received from plans of the employer who retires the employee. Specifically, the EEOC Interpretation takes the position that to be exempted, an employee must have the option of receiving during each year of his or her lifetime following retirement at least $27,000 per year not including amounts attributable to social security, rollover contributions, and contributions of prior employers.264 Amounts attributable to employee contributions which must be excluded are to be determined in accordance with Internal Revenue Service regulations promulgated under Code section 411(c).265 These regulations relate to the allocation of accrued benefits between employer and employee contributions. No specific method is suggested to determine amounts attributable to social security.266 Only retirement income of the employer desiring to force the employee to retire can be considered. Since most employers have plans of their own, this rule presents no problem. Some employers, however, participate in a plan with a number of other employers. This makes determination of the source of the retirement benefit difficult. If the benefits attributable to prior employers cannot be readily determined, the EEOC Interpretation requires the following formula to be used: Current employers benefits equal total benefits received less the benefit the employee would have received had the employee never worked for the current employer.267 Retirement benefits, however, provided by affiliated employers satisfying the controlled group requirement of Code section 414(b) and (c) may be considered. Rollover contributions are specifically excluded.268

268. 44 Fed. Reg. 66,791, 66,798 (1979) (to be codified in 29 C.F.R. § 1627.17 (e)(4)) (EEOC § 12(c) interpretation). A rollover contribution is a nontaxable transfer of retirement plan assets from one qualified plan to another qualified plan either directly or indirectly through the intermediary of an individual retirement account or annuity (IRA). See I.R.C. §§ 402(a)(5), 403(a)(4), 408(d)(3), 409(b)(3)(C); 45 Fed. Reg. 57-54-80 (1980) (prop. Treas. Reg. §§ 1.402(a)-3, 1.403(a)-3, 1.408-1(b)(2)).
The $27,000 per year requirement is considered met if the employee has the option of receiving upon retirement a lump sum benefit with which it is possible to purchase a single life annuity with no ancillary benefits yielding at least $27,000 per year.\textsuperscript{269} The $27,000 per year requirement is also met when the aggregate value of the employee’s retirement benefits as of the employee’s retirement date with respect to payments to be made with his life expectancy equals $27,000 per year as a single life annuity using reasonable actuarial assumptions.\textsuperscript{270} Thus, under the EEOC Interpretation, an employee who is entitled to receive an annual lifetime retirement benefit of less than $27,000 per year with ancillary benefits, and thus, actuarially worth $27,000 or more, will qualify for the exemption although the employee does not have the right to receive retirement benefits in a form equal to $27,000 per year or more. This represents a liberalization over the Department of Labor’s proposal. That proposal provided that no employee who is required to receive less than $27,000 per year during his or her lifetime in retirement because of other benefits being provided only after death will fall within the exemption.\textsuperscript{271} The Department of Labor’s proposal would have created problems for plans which provide only one form of retirement benefit which is not a single life annuity. For example, a defined benefit plan which provides the only form of retirement benefit is a qualified joint and survivor annuity. A retirement benefit payable during the joint lives of the employee and the spouse of $24,000 per year and a survivor annuity payable to the spouse of $12,000 a year may be equal actuarially to a single life annuity of more than $27,000. It would not have qualified for the exemption under the Department of Labor’s proposal, however, because the employee did not have the option to receive the benefits in the form of a $27,000 per year single life annuity.

The $27,000 amount is a static figure not subject to cost of living increases. This approach is somewhat surprising because ERISA, in several key provisions, establishes dollar limitations for pension benefits. In recognition of our inflationary economy, how-

\textsuperscript{269} 44 Fed. Reg. 66,791, 66,797 (1979) (to be codified in 29 C.F.R. § 1627.17(c)(2)) (EEOC § 12(c) interpretation).


\textsuperscript{271} 43 Fed. Reg. 58,148, 58,149 (1978) (preamble comment to Proposed Interpretative Bulletin) (to be codified in 29 C.F.R. § 850.17(c)).
ever, ERISA subjects those dollar amounts to cost of living adjustments. In time, the $27,000 limit will reach more employees than it does presently. Thus, the effect of inflation will make the bona fide executive and high policymaking exemptions the critical requirements rather than the dollar limitation.

In a defined contribution plan, the value of the individual's retirement benefit may fluctuate depending upon the investment experience of the plan. Fluctuations in retirement income may make it difficult for personnel managers to make long range determinations as to whether an individual will be eligible for forced retirement at age 65.

Employers will also have problems with plans which permit employees to make withdrawals of employer provided benefits while actively employed. The preamble to the EEOC Interpretation notes that there is nothing to prevent an active employee from withdrawing employer contributions from a plan in order to avoid receiving a $27,000 retirement benefit. The EEOC Interpretation also notes that an employer is not entitled to supplement retirement benefits in order to reach the $27,000 limit.

The only retirement benefits which may be counted towards the $27,000 annual test are those derived from a pension, profit-sharing, savings or deferred compensation program or any combination of such programs. The EEOC Interpretation specifically includes stock bonus, thrift plans, simplified employee pension plans and certain nonqualified deferred compensation arrangements. The Interpretation also suggests that more exotic types of retirement plans may be included. Severance pay plans, however, appear to be excluded.

272. See, e.g., I.R.C. § 415(d), adjusting dollar limits for the maximum contributions and benefits permitted under qualified retirement plans and ERISA § 4022(b)(3) 29 U.S.C. § 1,322(b)(3) (1976) establishing a maximum federally guaranteed qualified defined benefit plan benefit amount adjusted in accordance with Social Security increases.
275. Id.
277. Id. Are tax sheltered annuities benefits under I.R.C. § 403(b) funded by salary reduction agreements or agreements to forgo a salary increase considered to be employer provided benefits?
278. See 44 Fed. Reg. 66,791, 66,794 (1979) (preamble comments to EEOC § 12(c) interpretation). A severance pay plan provides additional benefits out of
The $27,000 per year benefit must be an immediate nonforfeitable benefit payable at the time of compulsory retirement. The EEOC Interpretation considers the nonforfeitable annual retirement benefit to be immediate within the meaning of ADEA's section 12(c) only if the first payment of plan benefits is made within 60 days after the date of compulsory retirement. This sixty day rule is more stringent than the ERISA requirement that benefits must commence no later than 60 days after the end of the plan year in which the employee retires.

The EEOC Interpretation considers the annual retirement benefit of a qualified retirement plan to be nonforfeitable if the employee is 100% vested. The nonforfeitable exceptions of ERISA and the Internal Revenue Code may be taken into account. For example, benefits may be discontinued at death and suspended during periods of reemployment. Nonqualified deferred compensation plans are separately considered. The preamble to the EEOC Interpretation indicates that prior to retirement such plans may provide for the forfeiture of benefits. Tax considerations dictate this interpretation. Nonforfeitable benefits may result in constructive receipt of income and loss of tax deferral. So long as employee’s rights to benefits are forfeitable, there is not constructive receipt. Thus, forfeitability of benefits

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287. An interest in a funded deferred compensation plan is not currently taxed if it is transferrable or is subject to a substantial risk of forfeiture. I.R.C. § 83(a) (1976). An interest in an unfunded deferred compensation plan is not currently taxed if the employees' rights are forfeitable. Treas. Reg. § 1.451-1,-2 (1978). An interest in an unfunded deferred compensation plan, however, is still not taxed currently even if the employees' rights are nonforfeitable if: (1) The agreement is entered into before
prior to retirement is desirable for tax reasons. After retirement, the EEOC Interpretation requires benefits to be nonforfeitable. Many nonqualified deferred compensation plans currently provide for loss of benefits to a retiree, if the retiree engages in litigation against the employer or obtains employment with a competitor of the employer. Such plans have forfeitable retirement benefits and cannot be considered when calculating the value of the employee's retirement benefits. Finally, the EEOC Interpretation provides that a benefit is nonforfeitable only if there is a reasonable expectation that the plan will be able to meet its obligations.

Ironically, section 12(c) of the ADEA may actually discourage the hiring of older executives because, if they do not work out, the employer is not entitled to include pensions from a prior employer to retire involuntarily the employee prior to age 70. Of course, the ADEA permits firing of an older employee for unsatisfactory performance. Traditionally, however, employers have preferred to permit older employees who have unsatisfactory performance to retire. The EEOC Interpretation also permits executive or high policymaking employees who fall within the exemption to be offered a lesser position or a part-time position. The rationale for this in-


289. 44 Fed. Reg. 66,791 (1979) (to be codified in 29 C.F.R. § 1625, 12(K)(2)) (EEOC § 12(c) interpretation). The proposed Department of Labor regulation required the plan to be "sufficiently funded" to meet its obligations. 43 Fed. Reg. 58,152 (1978) (to be codified in 29 C.F.R. § 860.97(K)(2)). This was omitted in the EEOC Interpretation because a "funding" requirement could eliminate all unfunded deferred compensation arrangements from the exemption. 44 Fed. Reg. 66,791 (1979) (preamble to EEOC § 12(c) interpretation). In addition, qualified defined benefit plan benefits which are restricted under the early termination rule are not considered forfeitable. Treas. Reg. § 1. 401-4(c), T.D.6675. The early termination rule restricts payments in excess of a certain amount for the 25 highest paid employees for the first ten years after the plan is established or amended, if the plan is not currently funded or if the plan is terminated within the ten year period. Id.

290. 44 Fed. Reg. 66,791 (1979) (to be codified in 29 C.F.R. § 1625.12(c)) (EEOC § 12(c) interpretation).
interpretation of section 12(c) is that an employer who is able to force an employee to retire should also be able to offer the employee a position of lesser status or, in the case of a full-time employee, a part-time position. The Interpretation, however, indicates that the employer loses the option of forcing an employee to retire prior to age 70, if the employer offers the employee a position of lesser status or a part-time position which is not a bona fide executive or high policymaking position.

V. NEED TO REVIEW EMPLOYEE BENEFIT PRACTICES NOW

The EEOC has yet to publish its employee benefit plan guidelines. Therefore, employers and their attorneys should begin a comprehensive review of their retirement practices and their employee benefit plans. They should take steps to insure that their plans conform to the ADEA as amended. The preamble to the Department of Labor's Interpretative Bulletin notes that its rules are "effective immediately," which means as of May 25, 1979. The Interpretative Bulletin also notes that for the period of time between January 1, 1979, when the law became effective as to most employers, and May 25, 1979, when the Interpretative Bulletin was published, employers who relied in good faith on the older Department of Labor's Interpretive Bulletin or an opinion letter of the Wage and Hour Administrator will not be held liable for failure to comply with the new rules. The Interpretative Bulletin notes, however, that some benefit practices "could never be proved to have been in good faith" conforming with the older interpretation. One such practice would be a total benefit cut off on the basis of age for employees between ages 40 and 65 and, since January 1979, for employees between ages 40 and 70.

After May 25, 1979, the Department of Labor notes that problems in achieving prompt compliance may be considered in the conciliation of individual cases. The Department of Labor and the EEOC, however, will evaluate whether prompt compliance "could feasibly be achieved" through existing insurance products or partial self insurance. The EEOC has noted that the Department of

292. Id.
294. Id.
295. Id.
296. Id. The phrase "partial self insurance" is troublesome. The phrase could
Labor's Interpretative Bulletins may be relied upon until it publishes its own guidelines. 297

Conformance with the ADEA amendments, recently enacted state laws, and federal regulatory interpretations will require significant changes in many employee benefit plans and especially in welfare benefit plans. A number of key policy decisions should be addressed by employers. The employer should initially make a basic business decision either to encourage, discourage or maintain a position of neutrality with respect to the retention of older employees. All employers, and especially those employers who wish to discourage the continued employment of older workers to the extent permitted by law, should take steps to establish a formal performance appraisal program in order to monitor the quality of work of all its employees. Unless an employee is a bona fide executive or high policymaking employee, the only way to terminate employee services prior to age 70 is by demonstrating unsatisfactory performance. Given heightened awareness among employees of the ADEA, employers must be able to produce tangible evidence of unsatisfactory employment of an older worker in order to avoid a discrimination action.

Employers should examine current retirement patterns of their employees to determine how many employees are likely to elect to defer retirement after age 65. Many personnel specialists believe that more workers will elect to defer retirement in the future. The employer should establish a separate statement of retirement policy, including a statement of whether the employer intends to use the exception for bona fide executive and high policymaking employees. Retirement plan benefits and welfare plan benefits for older workers should be reviewed carefully to determine whether the plans provide benefits consistent with the employer's philosophy of encouraging or discouraging continued employment after age 65.

The cost implications of any employee benefit plan options for present and future employees also should be reviewed. The employer should consider possible exposure to litigation if employee benefit plan practices depart from the requirements of the Interpretative Bulletin. To the extent that amendments to the existing

be interpreted to permit the EEOC to claim that prompt compliance could "feasibly be achieved" in any insured employee benefit plan by having the employer pay additional benefits not provided by or available through insurance companies out of its general assets.

benefit plans are necessary, employers should amend plan documents and the summary plan descriptions. They should also make any other changes necessary to comply with the reporting and disclosure requirements of ERISA. If a qualified pension plan must be amended, the plan should be filed for review with the Internal Revenue Service. Once the changes in the employee benefit programs are formalized, the changes should be communicated to employees. 298 Employers may wish to establish pre-retirement counseling programs to provide employees with an informal choice about retirement at various ages. 299

Given the growing numbers and political power of older Americans, 300 employers can expect additional demands concerning employee rights. Consideration has already been given to eliminating compulsory retirement. Similar consideration has been given to forbidding the cessation of benefit accruals at normal retirement age in defined benefit pension plans. Employers may wish to anticipate these trends and plan accordingly.

298. See text accompanying notes 55-64 supra.
300. The 65 and over population in the United States was 10.7% in 1976. AMERICAN COUNCIL OF LIFE INSURANCE, PENSION FACTS 1978-1979 40-45 (1979). It is projected to be 12.7% in 2010 and 18.3% in 2030. Id.
# APPENDIX

## STATE AGE DISCRIMINATION LAWS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Law</th>
<th>Does law apply to private industry employers?</th>
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<th>Exception to permit forced retirement of highly paid employees receiving substantial retirement benefits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>18 Alaska Stat. § 18.80.220 (1962).</td>
<td>Yes</td>
<td>No minimum</td>
<td>Employees of all ages</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>California</td>
<td>CAL. LAB. CODE § 1420.1 (Deering Supp. 1979).</td>
<td>Yes</td>
<td>5</td>
<td>From 40 on, no upper limit</td>
<td>No</td>
<td>Yes, $27,000/yr.</td>
</tr>
<tr>
<td>Colorado</td>
<td>COLO. REV. STAT. §§ 8-2-116, -117 (1974).</td>
<td>Yes</td>
<td>No minimum</td>
<td>18 to 60</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Connecticut</td>
<td>CONN. GEN. STAT. §§ 31-122, -126 (1979).</td>
<td>Yes</td>
<td>3</td>
<td>Employees of all ages</td>
<td>Yes, at age 70 (restricted to state and municipal employees and public school teachers)</td>
<td>Yes, $27,000/yr.</td>
</tr>
<tr>
<td>Delaware</td>
<td>DEL. CODE ANN. tit. 19, §§ 710, 711(a), (h) &amp; (i) (1975).</td>
<td>Yes</td>
<td>4</td>
<td>40 to 65</td>
<td>Yes</td>
<td>Yes, $27,000/yr.</td>
</tr>
<tr>
<td>Florida</td>
<td>FLA. STAT. ANN. §§ 13.211(6), 13.261 (1)(a), (8)(b) (West Supp. 1978).</td>
<td>Yes</td>
<td>15</td>
<td>Employees of all ages</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Georgia*</td>
<td>GA. CODE ANN. §§ 89-1701, 1707 (Cum. Supp. 1979).</td>
<td>No</td>
<td>15</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>* repealed 7/1/80</td>
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</tbody>
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## APPENDIX – STATE AGE DISCRIMINATION LAWS (continued)

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<tbody>
<tr>
<td>Idaho</td>
<td>IDAHO CODE §§ 44-1601, -1602 (1977).</td>
<td>Yes</td>
<td>None</td>
<td>No lower limit to age 60</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Indiana</td>
<td>IND. CODE ANN. §§ 22-9-2-1, -11 (Burns 1974).</td>
<td>Yes</td>
<td>1</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE ANN. §§ 601A.1, .6(2)-(5), .13 (1975 &amp; West Cum. Supp. 1979).</td>
<td>Yes</td>
<td>4</td>
<td>18 (unless at younger age is lawfully an adult) to no upper age limit except over 45 for bona fide apprenticeship employment programs</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Kentucky</td>
<td>KY. REV. STAT. §§ 344.030, .100, .110(2)(c) (1977).</td>
<td>Yes</td>
<td>8</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Louisiana</td>
<td>LA. REV. STAT. ANN. § 23:893 (West 1964) (law refers to firing &amp; hiring and not compensation).</td>
<td>Yes</td>
<td>25</td>
<td>Under 50</td>
<td>Yes (if pension covers periods of service no greater than 35 years and pays out no less than $45 a quarter)</td>
<td>No</td>
</tr>
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<td>Jurisdiction</td>
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</tr>
<tr>
<td>Maine</td>
<td>ME. REV. STAT. ANN. tit. 5, §§ 4571-4574 (1964 &amp; West Supp. 1979).</td>
<td>Yes</td>
<td>None</td>
<td>Minimum age when minor is lawfully allowed to work to no upper limit</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Maryland</td>
<td>MD. ANN. CODE art. 49B, §§ 15, 16 (Michie 1979).</td>
<td>Yes, except private membership club (other than a labor organization)</td>
<td>15</td>
<td>No upper or lower limit</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>MASS. GEN. LAWS ANN. ch. 151B, §§ 1, 4 (1971).</td>
<td>Yes, except private non-profit clubs</td>
<td>6</td>
<td>40 to 65</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Michigan</td>
<td>MICH. COMP. LAWS ANN. §§ 37.2201, 2211 (West Supp. 1979).</td>
<td>Yes</td>
<td>4</td>
<td>None</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Minnesota</td>
<td>MINN. STAT. ANN. §§ 181.81, 363.02, 03, (West Supp. 1979).</td>
<td>Yes</td>
<td>1</td>
<td>Mandatory retirement at age 70 permitted, differences in treatment allowed for over 59 or less than 21</td>
<td>Yes</td>
<td>Yes, $27,000/yr.</td>
</tr>
<tr>
<td>Montana</td>
<td>MONT. REV. CODES ANN. § 49-2-101(8), -303 (1979).</td>
<td>Yes, except for non-profit corporations</td>
<td>1</td>
<td>None</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. §§ 48-1001 to -1004 (1978).</td>
<td>Yes</td>
<td>25</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. §§ 613.310, .330, .350 (1972).</td>
<td>Yes, except Indian tribes and I.R.C. § 501(c) private clubs</td>
<td>15</td>
<td>None</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. STAT. ANN. § 10:5-12 (West Cum. Supp. 1979).</td>
<td>Yes</td>
<td>1</td>
<td>None</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. STAT. ANN. §§ 28-1-2, -7, -9 (1978).</td>
<td>Yes</td>
<td>4</td>
<td>None</td>
<td>Yes, may be forced to retire age 65 if plan qualifies under ERISA</td>
<td>No</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. EXEC. LAW §§ 292, 296 (McKinney 1972 &amp; West Supp. 1979).</td>
<td>Yes</td>
<td>4</td>
<td>18 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. GEN. STAT. § 143-422.2 (1978).</td>
<td>Yes</td>
<td>15</td>
<td>None</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. CENT. CODE § 34-01-17 (Supp. 1977).</td>
<td>Yes</td>
<td>1</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO REV. CODE ANN. § 4101.17 (Page Supp. 1979).</td>
<td>Yes, except certain industrial employers and bona fide church or sectarian religious groups</td>
<td>1</td>
<td>18 to 65, but compulsory retirement of employees required by law at an age under 65 years is not an unlawful employment practice</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. §§ 659.010, .015, .028, .050 (1977).</td>
<td>Yes</td>
<td>1</td>
<td>None</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>
## APPENDIX – STATE AGE DISCRIMINATION LAWS (continued)

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<tbody>
<tr>
<td>Pennsylvania</td>
<td>PA. STAT. ANN. tit. 43, §§ 954, 955 (Purdon Cum. Supp. 1979).</td>
<td>Yes</td>
<td>4</td>
<td>None</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>P.R. LAWS ANN. tit. 29, §§ 146, 151(1) (Supp. 1978).</td>
<td>Yes</td>
<td>No minimum</td>
<td>Minimum age when minor is lawfully allowed to work to 65</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 28-6-1, -5 (1968).</td>
<td>Yes, except private domestic service</td>
<td>1</td>
<td>45 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Texas</td>
<td>TEX. REV. CIV. STAT. ANN. art. 6252-14 (Vernon 1970).</td>
<td>No</td>
<td>No minimum number</td>
<td>21 to 65</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 34-35-6(1)(a), (d), § 34-35-6(3) (Supp. 1979).</td>
<td>Yes</td>
<td>25</td>
<td>40 to no upper limit</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE ANN. § 49.60.010, .040, .180 (West Supp. 1978).</td>
<td>Yes</td>
<td>8</td>
<td>None*</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. VA. CODE § 5-11-3, -4, -8, -9(a) (1979).</td>
<td>Yes</td>
<td>12</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. ANN. § 111.32(3)(a), (5)(a), (5)(b), (5)(c) (West 1974 &amp; Cum. Supp. 1979).</td>
<td>No</td>
<td>No minimum number</td>
<td>40 to 65</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

*But see Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 892, 568 P.2d 764, 767 (1977) (holds 40 to 65 is protected age group).