DOCUMENT RESUME

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TITLE	Work Force Changes and Age Discrimination: Educating Business Leaders in the 1990s and Beyond. A Project To Produce an Educational Package on Age Discrimination in Employment for Business Leaders.
INSTITUTION	American Bar Association, Washington, DC. Commission on Legal Problems of the Elderly.
SPONS AGENCY	Administration on Aging (DHHS), Washington, D.C.
PUB DATE	31 Mar 92
CONTRACT	90AT0495
NOTE	65p.
AVAILABLE FROM	Commission on Legal Problems of the Elderly, American Bar Association, 1800 M Street, N.W., Washington, DC 20036 (employer's guide and videotape).
PUB TYPE	Reports - Descriptive (141) -- Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC03 Plus Postage.
DESCRIPTORS	Adult Education; *Age Discrimination; *Business Responsibility; *Compliance (Legal); Continuing Education; *Employer Attitudes; Employer Employee Relationship; Equal Opportunities (Jobs); *Federal Legislation; Instructional Materials; *Material Development; Middle Aged Adults; Older Adults; Program Development; Retirement; Social Bias; Videotape Recordings
IDENTIFIERS	*Age Discrimination in Employment Act 1962; Older Workers Benefit Protection Act 1990

ABSTRACT

The purposes of the project that developed this education package for business were as follows: (1) enhance employer knowledge and understanding of the Age Discrimination in Employment Act (ADEA), especially in its application to corporate downsizing and the use of early retirement incentives; (2) discourage employer practices that violate the act and abridge the rights of older workers; and (3) influence employer attitudes and perceptions about the elderly in a way that will expand meaningful employment opportunities for older workers and critical resources for employers. With the help of an expert advisory group, the project developed a broadcast quality, 25-minute educational videotape and a 38-page written employers' guide that informs employers of their obligations under the ADEA. The guide included in this packet is organized in five parts that cover the following topics: (1) aging workers in a leaner and meaner economy; (2) older worker myths and realities; (3) Age Discrimination in Employment Act in brief; (4) analysis--the Older Workers Benefit Protection Act; and (5) 10 guidelines for employers considering downsizing. Contains references and resources. (KC)

PROJECT BRIEFS:

WORK FORCE CHANGES AND AGE DISCRIMINATION:

EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

A Project to Produce an Educational Package
on Age Discrimination in Employment
For Business Leaders

Grant Number: 90AT0495
MARCH 31, 1992

Grantee:
ABA Commission on Legal Problems of the Elderly
through the
Fund for Justice and Education
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611
312-988-5400

PROJECT ABSTRACT

WORK FORCE CHANGES AND AGE DISCRIMINATION: EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

(Project Term: October 1, 1990 - December 31, 1991)
A Project funded by the U.S. Administration on Aging
U.S. Department of Health and Human Services
Grant Number: 90AT0495

Grantee: Commission on Legal Problems of the Elderly, American Bar Association, through the Fund for Justice and Education, 750 North Lake Shore Dr., Chicago, Illinois 60611.
Project Director: Nancy M. Coleman.
Principal Investigator: Charles P. Sabatino, J.D., ABA Commission on Legal Problems of the Elderly, 1800 M Street, N.W., Washington, D.C. 20036. (202) 331-2297.

The goals of this project were to develop an education package for business to (1) enhance employer knowledge and understanding of the Age Discrimination in Employment Act, especially in its application to corporate "downsizing" and the use of early retirement incentives, (2) discourage employer practices that violate the Act and abridge the rights of older workers, and (3) positively influence employer attitudes and perceptions about the elderly in a way that will expand meaningful employment opportunities for older workers and critical resources for employers.

With the help of an expert advisory group, the project developed a broadcast quality, 25 minute educational videotape entitled <u>Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons</u> and a 38-page written "employers guide" that informs employers of their obligations under the Age Discrimination in Employment Act (ADEA), both generally and particularly in its practical application to corporate "downsizing" and the use of early retirement incentives. The target audience is business and industry leaders and senior through mid-level managers, as well as lawyers who advise business. The "Older Workers Benefit Protection Act," enacted in 1990, is a key focus of the material.

The video and guide are unique in offering an effective "business-oriented" perspective by recognizing the practical business environments in which legal mandates of the ADEA operate -- environments that are shaped by far-reaching economic trends, fundamental changes in American management, and the growing reality of an aging work force. The video enhances employer knowledge and attitudes about the elderly and the law.

National dissemination of the video began during the project term and will expand under the continuing sponsorship of the American Bar Association in cooperation with business organizations.

EXECUTIVE SUMMARY

WORK FORCE CHANGES AND AGE DISCRIMINATION: EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

An Educational Package For Business Leaders Entitled:
Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons

Produced By:

The American Bar Association's
Commission on Legal Problems of the Elderly
through the
Fund for Justice and Education
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611
312-988-5400

Grant Number: 90AT0495
MARCH 31, 1992

The goals of this project were to develop an education package for business to (1) enhance employer knowledge and understanding of the Age Discrimination in Employment Act, especially in its application to corporate "downsizing" and the use of early retirement incentives, (2) discourage employer practices that violate the Act and abridge the rights of older workers, and (3) positively influence employer attitudes and perceptions about the elderly in a way that will expand meaningful employment opportunities for older workers and critical resources for employers.

With the help of an expert advisory group, the project developed a broadcast quality, award-winning, 25 minute educational videotape entitled Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons and a 38-page written "employers guide." Narrated by Harvard Law School legal expert and public television personality Arthur Miller, the video uses dramatization, documentary technique and provocative discussion among experts to introduce audiences to employer obligations under the Age Discrimination in Employment Act (ADEA), both generally and particularly in its practical application to corporate "downsizing" and the use of early retirement incentives. The target audience is business and industry leaders and senior through mid-level managers, as well as lawyers who advise business. The "Older Workers Benefit Protection Act," enacted in 1990, is a key focus of the material.

The 38-page written guide that accompanies the video elaborates further upon the material and consists of the following sections:

Part 1	Introduction: Aging Workers in a Leaner and Meaner Economy
Part 2.	Older Worker Myths and Realities o References and Resource Materials
Part 3.	Age Discrimination in Employment Act- In Brief
Part 4.	Analysis: The Older Workers Benefit Protection Act
Part 5.	Ten Guidelines for Employers Considering Downsizing

The video and guide are unique in offering an effective "business-oriented" perspective by recognizing the practical business environments in which legal mandates of the ADEA operate -- environments that are shaped by far-reaching economic trends, fundamental changes in American management, and the growing reality of an aging work force. The video enhances employer knowledge and attitudes about the elderly and the law.

The primary significance of this project is that is provides business with the right product at the right time. It is the right product because it provides business with the an educational and consciousness-raising tool produced from a practical business perspective, offering legal guidance on age-neutral employer practices and incorporating enlightened gerontological perspectives showing the positive potential of older persons. Winning a 1992 National Media "Owl" Award confirms its high quality. It is produced at the right time because as we enter the 1990's, business must adapt to significant new legal requirements in tough economic times.

America's work force is aging. In 1986, persons age 40 and above composed 37.8 percent of the work force. By the year 2010, people age 40 and older are expected to make up close to half of the work force. Protecting the rights of older workers has been a policy goal of the Congress for many years. In 1967, the Congress passed the Age Discrimination in Employment Act (ADEA), which protects the employment rights of workers age 40 and over.

The pressure to lay off employees and reduce corporate employment rolls has been particularly intense during recent years because of changing economic conditions. Production cutbacks, plant closings, corporate mergers, restructurings, and technological change have prompted a growing number of U.S. businesses to reduce their work forces or "downsize." Experts who once considered downsizing a temporary economic phenomenon are now predicting that downsizing and its attendant discriminatory problems are here to stay.

While it used to be that only rank and file employees were laid off, layoffs now also are common among managerial and executive staff. Although in most cases these reductions in force, or "RIFs" are legal, they can have a devastating impact on older workers. While these cutbacks are often essential, it is incumbent on employers to understand the Age Discrimination in Employment Act and how to plan and implement staff restructuring so it is age-neutral.

One of the most common method of accomplishing work force reductions has been the use of early retirement incentive programs, which can easily run afoul of the ADEA, both in letter and in spirit. Interestingly, until the passage of the Older Worker Benefits Protection Act in 1990, the ADEA actually exempted employee benefit plans from the broad proscription against discrimination in the terms, conditions, and privileges of employment. Since the effective date of the new Act, employers have been faced with a whole new set of complicated rules and responsibilities governing layoffs and early retirement.

The danger of discriminatory employer actions based on age has been steadily fueled by ageist stereotypes that persist among employers. Commission research prior to this project confirmed that few, if any resources, were available to business to counter these negative perceptions and provide understandable legal guidance on age-neutral employer practices. The educational package is intended to fill this void quite effectively well beyond the project term because of the American Bar Association's long-term commitment to law and aging educational efforts.

National dissemination of the video began during the project term and will expand under the continuing sponsorship of the American Bar Association in cooperation with business organizations. The basic arrangement for distribution through collaborating business organizations entails our supplying these organizations with a sufficient quantity of the tapes and guides at no cost to them.

Initially, a total of 700 copies of the video and 2000 copies of the written guide have been produced. In exchange, the collaborating business organizations must agree to advertise and market the materials through their regular distribution channels (e.g. catalogs, newsletters). For any copies they sell, the Commission will receive a return of one-quarter of the sales price in order to ensure that we can make additional copies when supplies are deleted. The price for the materials can be set by each organization to fit their usual pricing schedule. However, we suggest $60 as a guide. In addition, the Worker Equity Department of the American Association of Retired Persons has requested permission to use it as part of its new national employer training program.

Policy/Program Implications Paper

WORK FORCE CHANGES AND AGE DISCRIMINATION: EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

An American Bar Association Educational Package For Business Leaders Entitled Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons

America's work force is aging, and protecting the rights of older workers has been a policy goal of the Congress for many years. In 1967, the Congress passed the Age Discrimination in Employment Act (ADEA), amending it several times since its inception.

The pressure to lay off employees and reduce corporate employment rolls has been particularly intense during recent years because of changing economic conditions. Production cutbacks, plant closings, corporate mergers, restructurings, and technological change have prompted a growing number of U.S. businesses to reduce their work forces or "downsize." Experts who once considered downsizing a temporary economic phenomenon are now confirming that downsizing and its attendant discriminatory problems are here to stay.

While it used to be that only rank and file employees were laid off, layoffs now also are common among managerial and executive staff. Although in most cases these reductions in force, or "RIFs" are legal, they can have a devastating impact on older workers. While these cutbacks are often essential, it is incumbent on employers to understand the Age Discrimination in Employment Act and how to plan and implement staff restructuring so it is age-neutral.

One of the most common method of accomplishing work force reductions has been the use of early retirement incentive programs, which can easily run afoul of the ADEA, both in letter and in spirit. Interestingly, until the passage of the Older Worker Benefits Protection Act in 1990, the ADEA actually exempted employee benefit plans from the broad proscription against discrimination in the terms, conditions, and privileges of employment. Since the effective date of the new Act, employers have been faced with a whole new set of complicated rules and responsibilities governing layoffs and early retirement.

The danger of discriminatory employer actions based on age has been steadily fueled by ageist stereotypes that persist among employers. The primary significance of this project is that is provides business with the right product at the right time. It is an effective product because it provides business with the an educational and consciousness-raising tool produced from a practical business perspective, offering legal guidance on age-neutral employer practices and incorporating enlightened gerontological perspectives showing the positive potential of older persons. And, it has come at the right time because right now businesses must adapt to significant new legal requirements in tough economic times.

Dissemination and Utilization Paper

WORK FORCE CHANGES AND AGE DISCRIMINATION: EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

An American Bar Association Educational Package For Business Leaders Entitled: Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons

A two-pronged dissemination approach was initiated during the project term and is currently being implemented by the ABA Commission. First, the Commission will itself publicize and distribute the video and guide, utilizing the extensive ABA communications network to advertise its availability to the legal and aging communities. For example, announcements of the availability of the package are planned for upcoming issues of the Commission's quarterly newsletter BIFOCAL and bi-monthly "Bar Committee Bulletin," as well as in the ABA Journal, the ABA's primary publication going to nearly 350,000 lawyers. In addition, the Worker Equity Department of the American Association of Retired Persons has also offered to publicize the materials in their publication for employers "Working Age."

Second, distribution agreements are presently being negotiated with several business organizations, since they are in the most effective position for reaching business leaders and managers directly. Tentative positive responses were received during the project term from the National Alliance of Business, the National Retail Federation, the American Management Association, the National Association of Manufacturers, and the Society for Human Resource Management. Final commitments and procedures for collaborating will culminate after the project term as part of the Commission's ongoing product dissemination activities.

In March 1992, the project received a welcome boost to our distribution efforts and publicity, because the project was notified of winning a National Media "Owl" Award in the annual competition sponsored by the Retirement Research Foundation. Considerable favorable publicity accompanies these awards.

The basic arrangement for distribution through collaborating business organizations entails our supplying these organizations with a sufficient quantity of the tapes and guides at no cost to them. Initially, a total of 700 copies of the video and 2000 copies of the written guide have been produced. In exchange, the collaborating business organizations must agree to advertise and market the materials through their regular distribution channels (e.g. catalogs, newsletters). For any copies they sell, the Commission will receive a return of one-quarter of the sales price in order to ensure that we can make additional copies when supplies are deleted. The price for the materials can be set by each organization to fit their usual pricing schedule. However, we suggest $60 as a guide.

For programs funded under the Older Americans Act who order from the Commission, we offer a 50% reduction in the price. The Massachusetts Executive Office of Elder Affairs used the video for purposes of training advocates and employment counselors and found it very effective. A copy of their letter in this regard is attached to the final report.

Although a copy of the employer's guide (similarly titled Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons) accompanies each order for the video, it may also be ordered in any quantities separately from the video, since the written materials both supplement the video and stand alone as an educational resource on the Age Discrimination in Employment Act.

FINAL REPORT:

WORK FORCE CHANGES AND AGE DISCRIMINATION:

EDUCATING BUSINESS LEADERS IN THE 1990's AND BEYOND

A Project to Produce an Educational Package
on Age Discrimination in Employment
For Business Leaders

MARCH 31, 1992

Project Term: October 1, 1990 - December 31, 1991

Grantee:
ABA Commission on Legal
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through the
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American Bar Association
750 N. Lake Shore Drive
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This project was supported, in part, by a grant, Number 90AT0495, from the Administration on Aging, Department of Health and Human Services, Washington, D.C. 20201. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not, therefore, necessarily represent official Administration on Aging policy.

TABLE OF CONTENTS

A. INTRODUCTION

The goals of this project were to develop and disseminate an educational package for business, consisting of a videotape and an employer's guide, to: (1) enhance employer knowledge and understanding of the Age Discrimination in Employment Act, especially in its application to corporate "downsizing" and the use of early retirement incentives, (2) discourage employer practices that violate the Act and abridge the rights of older workers, and (3) positively influence employer attitudes and perceptions about the elderly in a way that will expand meaningful employment opportunities for older workers and critical resources for employers.

Direct and tangible benefits to older people were expected in two respects. First, employer knowledge and understanding of the Age Discrimination in Employment Act would be significantly enhanced, thereby discouraging employer practices that violate the Act and abridge the rights of older workers. Second, because the videotape and written materials illuminate the congruency between the law and the unique potential that an aging work force offers to business, employer attitudes and perceptions about the elderly would be positively influenced in a way that ultimately expands meaningful employment opportunities for older workers.

B. METHODOLOGY

The project plan for the first four months called for extensive production research and planning. Accordingly, the first step accomplished during the first quarter of the project was the subcontracting with a video producer. The contractor selected was Ms. Traer Sunley of Video in the Capitol, Washington, D.C.

The principal investigator and video subcontractor, with the additional support of a law student, completed most of the background research needed for the production planning. Much of the non-legal research focused on assessing business practices, trends, and the business literature. The legal research focused heavily on the Older Workers Benefit Protection Act (P.L. 101-433), enacted in October 1990. This Act amended the Age Discrimination in Employment Act (ADEA), significantly changed the treatment of employee benefits under the ADEA, and set particular rules for severance benefits, early retirement incentive programs, and employee waivers of rights under the ADEA.

Concurrent with the "paper" research, the principal investigator and subcontractor developed an informal advisory group of experts and interested parties to guide the project. Because it became apparent that it was not feasible to bring these individuals together in one place for a formal advisory group meeting, the principal investigator and subcontractor met with each of them separately to discuss the project and to solicit their views and recommendations. Most of them were involved on a periodic basis to provide input and suggestions and to comment on scripts and production plans. The individuals and organizations comprising the informal advisory group were:

- Paul Boymel, Esq., Office of Legal Counsel, U.S. Equal Employment Opportunity Commission
- James Brudney, Chief Counsel and Staff Director, Labor Subcommittee. U.S. Senate Committee on Labor and Human Resources
- Ron Cooper, Steptoe & Johnson, Washington, D.C. (employer representative).
- Mark S. Dichter, Esq., Morgan, Lewis & Backius, Philadelphia, PA (has represented the U.S. Chamber of Commerce, Association of Private Pension and Welfare Plans, National Association of Manufacturers, and the ERISA Industry Counsel).
- Peter Eide, Manager of Labor Relations Committee, U.S. Chamber of Commerce
- Ray Faye, Esq., Bell, Boyd & Lloyd, Washington, D.C.
- Robert Fitzpatrick, Esq., private attorney and Vice-President for Governmental Affairs, National Employment Lawyers Association
- Eric Greenburg, American Management Association
- Virginia Lord, Right Associates (an international "outplacement" firm)
- Ed Lyon, Society of Human Resources Management
- Christopher Mackaronis, Esq., Bell, Boyd & Lloyd, Washington, D.C.
- John Martin, General Counsel, and Paul Coffey, Director of Personnel, Ford Motor Company
- Douglas S. McDowell, Esq., McGuiness & Williams, Washington, D.C. (employer representative and counsel to the Equal Employment advisory Council).
- Cathy Ventrell-Monsees, Esq., Worker Equity Department, American Association of Retired Persons
- Ken Morse, supervisory trial attorney, U.S. Equal Employment Opportunity Commission
- Robert M. Tomasko, Consultant, Arthur D. Little, Inc., author of Downsizing: Reshaping the Corporation for the Future.
- John Vine, Esq., Covington & Burling, Washington, D.C. (employer representative).

The above experts were an invaluable resource in helping the project staff to shape the final product in a way that would successfully target business leaders. Their expertise and advice were a key force during the project. Several permutations of content, approach, characterization, and style were considered and discussed with panel experts. By the end of the first project quarter, the video producer and principal investigator developed a first draft of a script.

The second project quarter was devoted primarily to script and casting efforts. The first draft of the script, produced during the project's first quarter, had gone through detailed review and redrafting by the staff and by the individuals in the project's advisory group.

Casting and the identification of experts to include in the video was a time-consuming task during the second project quarter. As narrator and host for the video, we obtained the services of the widely-acclaimed Harvard Law Professor Arthur Miller, who has hosted the award winning PBS forum discussions, Our Constitution: That Delicate Balance and Managing our Miracles (on health care technology and ethics). Staff have spent considerable time identifying and reviewing numerous possible expert for the panel. The goal is to achieve a lively, balanced, and insightful combination of personalities for this key portion of the video. The possibilities have been substantially narrowed down and final decisions will be made in May, 1991 (3rd project quarter).

Possible shooting dates have also been considered during this period. The key limiting variable for shooting dates is the availability of Professor Miller, who because of his celebrity status, seems to be constantly traveling. However, it is hopeful that a date will be confirmed for the month of May.

During the third project quarter, the project completed production of the videotape, entitled Downsizing in an Aging Work Force: The Law, the Limits, and the Lessons. The major portion of the video was taped at the "Flight 3" studio in Baltimore on May 6, 1991. The key participants in the video are Harvard Law School professor Arthur Miller, who acts as host and facilitator of a discussion of the Older Worker Benefit Protection Act with the following experts:

- Mark S. Dichter, Esq., Morgan, Lewis & Backius, Philadelphia, PA (has represented the U.S. Chamber of Commerce, Association of Private Pension and Welfare Plans, National Association of Manufacturers, and the ERISA Industry Counsel).
- Christopher Mackaronis, Esq., Bell, Boyd & Lloyd, Washington, D.C. (experienced plaintiff's attorney)
- Paul Coffee, Esq., Assistant General Counsel for Personnel, Ford Motor Company
- Cheryl Fells, Esq., management consultant for the management consulting firm Tower Perrins.

o Helen Dennis, gerontologist, University of Souther California.

Final editing of the footage took place in June 1991.

Story Line of the Video: After an introductory dramatization of a deposition of a corporate defendant, Mr. Miller provides an overview of key characteristics of today's aging work force and the economic realities causing businesses to downsize. He then takes viewers through the key elements of the Older Worker Benefit Protection Act (with the help of extensive graphics), followed by a lively discussion with five experts responding to vignettes and questions offered by Professor Miller and intended to explore the implications of the Act and issues that businesses need to consider.

During the fourth project quarter, the project focused on two activities: establishing a distribution process for the video and drafting the booklet to accompany the video.

The underlying distribution goal of the project was to recruit the assistance of a major business association to take the lead in distribution of the video. Since the ABA Commission is not in the "inner circle" of the business community, we sought a credible collaborator to provide the optimum linkage. During the quarter, discussions were held with the U.S. Chamber of Commerce with the aim of utilizing the Chamber as the distribution agent. The Chamber has an extensive catalog of materials and an existing system for advertising, stocking, and distributing materials.

The Chamber was alternatively very interested and then non-responsive to the ABA's offer for a period of several months. By the fifth project quarter, the decision was made to move on to establishing a distribution plan with alternative associations.

The second major task of the fourth project quarter was the drafting of the written guide to accompany the video. Publication of a final version was put on hold in hopes that a distribution agreement could be firmly established with at least one major business association. The delay in establishing a business association collaborator necessitated a request for a no-cost extension of the project for a fifth quarter, October through November 1991.

During the fifth and final project quarter, the project completed the written employer's guide that accompanies the video and established the groundwork for an ongoing distribution process.

The written guide (same title as video: Downsizing in an Aging Work force: the Law, the Limits, and the Lessons) was completed, and 2000 copies were published. At this time 700 dubs of the video were also produced in ½-inch VHS format. The video was previously submitted. The written guide's contents include:

Part 1	Introduction: Aging Workers in a Leaner and Meaner Economy
Part 2.	Older Worker Myths and Realities o References and Resource Materials
Part 3.	Age Discrimination in Employment Act- In Brief
Part 4.	Analysis: The Older Workers Benefit Protection Act
Part 5.	Ten Guidelines for Employers Considering Downsizing

Distribution efforts during this quarter focused on negotiating collaborative arrangements with several business organizations. Tentative positive responses were received from the National Alliance of Business, the National Retail Federation, the American Management Association, the National Association of Manufacturers, and the Society for Human Resource Management. A negative response was received from the American Management Association which not consider distributing materials produced by other organizations. Final commitments and procedures for collaborating with one or more of these organizations will culminate after the project term as part of the Commission's ongoing product dissemination activities.

The proposed arrangement for distribution through collaborating business organizations calls for supplying these organizations with a sufficient quantity of the tapes and guides at no cost to them. In exchange, the collaborating business organizations must agree to advertise and market the materials through their regular distribution channels (e.g. catalogs, newsletters). For any copies they sell, the Commission will receive a return of one-quarter of the sales price in order to ensure that we can make additional copies when supplies are deleted. The price for the materials can be set by each organization to fit their usual pricing schedule. However, the price set by the Commission for copies ordered directly from us is $60 for the video and written guide. For programs funded under the Older Americans Act who order from the Commission, a 50% reduction in the price is offered.

The Commission itself also began distributing the video and guide, utilizing the extensive ABA communications network to advertise its availability to the legal and aging communities. For example, announcements of the availability of the package are planned for upcoming issues of the Commission's quarterly newsletter BIFOCAL and bi-monthly "Bar Committee Bulletin," as well as in the ABA Journal, the ABA's primary publication going to nearly 350,000 lawyers.

The employer's guide may also be ordered in any quantity separately from the video, since the written materials both supplement the video and stand alone as an educational resource on the Age Discrimination in Employment Act.

C. RESULTS

The primary measurable result of the project has been the production of the 25-minute videotape and 38 page employer's guide, both entitled Downsizing in an Aging Work force: the Law, the Limits, and the Lessons. Seven hundred copies of the video and 2000 copies of the written guide were produced.

Because announcements of the availability of the materials have been released only in last few weeks preceding this final report, cumulative data on usage and response are not available. However, it is most noteworthy that in March 1992, the project was notified of winning a National Media "Owl" Award in the annual competition for media programs on aging sponsored by the Retirement Research Foundation. Considerable favorable publicity accompanies these awards.

Other favorable events include the use of the video by the Massachusetts Executive Office of Elder Affairs. It used the video for purposes of training advocates and employment counselors and found it very effective. A copy of their letter in this regard is attached to the final report.

As of the time of this writing, the American Association of Retired Persons is negotiating with the Commission to use the video as part of a new series of training materials for employers being developed by their Worker Equity Department. They also plan to publicize the materials in their publication for employers "Working Age."

D. DISCUSSION AND IMPLICATIONS

The primary significance of this project is that is provides business with the right product at the right time. It is the right product because it provides business with the an educational and consciousness-raising tool produced from a practical business perspective, offering legal guidance on age-neutral employer practices and incorporating enlightened gerontological perspectives showing the positive potential of older persons. Winning a 1992 National Media "Owl" Award confirms its high quality. It is produced at the right time because as we enter the 1990's, business must adapt to significant new legal requirements in tough economic times.

America's work force is aging. In 1986, persons age 40 and above composed 37.8 percent of the work force. By the year 2010, people age 40 and older are expected to make up close to half of the work force. Protecting the rights of older workers has been a policy goal of the Congress for many years. In 1967, the Congress passed the Age Discrimination in Employment Act (ADEA), which protects the employment rights of workers age 40 and over.

The pressure to lay off employees and reduce corporate employment rolls has been particularly intense during recent years because of changing economic conditions. Production cutbacks, plant closings, corporate mergers, restructurings, and technological change have prompted a growing number of U.S. businesses to reduce their work forces or "downsize." Experts who once considered downsizing a temporary economic phenomenon are now predicting that downsizing and its attendant discriminatory problems are here to stay.

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One of the most common method of accomplishing work force reductions has been the use of early retirement incentive programs, which can easily run afoul of the ADEA, both in letter and in spirit. Interestingly, until the passage of the Older Worker Benefits Protection Act in 1990, the ADEA actually exempted employee benefit plans from the broad proscription against discrimination in the terms, conditions, and privileges of employment. Since the effective date of the new Act, employers have been faced with a whole new set of complicated rules and responsibilities governing layoffs and early retirement.

The danger of discriminatory employer actions based on age has been steadily fueled by ageist stereotypes that persist among employers. Commission research prior to this project confirmed that few, if any resources, were available to business to counter these negative perceptions and provide understandable legal guidance on age-neutral employer practices. The educational package should fill this void quite effectively well beyond the project term, especially because of the American Bar Association's long-term commitment to law and aging educational efforts.

E. SUMMARY

With the help of an expert advisory group, the project successfully developed an award-winning, 25 minute educational videotape entitled Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons and a 38-page written "employers guide" that informs employers of their obligations under the Age Discrimination in Employment Act (ADEA), both generally and particularly in its practical application to corporate "downsizing" and the use of early retirement incentives. The target audience is business and industry leaders and senior through mid-level managers, as well as lawyers who advise business. The "Older Workers Benefit Protection Act," enacted in 1990, is a key focus of the material.

The video and guide are unique in offering an effective "business-oriented" perspective by recognizing the practical business environments in which legal mandates of the ADEA operate -- environments that are shaped by far-reaching economic trends, fundamental changes in American management, and the growing reality of an aging work force. The video enhances employer knowledge and attitudes about the elderly and the law.

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The significance of this project is that it provides business with the an educational and consciousness-raising tool produced from a practical business perspective, offering legal guidance on age-neutral employer practices and incorporating enlightened gerontological perspectives showing the positive potential of older persons. Winning a 1992 National Media "Owl" Award confirms its high quality. It's timeliness is underscored by the fact that as we enter the 1990's, business must adapt to significant new legal requirements in tough economic times.

BIBLIOGRAPHY

The following bibliography is reproduced in the employer's guide of the same title as the project video, Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons.

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APPENDICES

Appendix 1: Letter from Joel M. Semuels, Assistant General Counsel, Massachusetts Executive Office of Elder Affairs, dated November 13, 1991.

Appendix 2: Videotape entitled, Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons. Ten copies of the video accompany this final report.

Appendix 3: Employer's Guide entitled, Downsizing in an Aging Work Force: the Law, the Limits, and the Lessons. Ten copies of the written guide accompany this final report.

APPENDIX 1

The Commonwealth of Massachusetts
Executive Office of Elder Affairs
38 Chauncy Street. Boston. Mass. 02111

WILLIAM F. WELD
GOVERNOR
ARGEO PAUL CELLUCCI
LIEUTENANT GOVERNOR
FRANKLIN P OLLIVIERRE
SECRETARY

November 13, 1991

Charles Sabatino, Esq.
American Bar Association
Commission on the Legal Problems of the Elderly
1800 M Street, N.W.
Washington D.C. 20036

Dear Charlie:

Thank you for forwarding to me a "Preview Copy" of the videotape on the "Older Worker's Benefit Protection Act."

It has been in great demand since the day we received it. I have shown it to several groups of advocates. In addition, our Age Discrimination in Employment Counseling Program is using it to train its trainers.

Thank you again for this valuable resource.

Sincerely,

Joel M. Semuels
Assistant General Counsel

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abatape91

Downsizing

Produced for Business by:

The Commission on Legal Problems of the Elderly
American Bar Association
Public Services Division
Washington, DC

Downsizing in an Aging Work Force

**The Law,
The Limits,
and the Lessons**

By

The Commission on Legal Problems of the Elderly
American Bar Association
1800 M Street, NW
Washington, DC 20036
(202) 331-2297

These materials provide guidance for understanding employer obligations under the Age Discrimination in Employment Act (ADEA) in the context of today's changing economy. The amendments to the ADEA know as the Older Worker Benefit Protection Act of 1990 are given special attention, for they spell out terms and conditions that must be met in voluntary and involuntary reductions in force. Other sections address key issues, facts, and misperceptions about age in a work force that is growing older.

A 25-minute video of the same title
is available for use in conjunction with this booklet
as a complete training tool for employers
and others.

These materials are made available and distributed through business organizations for the business community.

...About the Commission on Legal Problems of the Elderly

In 1978, the American Bar Association established the Commission on Legal Problems of the Elderly to examine law-related concerns of the elderly. The Commission has explored legal and policy issues relating to age discrimination, the availability of legal assistance, long-term care, home care, guardianship and its alternatives, surrogate decision-making, housing, Social Security, and other benefit programs.

...About the Division for Public Services

The American Bar Association's Public Services Division provides management oversight to the Commission and promotes the public welfare by applying the knowledge and experience of the legal profession to concerns facing all sectors of the general public. The division pursues this ABA goal through programs which address the rights of special populations and substantive issues of national importance such as housing and the environment.

...Our Support

This project was supported, in part, by a grant (Number 90AT0495) from the Administration on Aging, U.S. Department of Health and Human Services, to the American Bar Association's Commission on Legal Problems of the Elderly, through the ABA Fund for Justice and Education. Grantees undertaking projects under government sponsorship are encouraged to express freely their findings and conclusions. Points of view or opinions do not, therefore, necessarily represent official Administration on Aging policy. This publication has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and does not represent the policy of the Association.

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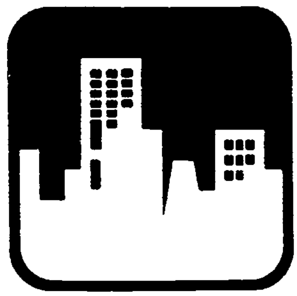
PART 1



Introduction: Aging Workers In A Leaner and Meaner Economy

It is no longer a surprise to anyone that America's work force is aging. In 1986, persons age 40 and above composed 37.8 percent of the work force. By the year 2010, people age 40 and older are expected to make up close to half of the work force.[1] While most people over 40 do not consider themselves old, many report having experienced age discrimination on the job or while looking for work. At age 55, the consequences of unemployment because of age discrimination can be devastating. Although the unemployment rate for older workers is about half that of younger workers, once they lose their jobs persons age 55 to 64 suffer the longest duration of unemployment of any group in the country, endure greater earnings loss in subsequent jobs than do younger workers, and are more likely to give up looking for another job altogether.[2]

Conflicting Trends

Optimistically, some analysts suggest that slow growth in the labor supply over the coming decade may place pressure on business to keep older workers employed longer. Indeed, between 1986 and the year 2000, the adult population under age 45 will grow by only 2 percent, while the age 45 and over population will grow by 30 percent.[3]

Yet, despite these demographics, the average age of retirement continues to fall.[4] This is believed in part to reflect the positive choice of many older workers who have greater economic freedom than ever before. However, the reality can be quite different for many others. A 1990 report of the Commonwealth Fund, based on a Louis Harris survey of 3,509 people in the crucial 50 to 64 age period, revealed a surprisingly large number of older persons who stated that they wanted to return to work.[5]

According to Commonwealth Fund Senior Vice President Thomas Moloney, "Of older persons who are out of the work force, half are satisfied, a quarter can't work because of their health or family situations, and the other quarter are very unhappy about the situation they're in. That quarter represents about two million people...."[6]

The Law

Protecting the rights of older workers has been a policy goal of the Congress for many years. In 1967, the Congress passed the Age Discrimination in Employment Act (ADEA), which protects the employment rights of workers age 40 and over.[7] The Equal Employment Opportunity Commission (EEOC) is charged with enforcement of the Act. The number of charges filed under the ADEA supports the observation that age bias is widespread in the work force. The number of age bias suits filed with the EEOC doubled between 1980 and 1983, reaching an all time high of over 18,000 charges. Since then the number has fluctuated between 14,000 and 17,000 charges annually.[8]

Downsizing

The pressure to lay off employees and reduce corporate employment rolls has been particularly intense during recent years because of changing economic conditions. Production cutbacks, plant closings, corporate mergers, restructurings, and technological change have prompted a growing number of U.S. Businesses to reduce their work forces or "downsize." Several surveys confirm this trend.[9] Experts who once considered downsizing a temporary economic phenomenon are now predicting that downsizing and its potential discriminatory problems are here to stay. Eric Greenburg, editor of the American Management Association's research reports, commented, "Downsizing has become an ongoing corporate activity without regard to a company's economic performance...Just as many companies do it to get more productivity as for an economic downturn." Greenburg's research indicates that a company that has downsized before is six times more likely to do so again as the process becomes one of constant refinement.[10]

While it used to be that only rank and file employees were laid off -- either temporarily or permanently -- layoffs now also are common among managerial and executive staff. Although in most cases these reductions in force, or "RIFs" are legal, they can have a devastating impact on older workers. Nearly one million workers over the age of 55 lost their jobs because of plant closings or employment cutbacks between 1981 and 1985. One-half of these workers were displaced from jobs they had held for 15 years or more. Less than half were reemployed.[11] While these cutbacks are often essential, it is incumbent on employers to understand the Age Discrimination in Employment Act and how to plan and implement staff restructuring so it is age-neutral.

One of the most common methods of accomplishing work force reductions has been the use of early retirement incentive programs. In 1986, a Hewitt Associates survey found that about one-third of more than 500 corporations surveyed had used exit incentive programs in the previous five years. Larger companies (25,000 or more employees) lead the pack with a 55 percent rate.[12] The U.S. General Accounting Office estimates that 80 percent of the Fortune 100 companies sponsored an exit incentive program at least once during 1979 through 1988.[13]

The 1986 Hewitt Associates survey also found that in nearly three-fourths of the cases, voluntary separation plans took the form of "early retirement windows" -- specified periods in which affected employees must decide whether to retire with some form of improved pension benefit or continue working.[14] Examples of enhanced pension benefits offered in "window" programs include:

- Early retirement incentive plans -- Monthly benefits are increased by diminishing or eliminating the actuarial factor that is normally used to reduce benefits of workers who have not yet reached the pension plan's normal retirement age.

- Retirement supplements -- A fixed cash amount is added to monthly pension benefits and may be discontinued after workers become eligible for social security benefits at age 62.

- Age and service credits -- Workers receive additional credits to their age and years of service. This permits younger workers to meet the pension provisions for eligibility and increases the amount of benefits they would have otherwise received.[15]

Early retirement programs can easily run afoul of the ADEA, both in letter and in spirit. This is especially true since the enactment of amendments to the ADEA referred to as the Older Workers Benefit Protection Act of 1990. These amendments set new, and in some cases, complex requirements that employers must meet when they offer their employees benefits such as early retirement incentives or severance pay. A detailed description of these amendments is provided in Section 4 of this booklet.

Attitudes and Realities

In spite of legal remedies for age discrimination, the potential for discrimination in the business world of the future continues to be fueled by ageist stereotypes held consciously or unconsciously by many employers. A 1989 survey of 400 companies conducted for the American Association of Retired Persons (AARP) by the Daniel Yankelovich Group, indicates that employer attitudes toward older workers have actually deteriorated since a similar study was conducted five years earlier. According to the survey, the number of senior managers who voiced a "commitment" to older workers (over age 50) dropped from 33 percent to 25 percent. Companies with 1000 or more employees displayed the least positive attitudes toward older workers.[16]

The realities of an aging population, coupled with "leaner and meaner" corporate strategies and the persistence of age stereotyping, have together motivated the production of this booklet and the video that accompanies it. It is hoped that these materials will effectively educate senior and middle level business managers about their obligations under the ADEA, enhance their appreciation of the value of older workers, and stimulate corporate thinking about innovative ways to better utilize older workers.

Notes to Part 1

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6 Lewin, Tamar. "Too Much Retirement Time? A Move is Afoot to Change It." ***The New York Times*** (April 22, 1990, p. 1).

7 Age Discrimination in Employment Act, 29 U.S.C. Section 621 *et seq.*

8 Testimony of Evan J. Kemp, Jr., Chairman, Equal Employment Opportunity Commission, before the Select Committee on Aging, U.S. House of Representatives (September 24, 1991).

9 For example, an American Management Association (AMA) survey in July 1987 of 1,134 respondents found that 45 percent of the companies responding had undergone significant reductions in force between January 1986 and June 1987. A later AMA survey in 1989 showed that in the preceding year, 39 percent of 1,084 companies and nonprofit organizations surveyed by the AMA reduced their work forces, cutting an average of 162 employees.

10 Skrzycki, Cindy. "The Drive to Downsize; Trimming is a Corporate Fact of Life -- But There Are Hazards." ***The Washington Post*** (August 20, 1989, p.H1).

11 National Senior Citizens Law Center, "Untender Mercies: Layoff and the Older Worker." 22 ***Clearinghouse Review*** 1104 (February 1989).

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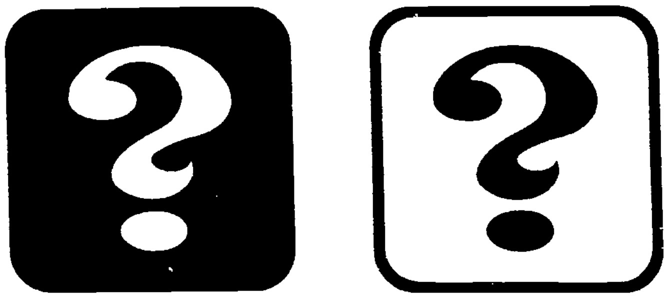
<u>PART 2</u>

Older Worker Myths and Realities



As with all myths, a small grain of truth sustains a whole field of misperception. In the case of older workers, five basic myths, or age stereotypes, commonly affect the workplace.

Myth One:

Older Workers Perform More Poorly Than Younger Workers.

The grain of truth that sustains this myth is the fact that, across the population as a whole, certain physical functions do show some decline in old age. These functions include the five senses, physical strength, lung capacity, and reaction time. However, average changes measured under laboratory conditions are normally far below levels that would materially affect on-the-job performance. Most studies under actual working conditions show that older workers perform as well as, if not better than, their younger counterparts on most measures, unless the job requires great physical strength or spit-second response time.

As to mental functioning, studies of healthy elderly have consistently failed to find any significant loss of memory or orientation. Significant declines in mental capacity do not occur in the general population until much later than commonly assumed. The Office of Technology Assessment (U.S. Congress, 1987) discovered severe dementia in only 1 percent of the age 65 to 74 population. It is only after age 85 that the proportion jumps significantly.

On the positive side, some characteristics tend to improve with age and more than compensate for any physical declines. For example, the greater experience of older employees generally results in fewer errors, and high marks for superior judgment, practical knowledge, and ability to handle crises.

Of special note is the fact that individual variability in these functions also increases with age. As a result, researchers have insisted that age itself is an increasingly poor predictor of individual ability. Rhodes (1983) reviewed twenty-five empirical studies and concluded that age seldom accounts for more than 10 percent of the variance in job performance. Where significant decline occurs, the cause is more likely to be a specific illness or injury, or a company culture that fosters "easing off" by older workers.

Myth Two:

Older Workers Are Less Reliable And Less Motivated Than Younger Workers.

Measuring reliability and motivation in terms of attendance, consistency in performance, and turnover, older workers score better than younger workers on all counts.

Several studies confirm that older workers have better attendance records and fewer avoidable absences. For example, a study by the Polaroid Company found that 18 percent of Polaroid's age 65-plus employees had perfect attendance records, versus 10 percent for the total workforce.

In general, workers age 55 and older take less time off than any other age group (Nye, 1988).

Consistency of performance is demonstrated by accident rates. Older workers have significantly fewer accidents than younger workers. Persons age 55 and older constitute 13.6 percent of the labor force, yet account for only 9.7 percent of work place injuries (Palmore, 1988). Workers aged 20 to 24 have the highest injury rate. Rates then drop off with age, falling most significantly for the over-65 population (Nye, 1988).

Finally, older workers have low turnover. AARP data show that workers age 20 to 30 stay with a company an average of only 3.4 years; those aged 50 to 60 have an average length of service of 15 years (Nye, 1988).

Myth Three:

Older Workers Are Less Adaptable To New Technology Than Younger Workers

Surveys in 1985 and 1989 by AARP found that employers commonly rate employees age 50 and older low in the ability to cope with new technology (AARP, 1989). The findings demonstrate the pervasiveness of two perceptions: one, that older workers are not interested in learning new things; and two, they do not learn as fast or as well as younger persons. Both perceptions again illustrate a grain of truth in a field of misperception.

The grain of truth is that speed of learning does show some decline, but this is in part accounted for by differences in learning style between older and younger workers (Palmore, 1988). Older workers are more likely to respond more positively to teaching that is more self-directed, less formal, and which takes advantage of their experience and knowledge. Countless corporate examples leave little doubt that older workers are as least as willing as younger workers to be trained in new technologies and are equally as capable of learning even the most sophisticated technologies. (Nye, 1988)

The misperceptions have been partly attributed to work culture that clings to a notion of career development as one-directional in nature and in which older workers are expected to "opt out" when they cease moving up in the hierarchy. The culture creates a self-fulfilling prophecy. And often, both employers and older workers acquiesce to this view.

Myth Four:

Older Workers Cost More Than Younger Workers.

Cost concerns about older workers usually focus on
- o insurance costs,
- o pension costs, and
- o salary costs in general.

According to a 1988 study of several national data sources conducted by Consolidated Consulting Group (1988), health insurance cost differences, whether measured by insurance premiums or by claim costs, do not differ significantly between older and younger workers and are not large enough to be an important factor in hiring decisions. Only 1 to 2 percent of employers' annual premium increases were due to the aging of workers. Indeed, some factors such as declines in family size for older workers tend to lower employer costs. The study found that the highest-expense single worker group (age 60-64) cost less than the lowest-expense family group (under age 25). Turning to claim costs among age groups, the study found a variation of less than 2 percent.

Rising health insurance costs for retirees has proven to be a far greater problem for employers than benefits for active workers. Indeed, maintaining older workers longer in active employment may actually aid cost containment for retiree health and pension benefits.

Pension costs are more easily controlled by plan design than are health benefits. They are not necessarily more expensive for older workers. For example, many employers are moving in the direction of providing defined contribution plans, which are more age-neutral, rather than providing defined benefit plans, under which workers close to retirement age may be more costly to employers.

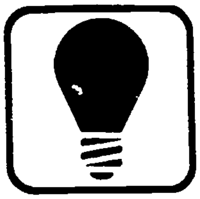
With respect to salary costs, workers age 50 and over traditionally commanded the highest salaries. However, the 1989 Yankelovich survey, sponsored by AARP, found that this distinction now goes to the 35 to 49 year-old group. The change is caused, in part, by management cost-containment strategies of the late 1980's which have emphasized early retirement to reduce the size of the work force (AARP, 1989).

Myth 5:

Early Retirement Incentives Provide A Cost-Effective Way for Companies To Downsize Their Work Forces.

The realistic response to this statement is that it is both true and false. While downsizing has become a recurring process for many businesses trying to trim costs and stay competitive, it can also have serious negative consequences if it is done without an effective, long-term planning perspective. Mere headcount reduction strategies often produce a loss of valuable skills and experience, weaken morale, squash innovation, and require considerable time and expense for training new staff. Robert Tomasko (1990), author of the book Downsizing, offers a planning perspective that emphasizes a multi-level reshaping of company resources and functions. He observes, "Redesigning a company requires more of the mentality of an architect than that of a surgeon."

Some recent studies have challenged the conventional assumption that early retirement incentive programs are a cost-effective strategy. A 1990 analysis of data from Fortune 100 companies concluded that heavy pension and retiree health care costs made it 33.5% costlier to retire workers age 55 and older than to lay off those from 40 to 54 (National Foundation for Occupational and Environmental Health Research, 1990). Focusing on training cost, many companies have found it far more cost-effective to retrain older workers than to hire fresh graduates (Nye, 1988).



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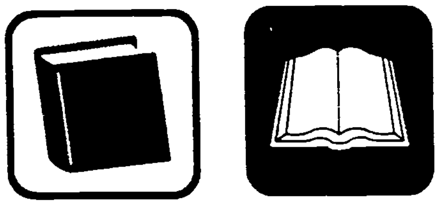
Selected Resource Materials



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PART 3

Age Discrimination in Employment Act - In Brief -

ORIGIN

Enacted in 1967, the ADEA is found at 29 U.S. Code Section 621 and following. It is enforced at the federal level by the Equal Employment Opportunity Commission. The Act states three purposes:

- To promote employment of older persons based on ability rather than age.
- To prohibit arbitrary age discrimination in employment.
- To help employers and workers find ways of solving problems arising from the impact of age on employment.

WHO MUST COMPLY?

Private employers with 20 or more employees.

All state, federal, and local government employers.

Employment agencies of any size.

Labor organizations with 25 or more members.

WHO IS PROTECTED?

Most employees age 40 and older, including U.S. citizens working for U.S. employers in foreign countries. Previously, the Act's protection stopped at age 70, but the age cap was removed in 1987.

The Act does <u>not</u> protect elected officials, the personal staffs of elected officials, appointees on a policymaking level, and those appointees' immediate legal advisors.

WHAT DOES THE ACT PROHIBIT?

Discrimination against workers age 40 and older with respect to hiring, discharge, promotion, demotion, training opportunities, working hours, compensation, benefits, or any other aspect of employment. (See the next chapter for a detailed discussion of ADEA rules regarding benefits.)

Use of age preferences in notices or advertisements for employment.

Retaliation against employees for complaining about age discrimination or for helping government investigations of alleged age discrimination.

Labor organizations and employment agencies may not discriminate on the basis of age in membership activities and referrals.

EXCEPTIONS TO THESE PROHIBITIONS

Certain employer practices are lawful even though they may adversely affect older workers. These exceptions can be used as defenses against a charge of age discrimination:

1. An employer may use age as a bona fide occupational qualification (BFOQ) where it is necessary to the normal operation of the particular business and alternative standards are not available.

2. Differences in treatment are based on "reasonable factors other than age" that are justified by business necessity.

3. A discharge or other discipline is justified by "good cause", for example, tardiness or poor performance.

4. An employer may observe the terms of a bona fide seniority system.

5. An employer may observe the terms of a bona fide employee benefit plan if certain conditions are met. These conditions are discussed in the following chapter on the ADEA amendments known as the Older Worker Benefit Protection Act.

6. An employer may retire certain executives or high policymaking employees at age 65 if specific conditions are met.

7. Tenured faculty may be retired at age 70 (but this exemption expires December 31, 1993).

8. Public safety officers may be subject to maximum hiring or mandatory retirement under state or local law (but this exception also expires December 31, 1993).

HOW IS THE ACT ENFORCED?

An individual who feels he or she has been discriminated against must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the discriminatory action or notice of the discriminatory action (whichever occurs first). The time limit is 300 days if the state has an age discrimination law and enforcement agency.

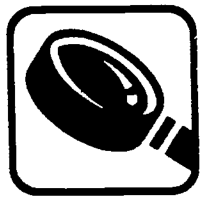
The EEOC operates a toll free HOTLINE that connects the caller to a local enforcement office in the calling area.

EEOC HOTLINE: 1-800-669-4000

The EEOC or state agency may attempt to conciliate, or investigate, and has the power to file a civil action on behalf of aggrieved employees.

After 60 days from the filing of a charge (but within two years of the discriminatory action), the individual has the right to file a civil suit against the employer.

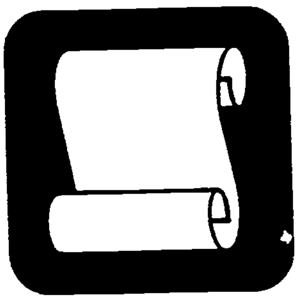
<u>*PART 4*</u>



Analysis:

THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990

By Ronald S. Cooper[1]



On October 16, 1990, President Bush signed into law the "Older Workers Benefit Protection Act", Pub. L. No. 101-433, 104 Stat. 978 (1990) (the "Act"), which amends the Age Discrimination in Employment Act of 1967 (the "ADEA"). The Act substantially increases employer exposure to liability under the ADEA by overturning the Supreme Court's 1989 decision in *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854 (1989) and limiting an employer's ability to rely on employee waivers. The following is an outline of the primary features of the Act.

I. General Rule on Lawful Employment Practices

The ADEA prohibits discrimination in the terms and conditions of employment based on an employee's age. The ADEA, however, contained an exception in Section 4(f)(2) which permitted the employer to observe the terms of a bona fide employee benefit plan - such as a retirement, life or disability plan - as long as the plan was not a "subterfuge" to evade the purposes of the ADEA. In *Betts*, the Supreme Court held that to demonstrate that a plan was a subterfuge, the plaintiff was required to prove that the employer actually intended for the plan to discriminate in a "non-fringe benefit" aspect of the employment relationship. The Act overturns the *Betts* decision and, with the significant exceptions discussed below, limits any differences in benefits based on age to those differences that can be justified by age-based cost differences.

The Act specifically incorporates 29 C.F.R. '625.10, the EEOC guideline on equal cost that was invalidated by *Betts*.[2] However, The Act specifically excepts from the equal cost standard certain types of voluntary early retirement incentive plans. In addition, the Act permits, in limited circumstances, the integration of severance benefits with pension benefits and the integration of disability benefits with pension benefits.

II. Early Retirement Incentive Programs

The Act has a significant impact on the legality of early retirement incentive programs that have been widely used by employers facing force reduction needs. While earlier versions of the bill raised serious questions regarding their continued viability, the Act, as passed, affirms the validity of these programs in appropriate situations. Indeed, the Statement of Managers[3] recognized their popularity with workers, stating:

> We recognize that employees may welcome the opportunity to participate in such programs, and we do not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs rather than resorting to involuntary layoffs.
> 136 Cong. Rec. S13596.

There generally have been two types of lawsuits in the voluntary early retirement program area. First, older workers who were ineligible for a program based on their age brought suit because they wanted to participate and claimed that the eligibility provisions of the plan unlawfully excluded them.

Second, workers who were included in the program, and elected to retire, brought suit alleging that they were in fact coerced into retiring because of their age. As discussed below, the Act will affect both types of lawsuits.

A. Challenges to Plan Design

1. Prima Facie Case

An early retirement incentive program that contains no upper[4] age restriction, either expressly or as a result of the plan's normal retirement age, does not create a prima facie case of age discrimination under Section 4(a) of the ADEA. The Statement of Mangers makes clear that the affirmative defenses in the Act do not come into play "unless a prima facie case of age discrimination has been established under Section 4(a)." 136 Cong. Rec. S13596. The Statement of Managers also describes a number of types of lawful incentive plans that do not have upper age restrictions:

> It is also clear that a wide variety of voluntary early retirement incentive plans would be lawful under the ADEA. For example, early retirement incentives that provide a flat dollar amount (*e.g.*, $20,000), service based benefits (*e.g.*, $1,000 multiplied by the number of years of service), or a percentage of salary to all employees above a certain age were permissible before the *Betts* decision and would remain lawful under this substitute. Similarly, early retirement incentives that provide flat dollar increases in pension benefits (*e.g.*, $200 per month) or percentage increases (*e.g.*, 20%), would continue to remain lawful. Finally, early retirement incentives that impute years of service and/or age would satisfy the ADEA. For example, a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age would be lawful.
> 136 Cong. Rec. S13596.

Presumably, programs of the type described above are lawful under the Act because no prima facie violation can be shown and would not need to meet the standards in either Section 4(1)(1)(B) or Section 4(f)(2)(B)(ii) that are discussed below.

2. *Early Retirement Subsidies and Social Security Supplements*

Section 4(1)(1)(B) of the Act expressly authorizes the provision in a defined benefit plan of a subsidized early retirement benefit or social security supplement. Subsidized early retirement benefits are plans that eliminate on a temporary or permanent basis, all or part of the actuarial reduction that would otherwise occur for employees who retire early. These plans are lawful even though the value of the inducement diminishes with age and is available to only those employees who retire prior to normal retirement age. S. Rep. 101-263 at 21 ("Committee Report").[5] The Committee Report addressed an earlier version of the bill and should be used carefully in determining the meaning of the Act as passed.

Similarly, Section 4(1)(1)(B) of the Act expressly authorizes social security supplements, sometimes referred to as social security "bridge payments." Accordingly, a defined benefit plan may provide for a fixed monthly payment to an early retiree intended to substitute for social security benefits that will become available to the retiree either at age 62 (eligibility for reduced social security benefits) or age 65 (eligibility for unreduced social security benefits). *Id.* Again, these programs are lawful under Section 4(1)(1)(B) of the Act and the language in Section 4(f)(2)(B)(ii) that requires an additional showing that a program is "consistent with the relevant purpose or purposes" does not apply. 136 Cong. Rec. S13596.[6]

It should be recognized that Section 4(1)(1)(B) only authorizes "subsidies" that offer an inducement to voluntary early retirement by eliminating or reducing the normal actuarial reduction otherwise provided in a plan. Early retirement programs that also offer additional service credit up to normal retirement age would not be exempted by 4(1)(1)(B).

For example, a plan with a normal retirement age of 65 might offer to treat employees age 60 or above who elect to retire during a "window" period as if they had already reached age 65 in terms of both age and service credit. Because additional service credit offered under such a plan would be diminished with age and would be unavailable to any employee age 65 and above, a prima facie case could be established. As a result, for such a plan to be lawful it would have to be justified under Section 4(f)(2)(B)(ii), which is discussed below.

3. Other Early Retirement Incentive Plans

As noted earlier, the Act adds to the ADEA a new Section 4(f)(2)(B)(ii) which provides that an employer may observe the terms of "a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act." As noted above, this standard does not apply to early retirement incentive plans unless a prima facie case of age discrimination has been established under Section 4(a) of the ADEA. Nor does it apply to subsidized early retirement benefits or social security supplements subject to Section 4(1)(1)(B). However, all other early retirement incentive programs must satisfy Section 4(f)(2)(B)(ii).

According to the Statement of Managers, the requirement that an early retirement incentive plan be "consistent with the *relevant* purpose or purposes" (emphasis supplied) of the Act generally requires that the plan be consistent with the purpose of prohibiting arbitrary age discrimination in employment. However, such a plan need not be consistent with every purpose of the ADEA (*e.g.*, the promotion of employment of older persons on the basis of ability rather than age). *See* 136 Cong. Rec. S13596.

The Statement of Managers provides, however, that a window benefit plan which includes an upper age limit may conflict with the purpose of prohibiting arbitrary age discrimination. 136 Cong. Rec. S13596. The legislative history does not give specific examples of programs with upper age limits that are lawful or unlawful. This is an unsettled area, which the Committee Report indicated should be "decided on a case-by-case basis, taking account of all relevant facts and circumstances."[7] Committee Report at 28.

B. Challenges to Voluntariness

Section 4(f)(2) requires that early retirement plans be voluntary. A retiree claiming discrimination in connection with his departure has the burden of proving that his retirement was involuntary.[8] The Statement of Managers provides:

> The Managers wish to make clear that it is the plaintiff's burden under the ADEA to demonstrate that his or her retirement was involuntary. Such a claim would be raised under section 4(a). Under the ADEA, an employer does not have to prove that an early retirement incentive plan is voluntary. Of course, no employee benefit plan - including an early retirement incentive plan - may require or permit the involuntary retirement of any individual.
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> * * *
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> Because, by definition, early retirement incentive plans are made available exclusively to older workers, relevant circumstances must be carefully examined to ensure that older workers make a voluntary decision. In order to determine whether a voluntary decision has been made, among the factors that may be relevant are (1) whether the employee had sufficient time to consider his or her options; (2) whether accurate and complete information has been provided regarding the benefits available under the early retirement incentive plan; and (3) whether there have been threats, intimidation and/or coercion. The employee retains the burden of proof regarding the issue of involuntariness.
> 136 Cong. Rec. S13596.

In addition to making clear that the employee retains the burden of proof on voluntariness, the Statement of Managers also provides that the attractiveness of an early retirement incentive does not raise an issue of voluntariness. 136 Cong. Rec. S13596. In other words, an employee will not be able to establish that his retirement was involuntary because the incentive was "too good" to pass up. *Id.*

III. Benefit Coordination and Integration

Several common employer practices involving benefit integration are affected by the Act. For example, employee benefit programs may integrate severance and pension benefits by providing that an employee eligible for retirement will have severance benefits reduced or eliminated. Similarly, employee benefit programs frequently offset pension benefits against disability benefits.

A. Severance Benefits

The Act generally prohibits the integration of severance and pension benefits, except pursuant to Section 4(1)(2) with respect to severance benefits that are triggered by a contingent event unrelated to age (*e.g.*, a plant shutdown). Following such a contingent event, where an individual is eligible for not less than an immediate and unreduced pension, the value of any additional pension benefits made available solely as a result of the contingent event may be deducted from severance pay. In addition, retiree health benefits which meet minimum standards set forth in the Act[9] may be deducted from any severance pay made available as a result of a contingent event.

B. Disability Benefits

The Act also restricts the integration of disability and pension benefits. Section 4(1)(3) authorizes an offset against disability benefits, but only for pension benefits (other than those attributable to employee contributions) that the employee (1) voluntarily elects to receive or (2) is entitled to receive at the later of age 62 or the normal retirement age under the plan. With regard to this provision, Senator Jeffords stated:

submitted by UNUM Corp., the nation's largest disability insurer. UNUM's views were described in the preamble to a 1979 amendment to the DOL interpretive bulletin that preceded the current EEOC guideline and support reductions for disability benefits in accordance with the following schedule:

Age at Disablement	Duration of Benefits in years
61 or younger....	To age 65
62......................	3 1/2 years
63......................	3
64......................	2 1/2
65......................	2
66......................	1 3/4
67......................	1 1/2
68......................	1 1/4
69......................	1

44 Fed. Reg. 30648, 30655 (May 25, 1979).

Although the DOL did not verify the accuracy of the data underlying UNUM's position, it was the DOL's view that "the data indicate how the duration of benefits could be reduced to avoid increases in costs." *Id.* Thus, there has long been an argument that the UNUM schedules are part of the EEOC equal cost safe harbor.

While it is not entirely clear whether disability benefit reductions pursuant to the UNUM schedule were incorporated in the EEOC guideline, there is no doubt that the EEOC guideline, and its safe harbor, have been adopted by the Act. Section 4(f)(2)(B)(i) expressly refers to 29 C.F.R. § 1625.10, without restriction, and the legislative history provides:

> Mr. BENTSEN. My next question is regarding the equal benefit or equal cost standard which is codified by section 103 of your bill into section 4(f)(2)(B)(i) of the ADEA. As I understand section 4(f)(2)(B)(i),

> It is my understanding that agreement has been reached that these two benefits can be integrated in such a way that the employee receives combined payments at the level of the greater of either pension or disability. Thus, the income stream to the employee is not decreased, only the source of the funds is shifted.
> 136 Cong. Rec. S13606.

Thus, while disability benefits may be offset by pension benefits, the total amount received by the employee must be equal to the greater of the two benefits.[10]

With regard to cost-based limitations on the periods of eligibility for disability payments, Section 4(f)(2)(B)(i) expressly incorporates 29 C.F.R. § 1625.10, the EEOC's equal cost guideline. That guideline contains a safe harbor for disability benefits, which provides:

> An employer which provides long-term disability coverage to all employees may avoid any increases in the cost to it that such coverage for older employers would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:
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> (A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.
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> (B) With respect to disabilities which occur after age 60, benefits cease 5 years after disablement. Cost data may be produced to support other patterns of reduction as well. 29 C.F.R. § 1625.10(f)(1)(ii). Among the "other patterns of reduction" referenced in the final sentence are those contained in comments

> it completely incorporates the definition, interpretation, and application of the equal benefit or equal cost rule contained in 29 C.F.R. section 1625.10. Is that correct?
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> Mr. PRYOR. That is correct. In fact, section 4(f) (2) (B) (i) specifically incorporates all 29 C.F.R. section 1625.10.
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> 136 Cong. Rec. S13609.[11]

IV. Retiree Health

The Committee Report raised a new and difficult issue with regard to retiree medical benefits by suggesting that an employer that provides retiree medical benefits cannot provide benefits (taking into account Medicare) that are higher for early retirees than for older retirees. The Committee Report provides:

> The Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree.
> Committee Report at 21-22.

The legislative history of the Senate Substitute disavows this position. The Statement of Managers describes the common employer practice of sponsoring retiree medical plans that provide medical coverage for retirees only until the retiree becomes eligible for Medicare, and notes that in many cases the value of the medical benefits the retiree receives before becoming eligible for Medicare exceed the total value of the retiree's Medicare benefits and the medical benefits the employer provides after the retiree attains Medicare eligibility. The Statement of Managers expressly provides that "[t]hese practices are not prohibited by this substitute." 136 Cong. Rec. S13597.

The Statement of Managers also provides that "nothing in this [Act] should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree." 136 Cong. Rec. S13597. Indeed, a colloquy suggests that retirees are generally outside the protection of ADEA:

> Mr. BENTSEN. Is it the understanding of the Senator that the Age Discrimination in Employment Act does not apply to retirees?
> Mr. PRYOR. The distinguished Senator is correct. The ADEA applies only to employees and those individuals seeking employment. However it does apply to an individual whose retirement benefits are discriminatorily structured prior to retirement.
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> 136 Cong. Rec. S13609.

V. Effective Date

Title I (the provisions discussed above) of the Act applies on a prospective basis only, and establishes different effective dates for collectively bargained and non-collectively bargained plans. With respect to collectively bargained plans, where an employee benefit is provided in accordance with a collective bargaining agreement that (1) was in effect on October 16, 1990, and (2) terminates after October 16, 1990, the Act applies to such employee benefit upon the *earlier* of June 1, 1992 or the date the collective bargaining agreement terminates. With respect to collective bargaining agreements entered into after October 16, 1990, the Act applies to any employee benefits provided under such collective bargaining agreement on the date the agreement is entered into.

With respect to employee benefits that are not provided pursuant to a collective bargaining agreement, where a benefit is established or modified after October 16, 1990, the Act applies to such employee benefit on the date such benefit is established or modified. With respect to employee benefits currently in existence, the Act becomes effective on April 14, 1991 (180 days after the date of enactment). Consequently, it is possible for the same employer to have multiple effective dates with respect to both collectively bargained and non-collectively bargained employee benefits.

The Act has no effect on pending cases, even those that were pending at the time of the *Betts* decision. With respect to such ongoing litigation, Senator Jeffords stated:

> It is my clear understanding that cases that were pending at the time of the *Betts* decision will not be affected by the new law, even if they remain pending on the date of enactment.
> 136 Cong. Rec. S13606.

Thus, a number of companies currently engaged in ADEA litigation concerning employee benefit issues will not have their cases affected by the changes made in the Act.

VI. Waivers

Title II of the Act drastically limits an employer's ability to rely on employee waivers under the ADEA. The only waivers allowable under the Act are those that are deemed "knowing and voluntary," and the Act establishes an objective procedure an employer must follow in order for a waiver to be deemed knowing and voluntary. Further, the Act requires employers to provide extensive written notice when offering an early retirement incentive program or other employment termination program.

The Act provides two alternative tests for determining whether a waiver is knowing and voluntary. Under the first test, a waiver pursuant to an agreement between the employer and employee must meet the following requirements:

- The waiver must be part of a written agreement, written in a manner calculated to be understood;
- The agreement must specifically refer to the waiver of rights and claims under the ADEA;
- The employee may not waive rights or claims that arise after the date of the agreement;
- The agreement must provide that waived rights or claims are exchanged for consideration received by the employee that is in addition to anything of value to which the employee is already entitled;
- The employee must be advised in writing to consult with an attorney before signing the agreement;
- The employee must be given a period of at least 21 days within which to consider the agreement; and
- The employee must be permitted to revoke the agreement for a period of at least 7 days following the execution of the agreement.

In addition, where the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees:

- The employee must be given a period of 45 days, rather than 21 days, during which to consider the agreement; and

- The employer must inform each employee in writing as to
  - The class, unit, or group of employees covered by the program, any eligibility factors and any time limits applicable to the program; and
  - The job titles and ages of all employees eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected.

The second test relates to waivers executed in connection with the settlement of an EEOC charge or court action. Under the second test, a waiver must meet the requirements listed above with the exception that, rather than the 21 or 45 day period, the individual must be given a "reasonable period of time" within which to consider the settlement agreement. Also, the individual is not entitled to the 7 day revocation period, nor is the special notice regarding window benefits required.

Finally, the Act provides that in the event of any dispute with respect to whether the waiver was knowing or voluntary, the party asserting the validity of the waiver has the burden of proving that each of the above-listed requirements was met. However, the Statement of Managers provides that the employer's burden is limited to establishing that it followed the objective steps required by the Act. On the ultimate issue of whether the waiver was "knowing and voluntary," the Statement of Managers provides that the Act is not intended to disturb existing law allocating burdens of proof and production. 136 Cong. Rec. S13597. As a result, this ultimate burden will ordinarily rest with the individual challenging the waiver.

Effective Date - The provisions of Title II are effective upon enactment, and apply to any waiver that occurs after October 16, 1990.

Notes to Part 4

1 Ronald S. Cooper is a Partner in the Washington, D.C. law firm of Steptoe & Johnson. He was closely involved in the legislative process leading up to the passage of the Older Workers Benefit Protection Act.

2 The legislative history approves the use of generally accepted actuarial principles to determine cost. The Statement of Managers in the Senate provides:

> The substitute incorporates the equal benefit equal cost rule into section 4(f)(2). We note that in complying with this provision, the employer may base necessary cost data on generally accepted actuarial principles, such as actuarial extrapolation, smoothing and averaging, and on the use of reasonable related data -- e.g., as to the effects of aging on disability incidence and costs. In all circumstances, the employer must base calculations on the best reasonably available data.
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> 136 Cong. Rec. S13597 (daily ed. Sept. 24, 1990) (Citations to the Congressional Record herein are to the daily edition.)

3 The Act was the product of a compromise in the Senate that significantly modified the bill as previously reported by the Senate Labor and Human Resources Committee. The Statement of Managers had the effect of revising the prior legislative history.

4 Section 4(1)(1) expressly authorizes the requirement of attaining a minimum age in order to qualify for an early retirement benefit.

5 The Committee Report addressed an earlier version of the bill and should be used carefully in determining the meaning of the Act as passed. See supra note 2.

6 However, Section 4(1)(1)(B) requires either type of benefit to be made under a "defined benefit" plan in order to avoid any challenge. Thus, it is imperative that if comparable subsidized early retirement benefits will be offered under a "top hat" plan, in order to avoid the discrimination requirements under the Code, that such benefits be provided under a defined benefit plan as defined in ERISA (35).

7 In the debate in the House, several proponents suggested that employers could not rely on cost data in meeting their obligation of showing that a plan was "consistent with the relevant purpose of purposes of the Act." See 136 Cong. Rec. H8618 (daily ed. Oct. 2, 1990) (statement of Rep. Clay); Id. at H8623 (statement of Rep. Roybal); Id. at H8626 (statement of Rep. Hawkins). These statements are not supported in the Senate history of the compromise, and would make it virtually impossible ever to establish a Section 4(f)(2)(B) defense. Nevertheless, the showing that would meet this new standard remains unclear.

8 This shifting of the burden of proof is a victory for employers. In the bills as reported by Committee in both the House and Senate, the employer would have born the burden of proving that each acceptance was voluntary.

9 The standards applicable to retiree health benefits are set forth at Section 4(1)(2)(D). For retirees under age 65, the benefits must be at least comparable to those provided under Medicare. For retirees age 65 and older, the benefits must be at least comparable to a plan that provides benefits with one-fourth the value of those provided under Medicare.

10 In addition, the legislative history makes clear that the Act permits the common employer practice of providing Social Security disability supplements under a pension plan, which are discontinued when the pensioner becomes eligible for Social Security disability benefits. 136 Cong. Rec. S13601.

11 The broad statement that the Act "completely incorporates the definition, interpretation, and application" of the EEOC regulation supports an argument that the UNUM schedule, as part of the regulation's preamble, also is incorporated. And this certainly was the view of UNUM Corp., which testified in support of the Act. 136 Cong. Rec. S13605.

PART 5

Ten Guidelines for Employers Considering Downsizing

1. Don't equate downsizing with mere head count reduction. Corporate consultant Robert Tomasko describes it as a carefully thought-out process of "reshaping the corporation for the future." There are no quick fixes.

2. In every decision related to downsizing, determine how it may directly or indirectly affect older workers. Make sure the result of such decisions will be age neutral before implementing them. Even enlist the help of an advisory committee including older managers and workers, and retirees.

3. Make sure all levels of management are sensitized to ageist stereotypes and behaviors and trained in the basic requirements of the ADEA. Even an age-neutral company decision can become discriminatory in the hands of an untrained manager.

4. Avoid age caps in exit incentive programs. Minimum age requirements normally are not a problem.

5. Give employees plenty of time to consider an exit incentive offer and plenty of resources to evaluate the offer, so that their decisions are knowing and voluntary.

6. When a downsizing plan is announced and carried out, communicate fully, objectively, and uniformly with all workers. Consider preparing a script for the responsible managers so that information and advice is given properly and consistently.

7. Remember that severance and other benefits are protected under the ADEA. Pension eligibility generally cannot be used to offset severance benefits. (The Older Worker Benefit Protection Act allows only very narrowly defined offsets of severance by certain health benefits and pension "shutdown sweetners.")

8. Performance ratings can be an effective, human resource criteria for downsizing; but make sure performance evaluations are...
   - age neutral in content,
   - age neutral in the way they are used,
   - effective, that is, they have "teeth."

9. Provide employees who are terminating, under either voluntary or involuntary exit programs, a full range of outplacement services, such as immediate and follow-up counseling; lessons in job hunting, career planning, interview techniques, and resume writing; and office space, telephones, and secretarial help to facilitate job searches.

10. Consider new and flexible ways to tap the potential of older workers through retraining, part-time employment, job redesign, phased retirement, and other strategies.