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ON FRINGE BENEFITS

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EEO LAW: IMPACT ON FRINGE BENEFITS

A Policy & Practice Publication

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PREFACE

The UCLA Institute of Industrial Relations has, over recent years, given close attention, through conferences and publications, to equal employment opportunity laws and developments.

This Policy and Practice publication represents a continuation of the Institute's responsibility to the industrial relations community as well as to the general community by offering guidance and understanding of national policies that directly and indirectly affect the workplace. And certainly federal equal employment opportunity laws have entered the work environment in multiple and complex ways.

The purpose of this publication is to focus on EEO developments as they relate to fringe benefits, a highly significant component of the wage dollar.

Two protected classifications—sex and age—have been the focal point for forging change in fringe benefit planning. The sex-based issues of pregnancy and pensions are discussed within the framework of the 1978 "pregnancy disability amendment" and the Supreme Court decision in the *Manhart* case, which involved the issue of different treatment of women and men under a pension plan. The 1978 amendment to the Age Discrimination in Employment Act of 1967, which raised the mandatory retirement age from 65 to 70 for nonfederal employees, reaches into several employee benefit plans and hence has long-range implications in personnel planning and practice.

It is our hope that the material in this publication will serve as a useful reference source and will stimulate discussion, including questions for which, perhaps, there are yet no answers.

Frederic Meyers, Director
Institute of Industrial Relations

January, 1979

CONTENTS

CHAPTER I - THE EVOLUTION OF FRINGE BENEFITS 1

The Meaning of "Welfare" 3
Impact of Fringes at Bargaining Table 5
EEO Laws Add to Complexity 7

CHAPTER II - WOMEN, WORK, AND BABIES 9

Title VII Coverage in Brief 9
Gender-based Practices 10
The Sex-Plus Concept 12
Defining Sex Discrimination: The Pregnancy Issue 13
EEOC Interpretations 14
Supreme Court Rulings 17
The Pregnancy Disability Amendment 22
Substantive Provisions 22
Disability Benefits 26
Health Insurance 30
The Abortion Exception 31
Dependency Coverage 34
Transition Provisions 35
Cost Impact 39
Health Insurance Plans 39
Disability Insurance 40
Defining Sex Discrimination: Pensions 43
The *Manhart* Decision 45
Impact of Manhart 49

CHAPTER III - AGE AND FRINGES 51

ADEA in Brief 51
1978 Amendments: A Summary 52
Mandatory Retirement 55
Collective Bargaining Exemption 59
Bona Fide Executive Exemption 59
College and University Faculty Exemption 61
Pension Credits After "Normal Retirement" Age? 62
Number of Workers and Pension Plans Potentially Affected 65
State Age Discrimination Laws on Retirement 67
Other Employee Benefits 68
Life Insurance 72
Health Insurance 73
Long-Term Disability 73
The Long-Range View 75

Appendices
Title VII as Amended in 1972 83
Pregnancy Disability Amendment of 1978 106
EEOC Guidelines on Discrimination Because of Sex 107
Age Discrimination in Employment Act of 1967 118
Age Discrimination in Employment Act, 1978 Amendments 125
Definitions 130

Notes to Chapter I 146
Notes to Chapter II 147
Notes to Chapter III 149

CHAPTER I

THE EVOLUTION OF FRINGE BENEFITS

The term "fringe benefits" can be traced back to about 1943, when a regional chairperson of the National War Labor Board referred to "fringe issues," a catchall phrase for all forms of employee compensation other than straight time wages or salaries.[1] Fringe benefits are also referred to as "indirect compensation" or "supplementary benefits."

The War Labor Board (WLB) helped to accelerate fringe benefits as a major bargaining table item. During World War II, the government's economic policy was to limit wage increases in order to hold down inflation. Consequently, union demands were directed toward nonwage benefits. The WLB permitted the granting of some benefits on the "fringe" of wages. The Board reasoned that some fringes were not inflationary, such as pension plans which were considered saving plans and hence noninflationary.

Other benefits such as paid vacations and paid holidays did not add income to the worker's total for the year. While the WLB acknowledged that such benefits represented an added cost to the employer, the possible inflationary effect was more than offset by increased employee productivity: holidays, vacations, and sick leave plans were needed to rest or restore an employee for greater productivity upon return to work.[2]

Today, employers and employees alike, organized and unorganized, share, for the most part, a similar and familiar definition of "fringe benefits"--health insurance plans providing medical, surgical and hospital coverage; dental insurance; life insurance; pensions; paid sick leave; disability insurance plans for nonoccupational injuries or illness; paid vacations; paid holidays, etc.

Additionally, there are government imposed programs which find their way into the fringe benefit column: state unemployment insurance and workers' compensation laws, and the federal social security system. Employers, public and private, must provide workers' compensation to cover valid employee claims of sickness or injury arising from work-related causes. Unemployment insurance, financed by a tax on an employer's payroll, was originally mandated for private sector employers only, except those employing farm and domestic workers. As a result of federal legislation enacted in 1977, agricultural and domestic workers now come under unemployment insurance coverage, along with state and local government employees--a total of 9 million newly covered workers. Ninety-seven percent of wage and salaried workers are now eligible for unemployment insurance protection under the federal-state unemployment insurance program.[3]

Social security coverage, while mandated in private sector employment, is optional for state and local jurisdictions. The other major difference is that

there is a mechanism by which public jurisdictions may terminate coverage.*

THE MEANING OF "WELFARE"

One common expression in the area of fringe benefits is "health and welfare." Obviously, the health portion refers to a health insurance plan. But what is meant by welfare?

"Welfare," as used by the California Division of Labor Statistics and Research in analyzing contracts, means life insurance and nonoccupational disability insurance.[4] The costs of this type of welfare (life and disability insurance) are lumped together with the costs of health insurance and thus become a "package."

A more expansive definition of "welfare" is provided by the U.S. Department of Labor. In setting forth an explanation of a worker's rights and protections under the Employment Retirement

---

* For an informative discussion of public sector involvement in social security, see *Background Material on Social Security Coverage of Governmental Employees and Employees of Nonprofit Organizations*, a report prepared by the staff of the Subcommittee on Social Security of the Committee on Ways & Means, U.S. House of Representatives, April 26, 1976. See also "Public Employment and Social Security," in *Social Security-How Social? How Secure? (p. 43)*, published by the UCLA Institute of Industrial Relations based on a 1976 Institute conference.

Income Security Act of 1974 (popularly known as ERISA; also called the Pension Reform Act of 1974), the Labor Department does not separate health insurance plans from other benefits under its explanation of an "employee welfare benefit plan." Additionally, the concept "welfare" ranges from child (day) care centers to apprenticeship or other training programs:

> Employee Welfare Benefit Plans
>
> Any plan, fund, or program which was established or maintained by an employer(s) engaged in [interstate] commerce or in an industry or activity affecting [interstate] commerce, or by an employee organization representing employees so engaged, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or any benefit described in section 302(c) of the Labor-Management Relations Act, 1947 (other than pension on retirement or death, and insurance to provide such pensions) - and these latter are holiday and severance or similar benefits.[5]

IMPACT OF FRINGES AT BARGAINING TABLE

The latter definition suggests that employee welfare or fringe benefits is an ever expanding and changing factor in the total compensation of workers. What is considered on the "fringe" of wages is bargained for just as vigorously as union wage demands and, during inflationary periods, sometimes with greater vigor because benefits, while a form of compensation, are not taxable income.

For the employer, concerns about the cost of providing a fringe benefit or improving an existing benefit is balanced against other factors. For example, an employer, engaged in collective bargaining, anxious to reach a settlement with the union, may not necessarily have a knee-jerk reaction to say "no" to a union proposal improving the quality of a health plan, if this means the union is willing to settle for a smaller wage increase. Wage increases carry with them certain built-in "roll-up" costs.

"Roll-up" costs are expenses which accompany a wage increase. They occur in given fringe benefit areas. For example, when wages go up, employer contributions are increased for social security, unemployment insurance, workers' compensation, and pension benefits. The first three government-imposed plans require a contribution based on a specified percentage of payroll.

A direct pay increase also rolls up premium pay, which is computed as a percentage of base pay. As wage rates go up, so does the amount of overtime payments. And if a shift differential is negotiated as a percentage of base pay, the aggregate amount paid for shift differentials also rises.

Further, the reader must bear in mind that the type of fringe benefit will often influence employer positions in reaching a settlement with a union. A demand for increased vacations, for instance, which might result in the need to hire new workers or to increase overtime work, hence premium payments, in order to maintain production levels, might be turned down. Initiating or improving a retirement plan may be more acceptable to the employer. It has been noted that "some employers may have been influenced to start new plans or to extend benefits to additional employee groups by factors such as the deferred nature of the payments of [retirement] benefits, as well as the economic pressures generated by favorable tax laws, group-selling practices, and unionization."[6]

Thus, both employers and unions, though for different reasons, may find themselves reaching agreement through trading off direct wages for fringes. Another way of putting it: the escalation over the years of the fringe benefit package has been a constructive means of reaching settlement since neither the union nor management is forced to put all its respective eggs in one wage basket--but rather can scramble the proposals and counter proposals so that hard-boiled direct wage intransigence on both sides can be softened by fringe benefit bargaining.

The foregoing is admittedly an oversimplification of the collective bargaining process in which fringe benefits are such a significant part of the total wage package.*

---

* It is alleged that if the expectations of companies surveyed by the Council on Employment Benefits are realized, employee benefit costs could rise to 56% or more of payroll by 1990. See *Daily Labor Report*, BNA, No. 202, Oct. 18, 1978, P. A-5.

Nor should it be overlooked that employee benefits can also be part of the unorganized worker's total compensation. Certainly public employees have long had fringes such as retirement plans, paid vacations, sick leave pay, etc. at all levels of government. Where collective bargaining has taken place, the union in the public sector is no different from its private sector counterpart in pushing for new benefits while seeking improvement of existing ones.

Unorganized private sector companies often have fringe benefit packages that are similar to those negotiated. As one management publication put it: "...these benefits are the plus factors that help you recruit and retain a competent workforce."[7] For some, it may be their response to warding off a successful union organizing campaign.

EEO LAWS ADD TO COMPLEXITY

The range and complexity of the collective bargaining process is now matched by the range and complexity of federal equal employment opportunity (EEO) laws, coupled with comparable state laws.[8]

These laws have added a new and challenging dimension to industrial relations and labor law. And one of the contentious areas in EEO law and doctrine has centered on health and welfare benefits and retirement plans. Sex-related and age-related employee benefit issues have occupied the attention of the Supreme Court and the U.S. Congress.

The chapters to follow discuss recent developments which directly affect labor-management practitioners in long-range fringe benefit planning as they seek to comply with the 1978 amendments to Title VII of the Civil Rights Act of 1964 and to the Age Discrimination in Employment Act (ADEA) of 1967.

The content of these chapters should also be helpful to employees in understanding how these amendments affect their compensation and working conditions.

The amendment to Title VII deals with the definition of sex discrimination with specific reference to fringe benefit programs: health plans, disability insurance programs, sick leave benefits and leave policies as they apply to pregnant women. Chapter II, following a brief background commentary, details the amendment to Title VII, its effect on existing employee benefit plans or those that may be instituted, and what it may mean in two different work settings--in organized and unorganized companies or agencies. Furthermore, Chapter II includes a discussion of the Supreme Court decision concerning sex-based pension plans.

The amendments to the Age Discrimination in Employment Act have generated a renewed interest and rethinking about retirement, life insurance and long-term disability insurance since the mandatory retirement age for nonfederal employees was raised from 65 to 70. There is, currently, confusion and disagreement concerning the Department of Labor's proposed regulations to implement congressional intent in enacting the 1978 amendments. Chapter III will discuss the amendments and distill the variety of concerns and potential implications of the changes in the law.

Title VII and the ADEA changes affect the private and public sectors. Additionally, public sector management has been faced with constitutional challenges to their benefit plans. The response of the courts, including the Supreme Court, to these constitutional issues merits separate treatment and hence is not discussed in this publication.

CHAPTER II

WOMEN, WORK, AND BABIES

TITLE VII COVERAGE IN BRIEF

The most comprehensive and well-known law dealing with sex discrimination is Title VII of the Civil Rights Act of 1964, amended in 1972 and 1978.*

Title VII, outlawing all forms of employment discrimination based on race, color, religion, sex or national origin, was the culmination of a 20-year federal legislative effort to enact fair employment practices legislation. Specifically Title VII provides that it is unlawful to discriminate with respect to "compensation, terms, conditions or privileges of employment, because of...sex." (Section 703(a)(1)

When Title VII became effective on July 2, 1965, only private sector employees were protected by its provisions. In 1972 Congress amended the law to include state and local government employees; federal employees were likewise brought under Title VII, but the administration and enforcement was placed in the hands of the U.S. Civil Service Commission, rather than with the Equal Employment Opportunity Commission (EEOC) which enforces Title VII in both the private and public sectors (state and local jurisdictions). However, the Civil Service Reform Act of 1978 provides that if a complaint is "mixed"--e.g., alleges discrimination and violation of a civil service rule or regulation--the EEOC will, under specified conditions, share responsibility with the newly created, independent Merit Systems Protection Board which handles employee or applicant appeals.[1]

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* See Appendix for text of Title VII, as amended in 1972, and text of 1978 amendment.

In addition to covering employers with 15 or more employees, labor organizations with 15 or more members or unions with hiring halls also are covered. Other provisions, apart from the membership or hiring hall requirement, bring under Title VII coverage--in addition to international, national and local unions--intermediate labor bodies such as joint boards, and state and local central labor bodies.

Very few employers, unions or independent employee associations, and employment agencies are excluded from Title VII coverage. Those that are may well come under a similar state law in which Title VII principles and doctrine are applied.

Gender-based Practices

Title VII has offered the means through which women, organized and unorganized, can seek to redress a variety of gender-based employment practices.

The initial, and often joint, efforts of women's organizations and of the Equal Employment Opportunity Commission were to impress the industrial relations community that hiring, job placement, and promotion must be based on the individual qualifications and abilities of a given female applicant for employment or a given female employee seeking promotion; that the day of making employment decisions based on the preconceived notions of the "average" woman was over; that the day of viewing women of childbearing age as perpetually pregnant was over; that the day of making gender-based hiring, transfer or promotion decisions based on the view of women as

marginal workers or based on the ingrained attitudes of male employees or perceived customer preference was likewise at an end. In short, decisions based on sex, absent a valid business necessity defense, become an unlawful employment practice under Title VII.*

The Title VII issue of women as childbearers and child rearers predictably surfaced, both in a hiring context and in an equal pay context because of different treatment accorded pregnant employees under specified employee benefit plans or in the application of leave policies.

In pre-Title VII days it was not uncommon nor illegal, absent a state or local law, for employers to refuse to hire women with children. Employers claimed that hiring women with child care responsibilities would result in excessive tardiness and absenteeism. Further, the job would not get the attention it deserved because the female employee would be preoccupied with household chores. Similar reasons accompanied the refusals to promote female employees with small children, and as collective bargaining agreements began to provide for paid sick leave, many employers felt that women would abuse the

*Sex discrimination is permitted if it meets the Title VII bona fide occupational qualification (bfoq) exception. The bfoq exception has been narrowly interpreted by the EEOC and the courts. Different treatment based on sex is also allowed under Title VII if such treatment is based on a bona fide seniority, merit, or piece-work system.

purpose of paid sick leave to take care of sick children or handle other domestic affairs.

The Sex-Plus Concept

The issue of discriminating against women with pre-school age children reached the Supreme Court in the case of *Phillips v. Martin Marietta Corp.*[2] The case was generated by a woman who had applied for a particular job and was told female applicants with pre-school age children were not being considered. No similar restriction applied to men with pre-school age children.

When the case reached the appellate court level, the majority of the judges held that the company's position did not violate Title VII because not all women were excluded from consideration. Rather, it was the combination of being a woman plus having pre-school age children that resulted in exclusion from job consideration. A dissenting judge, however, pointed out that this concept of "sex plus" would permit employers to discriminate against women in hiring and other employment practices by combining sex with some other factor such as height.

While the Supreme Court held that the appellate court was wrong, that it could not apply a different standard for a man and a woman--each with pre-school age children--it nevertheless left the door open on the "sex-plus" issue by indicating that employment decisions made on sex plus other factors would not necessarily violate Title VII, if based on a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

In any event, the "sex plus" concept has remained alive in the fringe benefit area. For example, the denial of disability insurance or health insurance benefits, under an existing plan, to pregnant women created a subclass of women: being female plus being pregnant. Being female and pregnant has been a significant "sex-plus" issue in the workplace and in the development of equal employment opportunity law.

As the information to follow details, it took Congress from 1964 to 1978 to explicitly define sex discrimination as it relates to pregnancy-based employment decisions.

DEFINING SEX DISCRIMINATION: THE PREGNANCY ISSUE

As previously noted, when enacted Title VII banned sex-discrimination in all aspects of employment--hiring, job placement, transfers, promotions and compensation, for example. The pregnancy issue has a direct link with total compensation, that is, direct wages as well as indirect wages (fringe benefits). However, there was no record concerning Congressional intent as to whether childbirth and pregnancy-related disabilities which may occur prior to or following childbirth were meant to be included within the Title VII prohibition against sex-based compensation.

The question thus remained: Does the denial of benefits to pregnant employees, comparable to those granted male employees and nonpregnant female employees, constitute sex discrimination? In short, is "pregnancy-based" discrimination incorporated into the meaning of "sex-based" discrimination?

The silence on the part of Congress can be traced to the fact that when the House Judiciary Committee reported out the proposed Title VII provisions, there was no mention of sex as a classification protected by Title VII. The proposed bill proscribed discrimination based on race, color, religion or national origin. At the time, the Chair of the Judiciary Committee was Congressman Emanual Celler (D-N.Y.), a recognized pro-civil rights advocate; yet he evidently was persuaded by the President's Commission on the Status of Women, among others, that "...discrimination based on sex...involves problems sufficiently different from discrimination based on...other factors... to make separate treatment preferable."[3]

At that time there was also a recognized anti-civil rights advocate lurking in the wings, Congressman Howard Smith (D-Va.), then Chair of the powerful House Rules Committee. With the cynical hope of killing the 1964 legislation, he offered an amendment on the House floor to include sex as another protected class under Title VII. The House accepted his amendment, but went on to pass Title VII as did the U.S. Senate, with the sex classification intact.

EEOC Interpretations

The General Counsel of the Equal Employment Opportunity Commission issued an opinion letter in response to a company's question as to whether excluding pregnancy and childbirth as a disability under a given plan would violate Title VII. The letter, dated October 17, 1966 stated:

> You have requested our opinion whether the... exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of

> Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy, we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, it is our opinion that according to the facts stated... a company's group insurance program which covers hospital and medical expenses for the delivery of employees' children, but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.

Shortly thereafter, another opinion letter came forth from the EEOC stating "an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."[4]

But in 1972 the EEOC issued "Guidelines on Discrimination Because of Sex,"* which reversed

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* The EEOC guidelines on sex discrimination (as well as its other guidelines) do not have the full force and effect of law. They are intended to reflect the Commission's interpretation of Congressional intent. The weight given to them by a court, including the Supreme Court, depends on whether the court concludes they reflect legislative intent. In turn, legislative intent requires a search of committee reports, and debate and discussion by both houses of Congress.

the foregoing EEOC position expressed in the opinion letters. Section 1604.10 provides, among other things, that disabilities resulting from "pregnancy, miscarriage, abortion,* childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities" and must be treated as such under any health or temporary disability insurance or sick leave plan that may be available to employees.

Why this turnabout in EEOC thinking?

One possible explanation has been offered by the Senate Committee on Human Resources. This Committee in a 1977 report[5] states that in amending Title VII in 1972 "Congress noted that discrimination against women is to be accorded the same degree of social concern given to any type of unlawful discrimination. (See H. Report No. 92-238, 92nd Cong., 1st Sess., p.5, 1971)." And the Senate Committee concluded that the EEOC issued its 1972 guidelines on pregnancy discrimination in order to implement the intent of Congress, and "made clear that excluding applicants or employees from employment because of pregnancy or related medical conditions was a violation of Title VII, and specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities. In the committee's view these guidelines rightly implemented the Congress' intent in barring sex discrimination in the 1964 act."

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*Enactment of S.995 will now require a change of guideline language as it relates to abortion. See page 31 for an explanation of the Congressional compromise on the abortion issue.

Supreme Court Rulings

Following the 1972 EEOC guideline on pregnancy and medical-related issues, 7 federal courts of appeals (plus 18 federal district courts) agreed that the EEOC guidelines reflected the intent of Congress and that to discriminate in employment based on pregnancy violated Title VII.*

Despite these consistent appellate court rulings, all decided in 1975, the Supreme Court in the following year held that the exclusion of pregnancy-related disabilities from a company's disability insurance program was not sex discrimination under Title VII. On a 6-3 vote, in *Gilbert v. General Electric Corp.*,[6] the majority concluded that both men and women were covered under the GE plan for like risks--the only risk excluded was related to pregnancy. Hence

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*For the appellate court decisions, see *Wetzel v. Liberty Mutual Insurance Co.*, 511 F. 2d 199 (3d Cir. 1975) *judgement vacated on other grounds*, 96 S. CT. 1202; *Gilbert v. General Electric Corp.*, 519 F. 2d 661 (4th Cir. 1975); *Farkas v. South Western City School District*, 506 F. 2d 1500 (6th Cir. 1975); *Hutchinson v. Lake Oswego School District*, 519 F. 2d 961 (9th Cir. 1975); *Berg v. Richmond Unified School District*, 528 F. 2d 1208 (9th Cir. 1975); *Communications Workers v. A.T.& T.* 513 F. 2d 1024 (2d Cir. 1975); *Tyler v. Vickery*, 517 F.2d 1089, 1007-1009 (5th Cir. 1975); *Holthaus v. Compton & Sons Inc.*, 514 F. 2d 651 (8th Cir. 1975).

women as a class were covered equally with men except for one condition--pregnancy--and no insurance plan has to be all inclusive.*

A similar decision by the Supreme Court preceded the *Gilbert* ruling. The Court had previously considered a challenge to the unemployment disability insurance law of California. This law provides that private sector employees, except domestics, contribute 1 percent of their weekly earnings, up to a specified annual maximum, to a state fund to be used by such employees when they are unable to work because of a nonjob-related illness or injury (job-related illness or injury is covered by the Workers' Compensation law). At the time of the challenge, disabilities caused by abnormal pregnancies were covered under the California unemployment disability insurance program. The law excluded from coverage normal pregnancies and childbirth. This exclusion was challenged under the Fourteenth

---

*The General Electric temporary disability insurance plan provided, up to a maximum of 20 weeks, a weekly benefit amount equal to 60% of an employees's straight time earnings, up to a maximum of $150.00. Benefit payments started on the eighth day of a nonoccupational illness or injury unless hospitalization occurred earlier; in that event coverage started on the day of hospitalization. In effect the plan was a weekly wage replacement or income protection plan, but excluded from its coverage childbirth and pregnancy-related disabilities.

Amendment of the U.S. Constitution which guarantees "equal protection" under the law. Those challenging the California law argued that denial of benefits for a disability that accompanies normal pregnancy and childbirth was invidious discrimination based on sex.

The Supreme Court in a 6-3 decision disagreed, stating "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause [of the Fourteenth Amendment]."*

---

*The California Legislature overturned the Supreme Court decision when it enacted, in 1976, an AFL-CIO sponsored bill (AB 3881 by Fazio (D), Sacramento) which extended benefit coverage under the state disability insurance program to include normal pregnancies for a total of 6 weeks--3 weeks prior to childbirth and 3 weeks following delivery; the 1 percent tax on covered employees' weekly earnings was not changed. The maximum taxable wage base was raised from $9,000 to $11,400. The impact of *Geduldig* was not national in scope since only four states, in addition to California, have unemployment disability insurance laws. And even in these states, the impact of the Supreme Court decision had little significance since these four states have disability insurance laws that variously cover pregnancy:

> *California.*--Coverage for complications of pregnancy and childbirth on same basis as other disabilities. Disability associated with normal childbirth--maximum coverage of three weeks before and three weeks after childbirth. (Cont'd next page)

The Court's reasoning in the *Geduldig* decision formed the basis for the decision handed down in *Gilbert*. The Court found the reasoning in its Fourteenth Amendment case *(Geduldig)* applicable under the Title VII case *(Gilbert)*.

The *Gilbert* decision found the Supreme Court defining sex discrimination for Title VII purposes. The Court noted that when Title VII was enacted, the concept of "discrimination" was well-known because of court interpretations of discrimination based on the Fourteenth Amendment. Therefore, the Court reasoned, when

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* Cont'd.

Hawaii.--Pregnancy-related disabilities treated like all other disabilities.

New Jersey.--Coverage for complications of pregnancy and childbirth on same basis as other disabilities. Disability associated with normal childbirth--maximum coverage of four weeks before and four weeks after childbirth.

New York.--Same as California and New Jersey. Eight-week limit on benefits for disabilities arising from normal (uncomplicated) childbirth.

Rhode Island.--$250.00 maximum for pregnancy-related disabilities.

(Source: House Committee Report No. 95-1786, 95th Congress, 2d Session, 1978, p.11.)

Congress made it unlawful for an employer to "discriminate...on the basis of...sex" without further explaining its meaning, then the meaning of sex discrimination should be what the Court has "traditionally meant" it to be under the Fourteenth Amendment, and under the Fourteenth Amendment excluding the condition of pregnancy from a temporary disability benefit plan is not sex discrimination. Therefore, it is not discrimination under Title VII either.

The *Gilbert* decision concerned itself specifically with one given type of benefit based on an insurance concept. What about paid sick leave days, earned by virtue of length of time on the job? The Supreme Court found that there was no legal difference between the two types of benefits--i.e., disability insurance benefits and earned sick pay. One year after *Gilbert*, the Court in *Nashville Gas Co. v. Satty*[7] found that the denial of sick pay to pregnant workers was not a violation of Title VII, unless the female employee who brought the suit could offer evidence that the exclusion of pregnancy met the test the Court had set down in *Gilbert*: the denial of sick pay to pregnant employees was a mere pretext purposely designed to discriminate against members of one sex or the other.

The Supreme Court decision in *Gilbert* met with the disapproval of a coalition of women's organizations, civil rights groups and the AFL-CIO, all bent on overruling the Court through the legislative process. They found willing supporters among Congressional members of both parties.*

*The House bill (H.R. 6075), introduced by California Congressman Augustus Hawkins, had 119 co-sponsors. The Senate bill (S.995), introduced by New Jersey Senator Harrison Williams for himself and 10 other senators, had 29 co-sponsors.

As a result, the Supreme Court decisions in *Gilbert* and *Satty* were overturned when Congress handily passed, and the President signed into law on October 31, 1978, the "pregnancy disability amendment" to Title VII. (The bill enacted was S.995, now Public Law 95-555.)

The Pregnancy Disability Amendment

Substantive Provisions

The identity given to the amendment, i.e., pregnancy disability" is misleading by virtue of its restrictive description. To be sure, the amendment prohibits the denial of health, disability, or sick leave benefits to pregnant women temporarily disabled by childbirth itself or by a medical condition incurred before or after childbirth. However, the amendment reaches beyond the issue of pregnancy-related disabilities. It incorporates a comprehensive prohibition against discriminatory treatment of pregnant women in all aspects of employment, e.g., hiring, job placement, transfers, promotions, job training.

The underlying principle of the amendment is that employment decisions concerning pregnant women must be based on their ability to work, in the same manner that such decisions would be made about any other employee. Congress has now made explicit that the fundamental aim of Title VII--to prohibit different (disparate) treatment based on sex--includes a prohibition against employment practices that deny pregnant women equal treatment in relation to treatment of non-pregnant employees.

The amendment does the following:

(1) Expands the definition of sex discrimination based on "pregnancy, childbirth or related medical conditions."

(2) Requires employers to treat pregnancy and childbirth like other causes of disability under fringe benefit plans such as health or disability insurance or paid sick leave plans. The single exception to this equal treatment requirement centers on the abortion issue. A compromise between the Senate and House, the abortion language provides that an employer is not required under Title VII to include under a health or disability insurance plan, or under a paid sick leave policy, payment for abortions unless the life of the mother is endangered or "medical complications" occur as a result of an abortion. However, the two houses of Congress are on record in emphasizing that the amendment protects women from discriminatory treatment if they choose to terminate their pregnancy. Hence, an employer may not fire or refuse to hire a woman--or to promote her--merely because she has had an abortion or plans to have one.

(3) Prohibits mandatory leaves arbitrarily set at a specified time during a pregnancy and not based on the inability of the pregnant woman to work.

(4) Protects the reinstatement rights of women on leave for pregnancy-related reasons, including credit for previous service, accrued retirement benefits and accumulated seniority.

(5) Prohibits terminating a woman solely because she is pregnant or refusing to hire or promote her solely because she is pregnant.

(6) Waives any interpretation under the Equal Pay Act (EPA) of 1963, as amended, which may find an employer in compliance with the EPA but may not find him or her in compliance under this latest amendment to Title VII. (By way of explanation: Section 703(h) of Title VII (commonly called the Bennett Amendment) contains a provision which, in effect, states that certain practices authorized by the Equal Pay Act do not violate Title VII. Both houses of Congress felt that the Supreme Court in *Gilbert* seemed to believe that under EPA regulations issued by the Department of Labor, the denial of disability benefits to pregnant women was allowed under the EPA. Thus, based on the pregnancy disability amendment an employer may not now rely on compliance with the EPA as a Title VII defense in denying benefits to pregnant women under a benefit plan.

The foregoing provisions set forth to employers and unions, when the firm or agency is organized, their Title VII responsibilities in revising existing plans, if needed, or in initiating health and disability benefit plans. They likewise set forth for employees who become pregnant their rights under Title VII. These responsibilities and rights are based on the provisions of

Section 1 of the 1978 amendment and as interpreted by Congress through its committee reports.*

Section 1 amends Section 701 - Definitions of Title VII by adding a new subsection (k). This section reads:

> "(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion."

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* These reports are: Conference Committee Report No. 95-1786, 95th Congress, 2d Session, 1978; House Committee Report No. 95-948, 95th Congress, 2d Session, 1978; Senate Committee Report No. 95-331, 95th Congress, 1st Session, 1977.

The pregnancy disability amendment prohibits discriminatory treatment (other terms used in equal employment opportunity discussions are "different" treatment or "disparate" treatment). Prohibition of discriminatory treatment is the touchstone of Title VII. Hence the pregnancy amendment does not require special or privileged treatment of pregnant employees or applicants for employment. Rather, it mandates the same treatment of pregnant women accorded to all employees or applicants for employment, *based on their ability or inability to work.*

This fundamental objective of the amendment--equal treatment--is of practical importance in two specific employee benefit areas: disability benefits and health insurance.

Disability Benefits

While disability insurance plans and paid sick leave policies are covered by the pregnancy disability amendment, there is no requirement that such plans do exist. Also, a voluntary unpaid leave plan does not violate Title VII if applied in a nondiscriminatory manner.*

Entitlement to disability insurance or sick pay benefits does not automatically flow from the condition of pregnancy. Unless the pregnant

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* California employers covered by the Fair Employment Practice Act (5 or more employees) are required, as of January 1, 1979, to grant a pregnancy leave for a reasonable period of time, not to exceed four months. "Reasonable period of time" means that period during which the female employee is disabled because of pregnancy, childbirth or related medical conditions. (Section 1420.35(b)(2) of the Labor Code.)

employee is medically unable to work, she is not entitled to sick pay benefits or disability insurance payments. This test of ability or inability to function applies to pregnant women as it does to all other employees. For example, Title VII would not protect a woman's claim of sex discrimination if, after giving birth without complication, she wanted to stay home beyond a normal recuperative period to be with her baby. Medically she is able to return to work. Therefore, she is not entitled to sick pay or disability benefits since her reason for wanting to remain at home is not a medical condition related to her previous pregnancy.*

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* This, of course, leaves the question: What about maternity leave as such? The pregnancy amendment does not address the problems associated with maternity leave. Both committee reports state the pregnancy amendment permits a voluntary unpaid leave policy as long as it is not discriminatory. But this must be read within the context in which it was presented, that is, in relation to disabled employees. On the issue of maternity leave, it seems likely that if an employer has, for example, a flexible or liberal leave policy when employees need time off for personal reasons, denial of such leave for child care reasons would be subject to challenge under the Title VII provision that prohibits sex discrimination in the privileges or conditions of employment. If maternity leave is granted in order to escape a possible Title VII challenge, does it follow that men are entitled to paternity leave under the same company policy?

An employer must provide the weekly payments under a disability insurance program or allow paid sick leave only for the period when a pregnant woman is medically unable to work, just as the employer would provide such payments for any other employee who is medically unable to work.

In other words, if a company has a short-term (temporary) disability insurance plan which pays, say, up to 15 weeks,* that does not mean that a worker, medically disabled because of pregnancy, is automatically entitled to the 15-week maximum. She, as any other disabled employee, can only receive benefits for those weeks during which she is medically unable to work.

Testimony before the House Committee on Education and Labor indicated that in 95 percent of the cases, time lost from work because of pregnancy is 6 weeks or less; so barring any medical complications (occurring in about 5 percent of all pregnancies), a period of 6 weeks or less is the amount of time a pregnant woman would be covered. However, if medical complications arose, these complications must be covered by the same time limits or dollar amounts that apply to other disabled workers.

*90% of disability plans provide for 15 to 26 weeks of coverage. Source: House Committee Report No. 95-948, 95th Congress, 2nd Session, 1978.

One of the concerns that arose during consideration of the amendment was that providing coverage of pregnancy disabilities under benefit plans would create a potential for abuse or malingering. Neither house of Congress accepted the premise that the tendency to abuse or malinger is a sex-related characteristic. Both congressional committees concluded that it was proper, if evenly applied, to have controls to prevent potential abuse of a benefit program. They noted that existing controls are now applied by employers--for instance, requiring a physician's certification of an employee's inability to work. Nothing in the pregnancy amendment prohibits this practice so long as it is required of all persons applying for disability or sick leave benefits. Or, as the committee noted, an employer could also require examination by a company physician to confirm the medical disability, if applied to all other types of disabilities. The point: no special "policing" requirement can be created to cover only pregnancy and childbirth.

While the congressional committees offered these as examples of employer-initiated controls to prevent abuse or malingering, the reader should keep in mind that in a collective bargaining setting such issues as choice of physician (company's or patient's) or other controls are subject to bargaining. Therefore, compliance with the pregnancy disability amendment does not protect an employer from a charge of an unfair labor practice (contract violation) if the employer unilaterally changes a contract provision providing for free choice of doctors to one providing for the use of a company

doctor only. Or if a disability plan or sick leave plan is negotiated for the first time and the employer misinterprets the committees' example of employer controls to argue that the subject of physican choice is not bargainable, this would immediately prompt the union to charge the employer with "bad faith" bargaining in violation of the National Labor Relations Act, in the private sector, or in violation of a bargaining statute controlling employer-union conduct in a public sector jurisdiction. Complying with Title VII requirements does not immunize a unionized employer from negotiating with the union on Title VII substantive requirements and the procedural provisions associated with compliance.

Health Insurance

One of the most prevalent fringes is health insurance coverage. According to estimates prepared by the Social Security Administration, as of 1974, nearly 70 percent (69.9%) of the labor force were covered by health insurance plans. In terms of persons affected, it meant that 57.6 million workers were under some type of health insurance plan. The Social Security Administration, however, could not come up with an estimate as to the number of plans that might be found to be discriminatory.

Illustrative of the type of health insurance the pregnancy disability amendment is intended to change is a hospital and medical benefit plan which excludes coverage of pregnancy disabilities and childbirth, or a plan which provides maternity coverage, but the hospital and medical benefits are not as liberal as the hospital and medical benefits provided for other disabilities.

As in the case of disability or paid sick leave plans, the pregnancy amendment does not require an employer to have a health insurance plan. If, however, a plan does exist, an employer must cover pregnancy, childbirth and other related medical conditions under the same terms and conditions applicable to other disabilities. And as discussed under "Transition Provisions" on page 35, the employer for a period of one year may not reduce the health benefits in order to comply with the law. (The same prohibition also applies to disability benefit or paid sick leave plans.)

The Abortion Exception

The only allowable exception to the equal treatment of pregnant women under a health plan is the exclusion of payments for abortions, unless the abortion is necessary to save the life of the mother or medical complications result from the abortion itself.

The abortion issue nearly killed the pregnancy disability amendment. A compromise agreement was reached between the House and Senate during the closing days of the Congressional session.

Except for the abortion provision in the House bill, the Senate and House versions of the pregnancy amendment were virtually identical. The Senate bill was silent on abortion.

The House' proposed abortion provisions and the intent of those provisions were explained by the House Committee handling the proposed legislation:

Because the bill applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers decisions by women who choose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.

Many members of the committee were troubled, however, by any implication that an employer would have to *pay* for abortions not necessary to preserve the life of the mother through medical benefits or other fringe benefit programs, even if that employer--a church organization for example--harbored religious or moral objections to abortion; such a requirement, it was felt, could compromise the religious freedom of such employers. The committee, therefore, amended the language of the bill to deal with the problem, by making clear that such employers will not be required to pay for abortions except where the life of the mother would be endangered if the fetus was carried to term. At the same time, the bill as amended makes plain that there is no intent to alter the effect of any other laws, including the National Labor Relations Act, upon the question of benefits for abortion, or to forbid employers to provide such benefits if they wish to.

Further, the exclusion of abortion benefits from the bill is intended to be

> limited to benefits for the abortion itself. If a woman suffers complications from an abortion, medical payments and disability or sick leave benefits for the treatment of complications would be covered. [8]

The House prevailed when the Senate agreed to include the abortion issue. The Conference Committee, comprised of members from both the House and Senate, wrote the compromise abortion language, now part of the 1978 amendment.

The language of the amendment provides that Title VII does not require an employer to pay for health insurance benefits for an abortion. This exclusion is limited to benefits for the abortion itself. As previously noted, if a woman suffers complications from an abortion or must have an abortion to save her life, then hospital and medical payments must be made under an existing health insurance plan which covers hospital and medical costs for all other disabilities, as well as disability payments or sick leave benefits under an existing disability or sick leave benefit program.

The abortion provision also makes it clear that while the exclusion of abortion itself from a medical plan does not violate Title VII, it does not prevent an employer from providing abortion benefits, nor affects collective bargaining agreements containing abortion coverage (and therefore agreements that may include such coverage in future contracts).

Dependency Coverage

What about the pregnant wife of an employee--does the Title VII pregnancy amendment mandate coverage of maternity costs in such cases?

This question first requires a distinction between a medical plan without dependency coverage and a medical plan with dependency coverage.

If there is no dependency coverage under a health insurance plan, the 1978 amendment does not require that there at least be dependency coverage for maternity benefits for wives of employees. The Senate Committee stated: [9]

> It was suggested before this Committee that an effect of Title VII, once this bill was enacted, would be to require that if the maternity costs of women employees were paid under a medical plan, the similar costs for wives of male employees would also have to be covered, whether or not the employer provided any other coverage for dependents. This suggestion is incorrect. This bill would not mandate that women dependents be compared with women employees, or that male employees with pregnant wives be compared with women employees themselves pregnant.

What still remains unanswered, however, is the question of whether a medical plan which does include dependency coverage can exclude

pregnancy coverage for the wives of employees. The Senate Committee noted that it is rare to find a plan which provides comprehensive medical coverage for the spouses of women employees, but not for the spouses of male employees, noting that "we are not aware of any Title VII legislation concerning such plans." But the Committee does not answer head on whether a comprehensive medical plan that provides benefits for dependents--either with or without additional cost to employees--may exclude pregnancy coverage for wives of male employees while providing comprehensive coverage for the husbands of female employees. Congress thus leaves the question open as to whether Title VII would be violated if the wives of male employees received coverage less comprehensive than that granted the spouses of female employees. In that event, "the question in regard to dependents' benefits would be determined on the basis of existing Title VII principles," the Senate Committee stated.[10]

Transition Provisions

With the exception of fringe benefit plans, all other employment policies as they relate to pregnant women have been subject to the 1978 amendment since it was signed into law on October 31, 1978. These policies include, for example, mandatory maternity leaves, refusing to hire pregnant women, firing women

who become pregnant, and denial of seniority because of pregnancy leave.*

In the matter of fringe benefit plans, the law provides for a 180-day delay from the date of enactment (Oct. 31, 1978) in order to allow employers or employers and unions to alter existing disability and health insurance plans that do not cover pregnancy-related disabilities or cover them with more limited benefits than those provided for other disabling conditions. If existing plans make no distinctions in coverage between pregnancy-related disabilities and other disabilities, they are, of course, already in compliance with Title VII.

Section 2 of the law covering the transition period as it relates to the timing of compliance reads in full:

> SEC. 2 (a) Except as provided in subsection (b), the enactment made by this Act shall be effective on the date of enactment.

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* The House Committee noted that "such policies usually do not result in any cost-saving to employers, and eliminating them would not require any actuarial advice or substantial administrative changes. Finally, these policies can have long-term, rather than short-term, effects on women's careers, so their immediate elimination is vital." House Committee Report No. 95-948, 1978, p.8.

> (b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act.

Section 3 also involves the transition period, but deals with the manner of compliance rather than the timing. This final section of the law provides that plans that are not in compliance cannot come into compliance by decreasing benefits or compensation to any employee for a period of one year or if there is a collective bargaining agreement, until the termination of the agreement. For instance, if an employer pays the insurance premiums, or makes contributions to a labor-management jointly trusteed fringe benefit fund, that employer would either have to increase premiums or contributions to cover the increased cost of providing equal benefits to pregnant women, or pay equal benefits directly to the affected woman. If an employer pays only a portion of the premium cost or of the trust fund contributions, the employer's share need only be increased by that same portion of the incremental cost and all employees (not only women or pregnant women) would have to pay their usual portion of the increase.

Section 3 reads in full:

> SEC. 3. Until the expiration of a period of one year from the date of enactment of this Act or, if there is an applicable collective-bargaining

> agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: And provided further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

The prohibition against reducing benefits is not a new idea. The Equal Pay Act (EPA) of 1963 contains a similar provision based on the principle that if an EPA violation is found when a woman receives less than a man doing substantially equal work, the woman's wage must be brought up to that of the man, not vice versa.

Both the Senate and House Committee reports "emphasize" that the one-year limitation on benefit reductions must not be construed as

permission for employers who do not comply immediately to reduce benefits simply because the one-year time limit has run.

Cost Impact

Health Insurance Plans

Those who opposed the enactment of the pregnancy disability amendment argued that it would be too costly. The Chamber of Commerce of the United States, the American Council of Life Insurance, and the Health Insurance Association of America testified that the total cost of the legislation could be as high as $1.7 billion, representing about a 5.4 percent increase in the cost of benefits. Two-thirds or $1.12 billion of this estimate related to health insurance coverage. The Senate Committee, while acknowledging that the costs were not negligible, concluded that "this estimate is demonstrably too high...." [11]

Others testified that they were unable to estimate increased health care costs that might result from the legislation because of the unavailability of sufficient data. Among those taking this position were representatives of the U.S. Department of Labor, and the AFL-CIO, as well as two nationally recognized actuaries. The Senate Committee agreed "that no accurate estimate of this cost is practicable. However, it is clear that the cost increase would be far less than the 5.4 percent estimated by opponents of this legislation." [12]

However one views the correctness of the Senate's conclusion, it would be difficult to disagree with the Senate Committee that health care costs incurred as a result of the amendment "could be extremely variable from plan to plan." [13] To illustrate, the Labor Department's Digest of Health and Insurance Plans (Vol. 1, 1974) summarized 148 health plans, representative of different kinds and sizes of industries. Of these plans, 57 treated maternity as any other disability for purposes of hospital benefits and medical and surgery costs. These plans, thus, would not have to be changed to comply with the 1978 amendment. Another thirty plans also appeared to be in compliance. The remaining 61 plans--or 41 percent--appeared to be discriminatory and what percentage of female employees were covered under these plans could not be calculated.

The House Committee report also reached the same conclusion: it is impossible to produce reliable cost estimates for health insurance under the pregnancy disability amendment.

Disability Insurance

All sides--opponents, proponents, and the U.S. Department of Labor (DOL)--did come up with estimates as to the proposed legislation's cost impact on disability benefits.

A supporter of the bill, the AFL-CIO estimated $130 million, the lowest estimate submitted. An opponent of the bill, the Health Insurance Association of America estimated $571 million, the highest estimate submitted. The DOL's estimate fell between the high and low and was set at $191.5 million.

Both congressional committees believed that the Labor Department furnished the "best available estimate" (House Committee) or "the most reliable" (Senate Committee).14

Among the reasons for viewing the Labor Department's estimate as "the most reliable" was that the estimate did not include workers already covered for pregnancy disability, either because of state fair employment law requirements or because they were covered under a private company plan. Neither the AFL-CIO nor the Health Insurance Association of America had excluded workers already covered.

If the DOL national total estimate is broken down into cost per employee, it would amount to an increase of

--20 cents per week per worker under temporary disability insurance (TDI) plans previously excluding pregnancy*

--4 cents per week per worker under TDI plans previously providing limited pregnancy disability benefits.

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* The Senate Committee on Human Resources estimated that of the approximately 34.2 million private sector workers covered by TDI insurance plans in 1976, 14.5 million workers were covered by plans which excluded disabilities related to pregnancy. Senate Committee Report No. 95-331, 1977, p. 13.

The DOL also claimed "that temporary disability insurance contributions represent 1.4 percent of the wage package for covered workers in private industry," and that the pregnancy disability amendment "will increase that percentage only to 1.50 percent. This total amounts to only 1 1/2 cents per dollar of wages." 15

The table below, provided by the Senate Committee on Human Resources, sets forth the various cost estimates and states the basic assumptions which account for their differences with the Department of Labor estimates.*

COMPARISON OF COST ESTIMATES

[Dollar amounts in millions]

Source of estimates	Total estimated cost[1]	Reasons for difference from DOL
Department of Labor	$191.5	
Murray W. Latimer (actuary)[2]	198.0	Does not exclude States where pregnancy discrimination is already prohibited.
Ethel C. Rubin (actuary)[3]	320.0	Assumes greater number of births per year among covered female employees than DOL. Assumes 8 weeks of benefits rather than 7½. Assumes $90 per week as average weekly benefit instead of $80.[4]
Health Insurance Industry Association.	571.0	Assumes greater number of births among female employees per year. Assumes 11.3 weeks of disability. Assumes $90 per week as average weekly benefits rather than $80.
AFL-CIO	130.0	Excludes births in those 14 States which already require equality of treatment for pregnancy disability. Assumes only 6-week disability duration. Assumes average weekly benefit of $78.

[1] Increase for the nondiscriminatory provision of temporary disability benefits for pregnancy.
[2] Fellow, Conference of Actuaries in Public Practice; fellow, Causalty Actuary Society; fellow, Canadian Institute of Actuaries; member, American Academy of Actuaries.
[3] Member, American Academy of Actuaries; associate of the Society of Actuaries; enrolled actuary under the Employees Retirement Income Security Act of 1974.
[4] New Jersey experience verifies an average weekly benefit for pregnancy disability claims of $76 in 1976. The State of Hawaii shows an average weekly benefit for all women in 1975 at $63.28.

* DOL assumptions: Average disability duration of 7 1/2 weeks; an average weekly disability benefit of $80, a birth rate of 66.7 births per 1,000 women 15 to 44 years of age. DOL also differed with the other estimates on the percentage of working women who would benefit from the bill.

DEFINING SEX DISCRIMINATION: PENSIONS

Sex-related fringe benefit issues under Title VII are not exclusively pregnancy connected. Pensions or retirement systems have also been challenged--and not always by women. For example, men have successfully challenged plans permitting women to retire at full pension at a younger age than men. In one case, the appeals court found a retirement plan violated Title VII because the plan discriminated against male employees on the basis of their sex by permitting female employees to retire at an earlier age, and with a shorter length of service, than could male employees. [16]

The cases involving early retirement provisions, based on sex, were significant signposts in understanding the wide-ranging thrust of Title VII as it relates to benefit plans. However, the core issue concerned two types of contributory insurance plans, prevalent before Title VII, which women alleged were discriminatory:

> 1) a plan requiring women to contribute a higher premium than men in order to receive the same benefits as similarly situated men;* or
>
> 2) a plan requiring women to contribute the same amount as similarly situated men, but under which women received reduced benefits.

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* "Similarly situated" means that a man and a woman retire at the same age with the same years of service and at the same salary level.

The usual reasoning among employers who matched the contributions in one of the two types of plans was that the cost of a retirement plan to the employer should break down to the same amount per employee, regardless of sex. And premium costs are higher for women because the "average" woman outlives the "average" man, as documented by insurance company mortality statistics; hence women receive benefits for longer periods of time. This fact, then, means women cost more than men for the same level of benefits and the only way to equalize employers' costs is to have women employees pay more per dollar of benefits than men, or, conversely, have women contribute the same premium in order to collect reduced benefits for longer periods of time; hence the aggregate amount received by the average woman equals the aggregate benefit amount received by the average man.

Those defending the "average" woman and "average" man concept in retirement benefit decisions clashed with the EEOC interpretation that Tible VII no longer permitted an employer to treat any particular woman as if she were the "average" woman, that benefits must be equal, and at no extra cost to women; nor could the employer defend his practice on the basis of what equality of benefits would cost.*

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* See Sections 1604.9(e) and 1604.9(f) of the EEOC Guidelines on Sex Discrimination in the Appendix.

The *Manhart* Decision

The "individual" woman v. the "average" woman debate came to a head when the Supreme Court considered the retirement plan of the Department of Water & Power of the City of Los Angeles. This plan, based on the greater longevity of the average woman, required that women contribute almost 15 percent more than men in order to receive equal benefits. The Department contributed an amount equal to 110 percent of all employee contributions.

In City of Los Angeles Department of Water & Power v. Manhart, et.al.,[17] the Supreme Court held the Department's plan unlawful under Title VII. The 6-2 decision, handed down on April 25, 1978, rejected the Department's defense that the higher payment rate was justified on actuarial grounds because women as a class live about five years longer than men; therefore, the cost of a pension plan for the average retired woman was greater than the cost for the average retired man. The Court said, while this is a true generalization, it is also true that many women do not live as long as the average man and many men outlive the average woman; therefore, it followed that many female employees of the Department of Water & Power will not live as long as the average man. And yet, "while they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire." The crux of the matter, in the Court's view, was that Title VII clearly focuses on the individual, not on class characteristics:

> The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's ...sex...." The statute's focus on the individual is unambiguous.... (emphasis added by Court)

The Court concluded that Title VII prohibits treatment of individuals as "simply components of a...sexual...class." Therefore, the Department's practice, which required "2,000 individuals to contribute more money into a fund than 10,000 individuals just because of gender, is in direct conflict with both the language and policy of the Act...."

The Department contended that a gender-neutral pension plan would violate Title VII because of its adverse impact on male employees who would be forced to subsidize the higher total of benefits received in retirement by the women. The Court responded that in the insurance industry it is common practice, not considered inherently unfair, to treat classes of risks as though they were the same for group insurance purposes: "When insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for less healthy; unmarried workers subsidize the pensions of married workers;* persons who eat, drink, or smoke to

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*The Court's interesting statement that "unmarried workers subsidize the pensions of married workers" was based on a study of life expectancy in the U.S. for 1949-1951. The study showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced; if married to 70.9 years of age--a difference of more than 10 years.

excess may subsidize pension benefits for persons whose habits are more temperate.... To insure the flabby and unfit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one 'subsidy' seem less fair than another."

In short, the Supreme Court concluded that it was not enough under Title VII that women receive the same pension as similarly situated men; their contribution, also, must be equal even though women employees--as a class--would receive more for their money.

Companies or agencies operating under the type of plan outlawed in *Manhart* had more on the line by the Supreme Court ruling than the Los Angeles City Department of Water and Power. For when the ruling came down in April, 1978, the Department had already abandoned its policy of requiring a higher contribution from women while still maintaining equal benefits for all employees.* Since January 1, 1975, no distinction has been made on the basis of sex. The abandonment of the sex-based policy came as a result of a California law prohibiting certain municipal agencies from requiring female employees to make higher pension fund contributions than males.[18]

The reader will recall that mention was made of another type of contributory plan that also

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* The retirement plan is administered by the Department. No private insurance company is involved in the administration or payment of benefits.

prevailed before Title VII: equal contributions for both men and women, but reduced benefits for women.

This type of compulsory contributory plan was found unlawful under Title VII by the U.S. Court of Appeals for the First Circuit. [19] The case was brought by the EEOC against Colby College, a private institution in Maine. Colby had enrolled in the Teachers Insurance and Annuity Association (TIAA) in 1935 and in the College Retirement Equity Fund (CREF) in 1956 to provide its retired teachers with pension annuities and life insurance. Some 2,800 colleges and universities participate in the programs.

Contributions made by the employers and by individual teachers were identical for similarly situated employees. However, in calculating the benefit amounts, TIAA and CREF used separate life expectancy tables for men and women. Because of the longer life spans of female retirees, the annuity plan made slightly smaller payments to females than those made to males. And because of the higher mortality rate for men, death benefits from the life insurance fund were lower for men than for women.

At issue in the case was the contributory pension plan. The suit brought by the EEOC against Colby resulted from a charge by a woman faculty member that she had been discriminated against on the basis of sex in violation of Title VII.

The appeals court found the issues in the case "highly comparable to *Manhart*," stating:

> If the statute's "focus on the individual" forbids an employer from treating women as a class with respect to annuities so as to require from them higher premiums, although they as a class receive more for their money, it is difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men, but receive smaller monthly payments.

And the appeals court found that Colby College, like the employer in *Manhart*, had "presented no evidence that any factor other than sex was considered in arriving at the benefit differential."*

Impact of Manhart

The thrust of the *Manhart* decision envisages a single (unisex) rate of sufficient amount to pay for equal benefits for both sexes.

Many plans are not affected; for example, plans, either negotiated or employer-initiated, wherein the employer pays the full premium and eligible employees, similarly situated, receive equal benefits based on a formula which does not include sex as a factor.

Employers who operated under the type of contributory plans now found to be illegal under Title VII are not denied the right to use separate actuarial

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* Under another law, the Equal Pay Act, a differential between the sexes is allowed if based on factors other than sex.

tables for men and women to determine a single rate and hence to determine their costs under a contributory plan. But the use of separate tables for employees who choose some optional type of survivorship benefit payment probably violates the principle of individual treatment.[20]

The Supreme Court noted that its *Manhart* decision did not imply that an employer could not give a specified equal amount of money to each employee, male and female, and let each go out on the open market to purchase an annuity plan. If the payment made to the employee is limited to the purchase of an annuity, then the employer has foreknowledge that the woman's dollar will not buy the same amount as the man's dollar. The Supreme Court notwithstanding, could not women allege that this approach is a pretext to discriminate? And if a union were involved, it is difficult to believe that it would accede to such a proposal, for several reasons, including its legal responsibility to fairly represent the females in the bargaining unit, and to its own liability under Title VII.

One last point about *Manhart* merits mention. The Supreme Court, on a 7-1 vote, denied to the affected women restitution of excess contributions because the Department's fund administrators could well have assumed the contribution differential was justified, and because such liability might jeopardize the plan's soundness. In the view of one legal authority, "that excuse, however, would not be available with respect to liability from this point forward." [21]

CHAPTER III

AGE AND FRINGES

ADEA IN BRIEF

The Age Discrimination in Employment Act (ADEA) of 1967 prohibits discrimination because of age in hiring, promotion, discharge, compensation, and other terms, conditions, and privileges of employment.

The Act became effective in June 1968 and provided protection for private sector employees in the 40 through 64 age range (40-65). In 1974 the ADEA was amended to include most public sector employees--federal, state and local government workers.*

Private sector employers are covered if they employ 20 or more persons. Public sector employers are covered regardless of the number of employees in the employing unit.** Employ-

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*See Appendix for text of the ADEA as amended in 1974, and 1978 amendments titled "Age Discrimination in Employment Act Amendments of 1978."

**Public sector coverage under the ADEA has been challenged on the basis of the Supreme Court decision that the Fair Labor Standards Act (the federal law establishing minimum wages and overtime pay requirements) was an unconstitutional infringement on the rights of states and local governments to regulate the terms and conditions of employment *(National League of Cities, et al v. Usery,* 426 U.S. 833, 1976). To date, the courts have all held that the Supreme Court ruling in the *League of Cities* case does not apply to federal laws prohibiting employment discrimination.

ment agencies servicing covered employers are likewise under the Act.

Labor organizations with 25 or more members or those with hiring halls are covered, as are state and local central labor bodies and joint boards or councils.

The Act is administered and enforced by the Wage and Hour Division of the U.S. Department of Labor, except for the federal sector. Enforcement of the ADEA in the federal sector was the responsibility of the U.S. Civil Service Commission, since replaced by the Office of Personnel Management under the Civil Service Reform Act of 1978.*

The Department of Labor loses its jurisdiction on July 1, 1979 when the Equal Employment Opportunity Commission takes over the responsibility of administering and enforcing the ADEA, as a result of the President's reorganization of the equal employment opportunity enforcement effort.

1978 AMENDMENTS: A SUMMARY

The Age Discrimination in Employment Act Amendments of 1978 were signed into law on April 6, 1978 (P.L. No. 95-256).**

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*See Note 1 at end of Chapter II for brief explanation of the Civil Service Reform Act.

**The legislation--H.R. 5383--passed both congressional branches by impressive margins. The Senate vote on final passage was 62 to 10; the House, 391 to 6.

The 1978 Act raises the upper age limit on coverage from 65 to 70, effective January 1, 1979.

More specifically, significant substantive and procedural changes were made. In summary, the 1978 Act does the following:

(1) Prohibits a retirement plan or seniority system which mandates retirement of an employee under the age of 70. Effective: Date of enactment (April 6, 1978) for employees under age 65; January 1, 1979 for employees age 65-69, inclusive.

Three Exceptions

--If a collective bargaining agreement was in effect on September 1, 1977, the prohibition is delayed until January 1, 1980 or until the termination of the agreement, whichever comes first.

--Colleges and universities will be allowed to retire tenured employees at age 65 until January 1, 1982. Effective: January 1, 1979.

--Permits the compulsory retirement at age 65 of those employed in a bona fide executive or high policymaking position for at least two years prior to retirement age and who are entitled to an annual pension of at least $27,000. Effective: January 1, 1979.

(2) Eliminates the upper age limit for most federal employees. In the past, nearly all federal employees were mandatorily retired upon reaching 70 years of age. This amendment does not affect those employees who are in positions for which a retirement age is established by statute. Effective: September 30, 1978.

(3) Makes three major procedural changes:*

a) An aggrieved person is entitled to trial by jury on any issue of fact in a lawsuit for back pay or liquidated damages. The Supreme Court ruled in *Lorillard v. Pons*[1] that the plaintiff in an ADEA case has a right to a jury trial on the issue of back pay, but did not discuss the issue of liquidated damages (as defined under the Equal Pay Act, liquidated damages mean payment of back wages plus an additional amount equal to the back wages found due--in effect, double damages).

b) The former requirement that an aggrieved person had to file a "notice of intent" to sue with the Secretary of Labor was changed to a requirement that a "charge" be filed within

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* These procedural provisions are not discussed elsewhere in this publication. They are outside its intended scope. For further information see Conference Committee Report 95-950, 95th Congress, 2d Session, 1978; House Committee Report No.95-527 Part 1, 95th Congress, 1st Session, 1977 and Senate Committee Report, No. 95-493, 95th Congress, 1st Session, 1977.

180 days after the alleged violation occurred or within 300 days if the claim was filed with a state agency. Effective: Date of enactment, April 6, 1978.

c) The time limit for filing lawsuits can be suspended for up to one year while the Labor Department attempts to conciliate the dispute.

MANDATORY RETIREMENT

The most important change made by Congress was outlawing mandatory retirement. While other employee benefit plans are also affected by the 1978 amendments, it was the mandatory retirement issue that sparked Congress to clarify what it had in mind in originally exempting bona fide employee benefit plans. These plans were permitted to treat individuals differently under provisions of a retirement, pension, or insurance plan. The language of the exemption, found in Section 4(f)(2), read:

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

According to the explanations of the House and Senate committees involved in the 1967 legislation,

Section 4(f)(2) was designed to increase the employment opportunities of older workers by not requiring employers, because of cost considerations, to afford older workers exactly the same pension, retirement, or insurance benefits provided to younger workers.

However, employers used the exception under Section 4(f)(2) as a defense when employees, involuntarily retired before age 65 under a retirement plan, charged an ADEA violation. The employers alleged the retirement plan was bona fide under the terms of the Section and was not a subterfuge to discriminate because the retirement plan was in effect before the ADEA became law.

The U.S. Supreme Court agreed with the employer interpretation. In *United Air Lines, Inc. v. McMann* [2], the Court ruled that a bona fide retirement plan established before the enactment of ADEA could not be a "subterfuge" to evade the purposes of the Act. In this case the retirement plan permitted the employer to retire an employee at age 60. The Court stated that it could find nothing in the ADEA language "to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans."

The Congress overturned the Supreme Court ruling by amending Section 4(f)(2) to forbid the mandatory retirement of an employee under the age of 70 pursuant to the terms of an employee benefit plan, and the Congress again underscored the original purpose of the section.

As amended, Section 4(f)(2) now reads:

> It shall not be an unlawful employment practice for an employer...or labor organization--
>
> ...to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual....** (1978 amendment in italics)

This amendment means, therefore, that the date upon which a retirement plan became effective is no longer a defense to support an involuntary retirement policy. The members of the House-Senate Conference Committee stated:

> Plan provisions in effect prior to the date of enactment are not exempt under Section 4(f)(2) by virtue of the fact that they antedate the Act or these amendments.[3]

The prohibition against mandatory retirement prior to age 70 should not be read in a vacuum. Two other provisions of the ADEA, unchanged by the 1978 amendments, qualify the prohibition

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* Section 12(a) refers to that section which raises the upper age limit from 65 to 70.

against mandatory retirement:

--Section 4(f)(1) provides that it is not unlawful to discriminate on the basis of age if age is a bona fide occupational qualification (bfoq) reasonably necessary to the normal operation of a particular business or where differentiation, because of age, is based on reasonable factors other than age.

--Section 4(f)(3) provides that it is not unlawful to discharge or otherwise discipline an individual for good cause.

As explained by the House Committee on Education and Labor: [4]

...it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in Section...4(f)(1). It is recognized that certain mental and physical capacities may decline with age.... In addition, this legislation is not intended to prohibit the discharge of or other disciplinary measures against an employee for good cause.*

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* One factor apparently overlooked was the Vocational Rehabilitation Act protection now afforded workers in firms or agencies with government contracts or receiving federal financial assistance. Would an older employee, with either a mental or physical handicap, be protected by the Vocational Rehabilitation Act which prohibits employer discrimination against the handicapped and requires that covered employers make reasonable accommodations in hiring or retaining an employee?

The bfoq exception also applies to federal employees. (Section 15(b)(3))

Collective Bargaining Exemption

The amendment defers the effective date of the prohibition against mandatory retirement of persons 65 through 69 years of age if involuntary retirement is permitted under existing collective bargaining agreements in effect on September 1, 1977.

The exemption ends on contract termination or on January 1, 1980, whichever comes first.

The reason given by the Senate committee for extending the effective date for collectively bargained employee benefit plans was "to recognize, and provide the maximum deference to, contracts negotiated between management and labor,... The committee recognizes that these contracts were negotiated in good faith and that reciprocal agreements and concessions were made in exchange for the mandatory retirement provision. This delay will give management and labor an opportunity to make clarifications, as required by the change, in pension plan agreements."

Plans that were not negotiated come under the amendment as of January 1, 1979.

Bona Fide Executive Exemption

The 1978 Act also provides that certain high-level executives and policy makers may be mandatorily retired between the ages of 65 and 70. There is no cutoff date for this exemption.

Three tests must be met to qualify for the exemption: (1) The person must meet the definition of a "bona fide executive or high policy making position"; (2) must have served in the position for at least two years before retirement and (3) must come under a plan which provides for a lifetime annual annuity of $27,000. The $27,000 cannot include amounts attributable to social security, employee contributions and contributions of prior employers.

The Conference Committee report stated that the definition of "bona fide executive" under the Fair Labor Standards Act (FLSA) is intended to be a guide only, since the definition is too broad. The Conference Committee provided examples of a bona fide executive:

1. The head of a significant and substantial local or regional operation such as a major production facility or retail establishment;

2. The head of a major department or division (e.g., legal, finance, marketing, production or manufacturing);

3. An immediate subordinate of a division head, if the subordinate's authority is at least as great as that of the head of a significant and substantial local operation.

The Conference Committee added the term "high policymaking position" in order to assure that certain top-level employees who are not "bona fide executives" could nevertheless fall within the exemption; that is, could be retired between the ages of 65 and 70. Examples: the chief

economist or the chief research scientist of a corporation who typically has little line authority. His or her duties would be primarily intellectual as opposed to executive or managerial. But a chief economist or chief research scientist would have significant impact on the ultimate decisions or policies by virtue of his or her knowledge and access to the decision makers.

This exemption does not apply to federal employees.

The DOL has issued a draft regulation on "Exemptions for Certain Executives and High Policymaking Employees." [5] It is impossible to predict when the final regulation will be issued.

College and University Faculty Exemption

The third exemption permits a college or university to compel retirement for tenured faculty members between 65 and 70 years of age. This exemption will cease on July 1, 1982.

The proposed DOL regulation is identified as "Exemption for Certain Tenured Employees at Institutions of Higher Education." [6]

The interpretation of the DOL does not limit the term "employees" solely to teachers. The draft regulation applies the mandatory retirement exemption to deans, scientific researchers, professional librarians and counsellors who frequently are eligible for tenure in institutions of higher education.

Again, there is no predictable date as to when the final regulation will be issued.

Pension Credits After "Normal Retirement" Age?

While the ADEA amendment on mandatory retirement is silent on the issue of pension credits, the Congress has explained that the Act does not require that service (employment) credits for the purpose of benefit accrual continue for a person who works beyond a plan's "normal retirement" age. Further, cutting off pension benefit credits after the normal retirement age does not conflict with the Employee Retirement Income Security Act (ERISA)--also known as the Pension Reform Act.

"Normal Retirement" age is usually 65 since unreduced social security benefits are available at age 65. In more general terms, it is the age, as established by a plan, when retirement normally occurs.

The Congressional explanation that a plan's normal retirement age cutoff date for benefit accrual does not violate the ADEA or ERISA is based on a letter from Donald Elisburg, Assistant Secretary of Labor for Employment Standards, responsible for enforcement of ERISA and, until July 1979, ADEA. Elisburg responded to a series of questions from the Senate Committee on Human Resources, a copy of which is found at the end of this chapter.

Congress agreed with the Elisburg interpretation:

--The ADEA does not require an employer to credit, for purposes of benefit accrual,

those years of service which occur after an employee's normal retirement age. ERISA also does not require such accrual.

--An employer would not be required to adjust the pension amount (i.e., pay the actuarial equivalent) for an employee who continues to work after the normal retirement age; if an employee works, for example, until age 67, that means a two-year loss in pension payments, assuming 65 is the normal retirement age. It is not required that the pension be adjusted to a higher amount to include the two-year pension loss.

--If an employee does work beyond normal retirement age, the ADEA does not require commencement of the pension before the employee's actual retirement.

The Senate Committee on Human Resources endorsed the Elisburg interpretation and stated in more general terms: [7]

> This legislation would not change the definition of normal retirement under ERISA. It does not require the accrual of additional benefits to employees who choose to work beyond the plan's normal retirement date.

During Senate debate, Senator Harrison Williams, Chair of the Senate Committee on Human Resources, referred to the Elisburg letter, commenting that it makes clear that "employers will not be required

to continue contributions to either defined benefit or defined contribution plans* for employees who continue working beyond a plan's normal retirement age." [8]

While the Congress appeared satisfied there was no conflict between the ADEA and ERISA, there are still doubts expressed in some quarters on this matter as well as to the finality of the issue concerning the right of an employer to deny employees pension credits for time worked between normal retirement (usually age 65) and age 70. One source states that "litigation...is possible." [9]

The DOL has announced that a proposed regulation on involuntary retirement will be issued. As of this writing, none has been forthcoming.

The only reference to retirement plans is found in the proposed regulation dealing generally with employee benefit plans.[10]

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*A *defined benefit plan* is one in which the benefits to be received are fixed or known. Under a defined benefit plan the pension benefit may be a flat amount, or it may be based on a formula in which age, years of service, and salary are the factors determining the pension amount. Conversely, under a *defined contribution plan* the benefit amount is not set. This type of plan is an individual account (e.g., profit sharing) and the participant's benefits are based solely on the account balance. In short, any pension which is not an individual account plan is a defined benefit plan.

Number of Workers and Pension Plans Potentially Affected

A 1974 Bureau of Labor Statistics study of private sector pension plans showed that of the almost 21 million workers covered, 41 percent were under mandatory retirement plans.* (In 1971, a higher percentage--58 percent--were under mandatory retirement policies.) 11

Additionally, 10 percent of the workers were under plans which permitted employers to retire them before normal retirement, provided certain maximum age and service requirements were met.

In comparing negotiated and nonnegotiated (unilaterally controlled by a company or union) plans, it was found that 37 percent of the employees under negotiated plans were subject to mandatory retirement as compared with 54 percent of the workers under nonnegotiated mandatory retirement plans.

The most prevalent mandatory retirement age in the private sector was 65.

A 1972 survey of the largest state and local retirement systems, covering about 70 percent of all employees enrolled in such systems, showed that two-thirds of the plans already

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*Mandatory retirement provisions in private pensions are classified as compulsory (permits employers to retire workers reaching a specified age) and automatic (requires workers to retire when they reach a specified age).

had a mandatory retirement age of 70 or later; one-third set this age at 65 through 69.[12]

The latest Bureau of the Census report on coverage in the nonfederal public sector shows that 11 million state and local government employees were members of publicly administered retirement systems in fiscal 1976-1977. This represents some 80 percent of all state and local government employees.[13]

Early Retirement Trend

While mandatory retirement is being phased out either totally or partially as a result of federal and state laws, there is a trend toward voluntary early retirement on the part of employees who can financially afford to do so before normal retirement age.

In a recent survey conducted by the American Society for Personnel Administration and the Bureau of National Affairs, most employers were not unduly concerned about the impact of the prohibition against mandatory retirement before age 70. Among the reasons, and the first one cited: the experience of these companies is that employees generally prefer to retire early --only 5 percent or less of each employee group included in the survey were expected to choose work beyond age 65.[14]

Secretary of Labor Ray Marshall has stated that "Americans are retiring at ages younger than ever before." He cites these facts: "In 1950, 46 percent of men age 65 and over were in the labor force. By 1965, this figure had

dropped to 28 percent; today it stands at 20 percent. Lower participation rates are evident in the 55-65 age groups, as well...the figure shows a similar trend toward early retirement for women workers." Further, he states that Bureau of Labor Statistics analysts predict a continuing decline in the labor force participation of older persons.

Marshall points out that among the major factors in this trend are the liberalization and expansion of private pension plans and the election by both men and women to retire at 62 with reduced social security benefits. [15]

State Age Discrimination Laws on Retirement

Employers and unions must make certain that compliance with the ADEA prohibition against forced retirement before age 70 also means compliance with the state law under which they are covered as well.

The Senate Human Resources Committee stated that Section 14(a) of the ADEA "makes clear" that "the ADEA does not preempt state laws." (This should be read within the context of substantive issues such as retirement; there are still some procedural questions.)

Employers and unions in California, for example, operate under the California Fair Employment Practice Act (FEPA) which does not fix a mandatory retirement age, but provides for voluntary retirement.[16] Thus, an employer (or employer and union) could comply with the federal law by establishing age 70

as the retirement age under a benefit plan, but would be in violation of the California law. The California FEPA, in providing for voluntary retirement for employees in the private sector and most employees in the public sector, does allow that an employee may be retired based on factors other than age, such as the inability to perform.

In addition to the need for understanding age discrimination laws as they relate to retirement and other employment practices, there are other compliance concerns facing companies operating in various states. For example, can a company transfer a worker, age 60, from California to New York if the result of the move is to force retirement at age 70 (the ADEA maximum), which the company could not have done under the California law?

OTHER EMPLOYEE BENEFITS

What other employee benefit plans are affected by the raising of the upper age limit to 70?

The answer given by the Department of Labor: only those plans in which age is an actuarially significant cost factor because "generally speaking, Section 4(f)(2) permits a reduction in benefits for older workers on the bases of actuarially significant cost considerations." [17] The DOL cites paid vacations and paid sick leave as examples of plans in which age is not an actuarially significant cost factor. The DOL's proposed regulation on employee benefit plans states that such time-off-with-pay plans "could not lawfully provide lesser benefits to older workers on account of age."

Agreement is not unanimous on the DOL's interpretation. During hearings on the draft regulation, the American Council of Life Insurance and the Health Insurance Association of America said that the Department "is simply wrong" because the incidence of disability increases with age, thus raising insurance premiums. [18]

DOL cites three of the most common types of employee benefit plans in which cost is age-related: life insurance, health insurance, and long-term disability (LTD) insurance.

In interpreting what is expected of such plans, under the ADEA requirements, the Department of Labor states it is guided by the intent of Congress in exempting a bona fide employee benefit plan as unlawful, even though unequal treatment, based on age, occurs. That is, the purpose of this exemption is to take account of the increased costs of providing certain benefits to older workers as compared to younger workers. Senator Jacob Javits, one of the principal authors of the legislation stated: *"Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers*...even though the older worker may then be receiving a lesser amount of...coverage...." [19] (emphasis added)

The proposed Department of Labor regulation on employee benefit plans is therefore based on the equal cost approach.* That is, age-based

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*Note the difference between Title VII and the ADEA as these two laws relate to employee benefits. Title VII doctrine (See *Manhart* decision p. 45) underscores the law's emphasis on the *individual* who cannot be classified as a member of a group under a fringe benefit plan. Further, the EEOC guidelines say cost cannot be a reason for denying, e.g., women, less benefits than men. However, under the ADEA, as set forth under its legislative history and now reflected in the proposed regulations on employee benefits, older workers can be "grouped" where equal cost, rather than equal benefits, will be the test of equal treatment.

Further, the intent of Congress to permit the "grouping" of older workers, for the purpose of benefit plans, contradicts other sections of the ADEA which stress the protection of the *individual*. Sections 4(a)(1) and 4(a)(2) read in pertinent part: "It shall be unlawful...to ...discriminate against any *individual* with respect to...compensation, terms, conditions, or privileges of employment, because of such *individual's* age;...or to classify...employees in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* age." (emphasis added)

reductions in given benefit plans must be justified by actuarially significant cost considerations. (The only exception: retirement plans where contributions to the plan can be cut off at normal retirement age without violating the Act.)

While the proposed regulation does not require equal benefits, there is, nevertheless, adverse reaction from the management community. Opposition does not stem from the cost equivalent concept, but rather from the manner in which the concept is to be applied.*

For example, the proposed regulation would require that cost comparisons at different age levels be based on a benefit-by-benefit approach. Employers and management attorneys argue that such cost comparisons should be based on a benefit package as a whole.

Another objection concerns the proposed requirement that these cost comparisons related to reduction of benefit coverage be made on a year-by-year basis, which, it is alleged, is in direct conflict with current practice and would place unnecessary burdens on many bona fide plans.

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*However, one group known as the ERISA Committee has gone on record against the exclusive use of the cost equivalency test in determining benefits, arguing that the legislative history "explicitly recognizes that cost is not the sole test," allowing for factors other than age--e.g., economic or business necessity--to justify benefit differentials for older workers. See *Daily Labor Report*, No. 206, 10-24-78, p. A-1, BNA, Inc.

This touches upon but a few interpretation differences between the DOL and segments of the management and insurance community. What modifications may be made before final adoption of the regulation is open to speculation.

A factor which may influence the date of issuance of a final regulation on employee benefit plans: the administration and enforcement of the ADEA moves from the Department of Labor to the Equal Employment Opportunity Commission on July 1, 1979. It has been suggested that final decisions on the employee benefits regulation will not be made until after the ADEA is under EEOC jurisdiction.

Life Insurance

In the DOL's reading of legislative intent, the "sudden, total cutoff" of life insurance benefits would not be allowed under the ADEA. On the other hand, a reduction in benefits, based on age, would be permitted when an employer can demonstrate the reduction in coverage is justified by an increase in insurance cost. No violation of the ADEA would result.

An older worker would have the option of making an additional contribution in order to prevent a reduction in life insurance benefits, if such reduction is justified. This is true for other benefit plans as well. But an employer cannot require that an older employee make a greater contribution into a life insurance or any other plan as a condition of employment or of participation in a plan, so that the older employee could receive the same level of benefits as the younger employee.

Health Insurance

The DOL holds to the view that reductions in *total* health benefits for those between ages 65 and 70 would violate the ADEA.

For example, an employee becomes eligible for Medicare, and if benefits under Medicare are less than those received by employees not under Medicare, the employer must make up the difference under the DOL's "gap and plug" theory.[20]

It would seem possible that this integrated basis of covering post-65 employees should not materially increase costs, unless a company's post-65 employee population grows beyond current expectations.*

Long-Term Disability

The DOL acknowledges that long-term disability (LTD) plans raise difficult problems.

The purpose of LTD plans is to replace, at least partially, income an employee would have earned but for the disability. There is a wide variation in the duration of benefits; the most common limitations are 5 years, 10 years, or age 65. Some plans provide LTD benefits until the employee reaches normal retirement age, usually 65.

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*Based on a report of the Social Security Administration, in 1975 for every award of social security benefits at age 65, there were 8.23 awards for early retirement. *The Social Security Bulletin*, Annual Statistical Supplement, Table 59.

In addition to the differences in benefit duration, there are also many variations in the types of disabilities covered.

There is no problem under the ADEA where disability benefits are provided for a certain number of months or years regardless of age, or where a disability pension is provided for life, regardless of age, for a permanent disability. The problem arises with plans providing LTD benefits until a specific age, where that age is less than 70.

Reduction in LTD benefits on the basis of age would be permitted when justified by age-related costs considerations. But permissible and justified reductions do not answer the question of whether LTD can be cut off prior to age 70.

If one takes the position that the ADEA protects an employee's expectation of employment to age 70, then it would be consistent with the Act to have 70 as the cutoff age in LTD plans which use age as the criterion for cutting off LTD benefits.

However, such a conclusion could be attacked because of a false assumption: that a worker who suffers from a long-term disability would, in the absence of the disability, have worked until age 70, despite the worker's entitlement to full retirement benefits at an earlier age.

The DOL, taking such criticism into account, has offered two alternatives, and has invited comment on both approaches:

1) The first alternative would treat LTD benefits like life insurance; i.e., the employer would be allowed to decrease contributions on the basis of increased cost, with an age 70 cutoff point. Under this proposal the cost differential would be determined by comparing the cost for a 65 to 70-year-old employee with the cost for a 64-year-old, not with the cost for a 27-year-old. [21]

2) The second alternative: LTD for an employee disabled at age 60 or earlier may not be terminated before age 65, based on the assumption that 65 is still the common age at which employees retire. For disabilities occurring after age 60, benefits may not be terminated until at least five years after the onset of the disability, except that no payments need be made after age 70.

The ADEA amendments obviously will have a cost impact on LTD plans if coverage is required to age 70. It will, however, take several years before the exact cost of extending LTD to cover the 65-70 age group will be known. This is based, of course, on the fact that data do not generally exist on the experience of persons aged 65 to 70 covered by LTD plans.

THE LONG-RANGE VIEW

If nothing else, the 1978 ADEA amendments, apart from their impact on fringe benefit planning, have generated broad concerns ranging from the need for improved job evaluation policies and

practices for all employees, regardless of age, to a practitioner's interest in early retirement trends and in the age components of the future work force. The 1978 amendments are thus having a domino effect.

The adjustments required by the 1978 amendments to the ADEA will perhaps be looked back upon as the trial and error period in which attitudes, as well as employment practices, changed in anticipation of the predicted older work force. The largest age group in the work force is that of the post-World War II "baby boom," i.e., those currently aged 24-34. If this group is expanded to include those up to age 44, it accounts for over 50 percent of the current work force today and may grow to almost 65 percent by 1985. [22] This age group will be nearing conventional (age 65) retirement age by 1990 and beyond. The implications for the general economy, the social security system, and for employers and unions are critical. They require planning now for the continued participation of persons age 65 and older in the work force. With the likelihood of increased longevity, the burden of supporting such a large retired population could prove to be impossible.

It may well be that most employers, in the future, will urge older employees to stay on the job, while the aging employee, paradoxically, seeks early retirement under a retirement system that makes that possible.

THE ELISBURG LETTER

U.S. DEPARTMENT OF LABOR,
OFFICE OF THE ASSISTANT SECRETARY
FOR EMPLOYMENT STANDARDS,
Washington, D.C.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Committee on Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your and Senator Javits' letter of August 29, 1977, in which you request the Department's response to a number of questions concerning any potential conflicts between the Employment Retirement Income Security Act of 1974 (ERISA) and the proposed amendments to the Age Discrimination in Employment Act of 1967 (ADEA).

As I indicated in my testimony before the Senate Labor Subcommittee, raising the upper age limit of the ADEA would not create any conflict with ERISA. Those responsible for administering ERISA in the Department of Labor are in complete agreement that the proposed amendments would not interfere with any of the provisions of ERISA.

The following represents the Department's answers to your specific questions:

Question 1. Would an employer be required to credit years of service for purposes of benefit accrual after normal retirement age?

Answer. It is our view that nothing in the ADEA or in the proposed amendments would require an employer to credit, for purposes of benefit accrual, those years of service which occur after an employee's normal retirement age. ERISA likewise does not require such accrual. There is a section in ERISA which limits the extent to which a plan may provide for the accrual of benefits at a higher rate during later and presumably higher paid years of service. This provision, section 204, sets forth three alternative tests, one of which a plan must meet in order to demonstrate that benefits are being accrued properly (29 U.S.C. 1054). Two of these tests (the 33⅓ percent test and the fractional test) explicitly permit a plan to provide that no benefits will accrue after normal retirement age (26 CFR 1. 411(2)–1). The third test requires the accrual of benefits after normal retirement age. It should be noted. however, that no employer is required to select the third test, provided that he satisfies one of the two other tests.

Question 2. Would an employer be required to pay the actuarial equivalent of normal retirement benefits to an employee who continues to work beyond the normal retirement age?

Answer. No. There will not have to be any adjustment in the size of the periodic payments at the time of actual retirement. This is also the case under ERISA. See the final regulations issued by the Internal Revenue Service under section 411 of the Code and section 204 of ERISA which provide that no adjustment to an accrued benefit is required on account of employment after normal retirement age [(26 CFR, section 1.411(c)-1(f)(2))]

Question 3. If the upper age limit is raised, some employees who choose to work beyond age 65 will be participants in plans which provide for the commencement of retirement benefits at age 65. Could such plans be amended to provide that retirement benefits would commence at the actual date of retirement without violating the ADEA or ERISA?

Answer. Generally, pension plans condition the payment of benefits on actual retirement. Thus, it would not be necessary to amend these plans since neither they nor the ADEA nor ERISA require the payment of retirement benefits to employees who continue to work beyond normal retirement age. The requirement in ERISA (section 206(a)) is that benefits must commence at normal retirement age or on the actual date of retirement, whichever is later (29 U.S.C. 1056). Of course, if there are some plans which provide for the payment of pension benefits at a specified age, regardless of actual retirement, such plans could be amended without violating either the ADEA or ERISA.

Question 4. Would an increase in the upper age limit of the ADEA increase the funding costs for private pension plans?

Answer. An increase in the upper age limit of the ADEA would not increase the funding costs for private pension plans. As a matter of fact, financial pressure on private pension plans could be alleviated. Requiring an employer to permit a qualified employee to work until the Act's upper age limit, regardless of the pension plan's normal retirement age, would result in cost savings to plans rather than increases. As an actuarial matter, the longer an employee works, the shorter the period retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings would of course come from the added years of accumulated interest on the fund. Savings would also stem from the fact that, as indicated above, a plan need not provide for further accrual of benefits after the participant has reached the plan's normal retirement age, and thus the added years of service do not increase the ultimate retirement benefit or the cost of providing it.

It is possible that certain plans, such as those which provide for the accrual of benefits after normal retirement age, will not experience these savings. However, there will be no significant cost increase to these plans. Any increases in benefits due to such factors as salary increases after employees have attained normal retirement age would generally be offset by factors such as the shorter life expectancy of employees upon retirement after normal retirement age, interest earned on plan assets during the period between normal retirement age and the age at which employees actually retire, and increases in pre-retirement mortality.

Question 5. Assuming that under ERISA a plan need not provide for benefit accruals for an employee who continues to work after the normal retirement age, would an employer's failure to provide for the accrual of benefits for such an employee constitute age discrimination under the ADEA?

Answer. In our opinion, a bona fide pension plan that provides that no benefits accrue to a participant who continues service with the employer after attainment of normal retirement age would not violate the ADEA. Under Section 4(f)(2) of the ADEA, it is not unlawful to observe the terms of a bona fide pension plan that is not a subterfuge to evade the purposes of the ADEA. As I noted in my testimony, the legislative history of the ADEA indicates that Section 4(f)(2) was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid. We believe that it will run counter to the intent of the Act to require a plan to provide for benefit accrual after the plan's normal retirement age.

I might also note that the proposed amendments to the upper age limit in Section 12 of the ADEA would in no manner affect the definition of the term "normal retirement age" in Section 3(24) of ERISA.

I hope these responses to your questions will be helpful to the subcommittee.

Sincerely

DONALD ELISBURG,
Assistant Secretary.

APPENDICES

TITLE VII AS AMENDED IN 1972

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other items or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for em-

ployees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between

points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for

employment, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership or applicants for membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprice, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular

religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate

upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relat-

ing to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national original, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) The Commission shall have an official seal which shall be judicially noticed.

(e) The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken; the names, salaries, and duties of all individuals in its employ and the moneys it has disbursed; and shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with, and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming

to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or

local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency whith authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty-days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission,

or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any

judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or pro-

motion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U.S.C. 101–115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

SEC. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that court of three judges be convened to hear and determine the case. Such request by the Attorney

General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all

court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

EFFECT ON STATE LAWS

SEC. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

SEC. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person

or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish

upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

INVESTIGATORY POWERS

SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

NOTICES TO BE POSTED

SEC. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from, or summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

VETERANS' PREFERENCE

SEC. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

RULES AND REGULATIONS

SEC. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

SEC. 714. The provisions of section 111 and 1114, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.

EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the

Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section.

EFFECTIVE DATE

SEC. 716. (a) This title shall become effective one year after the date of its enactment.

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)

in miliary departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

SPECIAL PROVISION WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months with-

out first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

PREGNANCY DISABILITY AMENDMENT OF 1978

That section 701 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

"(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.".

SEC. 2. (a) Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment.

(b) The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act.

SEC. 3. Until the expiration of a period of one year from the date of enactment of this Act or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: Provided, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: And provided further, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act.

EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Sec.

1604.1 General principles.
1604.2 Sex as a bona fide occupational qualification.
1604.3 Separate lines of progression and seniority systems.
1604.4 Discrimination against married women.
1604.5 Job opportunities advertising.
1604.6 Employment agencies.
1604.7 Pre-employment inquiries as to sex.
1604.8 Relationship of Title VII to the Equal Pay Act.
1604.9 Fringe benefits.
1604.10 Employment policies relating to pregnancy and childbirth.

AUTHORITY: The provisions of this Part 1604 issued under sec. 713(b), 78 Stat. 265, 42 U.S.C. sec. 2000e–12.

SOURCE: 37 FR 6836, April 5, 1972, unless otherwise noted.

§ 1604.1 General principles.

(a) References to "employer" or "employers" in this Part 1604 state principles that are applicable not only to employers but also to labor organizations and to employment agencies insofar as their action or inaction may adversely affect employment opportunities.

(b) To the extent that the views expressed in prior Commission pronouncements are inconsistent with the views expressed herein, such prior views are hereby overruled.

(c) The Commission will continue to consider particular problems relating to sex discrimination on a case-by-case basis.

§ 1604.2 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels—"Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on sterotyped characterizations of the sexes. Such steretoypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

(b) Effect of sex-oriented State employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that State laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of States require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by State law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented State employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment oppor-

tunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the State law is in conflict with and superseded by tile VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some States require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

§ 1604.3 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A Seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§ 1604.4 Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of section 703 (e)(1) of title VII. We express no opinion on this question at this time except to point out that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§ 1604.5 Job opportunities advertising.

It is a violation of title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed "Male" or "Female," will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 1604.6 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have

reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

§ 1604.7 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male _____, Female _____"; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§ 1604.8 Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

§ 1604.9 Fringe benefits.

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(e) It shall not be a defense under title VIII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. A statement of the General Counsel of September 13, 1968, providing for a phasing out of differentials with regard to optional retirement age for certain incumbent employees is hereby withdrawn.

§ 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employ-

ees because of pregnancy is in prima facie violation of title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

Age Discrimination in Employment Act of 1967

Text of the Age Discrimination in Employment Act of 1967, P.L. 90-202, effective June 12, 1968. The Act reads as last amended by P.L. 93-259, effective May 1, 1974.

STATEMENT OF FINDINGS AND PURPOSE

Sec. 2. (a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

EDUCATION AND RESEARCH PROGRAM

Sec. 3. (a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures:

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster, through the public employment service system and through cooperative effort, the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) Sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12.

PROHIBITION OF AGE DISCRIMINATION

Sec. 4. (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual member, or applicant for membership, has opposed any practice made unlawful by this section, or because such individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

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

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

STUDY BY SECRETARY OF LABOR

SEC. 5. The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

ADMINISTRATION

SEC. 6. The Secretary shall have the power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee-for-service basis, as he deems neces-

sary to assist him in the performance of his functions under this Act;

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

Sec. 7 (a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217) and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to an individual as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any aggrieved individual may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any individual to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such individual under this Act.

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 13(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

NOTICES TO BE POSTED

Sec. 8. Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as

the Secretary deems appropriate to effectuate the purposes of this Act.

RULES AND REGULATIONS

Sec. 9. In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

CRIMINAL PENALTIES

Sec. 10. Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

DEFINITIONS

Sec. 11. For the purposes of this Act—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency but such term does not include the United States, or a corporation wholly owned by the Government of the United States. (as amended effective May 1, 1974)

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States. (as amended effective May 1, 1974)

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relation Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy-making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. (as amended effective May 1, 1974)

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States, or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

LIMITATION

Sec. 12. The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

ANNUAL REPORT

Sec. 13. The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendation to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

FEDERAL-STATE RELATIONSHIP

Sec. 14. (a) Nothing in this Act shall affect the jurisdiction of any agency

of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules and regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination

that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law. (as amended effective May 1, 1974)

EFFECTIVE DATE

Sec. 16. This Act shall become effective one hundred and eighty days after enactment (except (a) that the Secretary of Labor may extend the delay in effective date of any provision of this Act up to an additional ninety days thereafter if he finds that such time is necessary in permitting adjustments to the provisions hereof, and (b) that on or after the date of enactment the Secretary of Labor is authorized to issue such rules and regulations as may be necessary to carry out its provisions).

APPROPRIATIONS

Sec. 17. There are hereby authorized to be appropriated such sums, not in excess of $5,000,000 for any fiscal year, as may be necessary to carry out this Act.

AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS OF 1978

SHORT TITLE

SECTION 1. This Act may be cited as the "Age Discrimination in Employment Act Amendments of 1978".

SENIORITY SYSTEMS AND EMPLOYEE BENEFIT PLANS

SEC. 2. (a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual".

(b) The amendment made by subsection (a) of this section shall take effect on the date of enactment of this Act, except that, in the case of employees covered by a collective bargaining agreement which is in effect on September 1, 1977, which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938), and which would otherwise be prohibited by the amendment made by section 3(a) of this Act, the amendment made by subsection (a) of this section shall take effect upon the termination of such agreement or on January 1, 1980, whichever occurs first.

APPLICATION OF AGE LIMITATION

SEC. 3. (a) Section 12 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631) is amended to read as follows:

"AGE LIMITATION

"SEC. 12. (a) The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

"(b) In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act, the prohibitions established in section 15 of this Act shall be limited to individuals who are at least 40 years of age.

"(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profitsharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in aggregate, at least $27,000.

"(2) *In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.*

"(d) *Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965).*".

(b)(1) *Sections 12(a), 12(c), and 12(d) of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section, shall take effect on January 1, 1979.*

(2) *Section 12(b) of such Act, as amended by subsection (a) of this section, shall take effect on September 30, 1978.*

(3) *Section 12(d) of such Act, as amended by subsection (a) of this section, is repealed on July 1, 1982.*

ENFORCEMENT PROCEDURE

SEC. 4. (a) *Section 7(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(c)) is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:*

"(2) *In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.*".

(b)(1) *Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended to read as follows:*

"(d) *No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—*

"(1) *within 180 days after the alleged unlawful practice occurred; or*

"(2) *in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.*

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.".

(2) The amendment made by paragraph (1) of this subsection shall take effect with respect to civil actions brought after the date of enactment of this Act.

(c)(1) Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of one year.".

(2) The amendment made by paragraph (1) of this subsection shall take effect with respect to conciliations commenced by the Secretary of Labor after the date of enactment of this Act.

FEDERAL GOVERNMENT EMPLOYMENT

SEC. 5. (a) Section 15(a) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(a)) is amended by inserting "who are at least 40 years of age" after "applicants for employment" and by inserting "personnel actions" after "except".

(b)(1) Section 3322 of title 5, United States Code, relating to temporary appointments after age 70, is repealed.

(2) The analysis for chapter 33 of title 5, United States Code, is amended by striking out the item relating to section 3322.

(c) Section 8335 of title 5, United States Code, relating to mandatory separation, is amended—

(1) by striking out subsections (a), (b), (c), (d), and (e) thereof;

(2) by redesignating subsections (f) and (g) as subsections (a) and (b), respectively; and

(3) by adding after subsection (b), as so redesignated, the following new subsections:

"(c) An employee of the Alaska Railroad in Alaska and an employee who is a citizen of the United States employed on the Isthmus of Panama by the Panama Canal Company or the Canal Zone Government, who becomes 62 years of age and completes 15 years of service in Alaska or on the Isthmus of Panama shall be automatically separated from the service. The separation is effective on the last day of the month in which the employee becomes age 62 or completes 15 years of service in Alaska or on the Isthmus of Panama if then over that age. The employing office shall notify the employee in writing of the date

of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

"(d) The President, by Executive order, may exempt an employee from automatic separation under this section when he determines the public interest so requires".

(d) Section 8339(d) of title 5, United States Code, relating to computation of annuity, is amended by striking out "section 8335(g)" and inserting in lieu thereof "section 8335(b)".

(e) Section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) is amended by adding at the end thereof the following new subsections:

"(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

"(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act. Amendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

"(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.".

(f) The amendments made by this section shall take effect on September 30, 1978, except that section 15(g) of the Age Discrimination in Employment Act of 1967, as amended by subsection (e) of this section, shall take effect on the date of enactment of this Act.

REPORT BY SECRETARY OF LABOR

SEC. 6. (a)(1) Section 5 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 624) is amended by inserting "(a)(1)" after the section designation, and by adding at the end thereof the following new sentence: "Such study shall include—

"(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 12(a) of this Act to 70 years of age;

"(B) a determination of the feasibility of eliminating such limitation;

"(C) a determination of the feasibility of raising such limitation above 70 years of age; and

"(D) an examination of the effect of the exemption contained in section 12(c), relating to certain executive employees, and the exemption contained in section 12(d), relating to tenured teaching personnel.".

(2) Section 5(a) of the Age Discrimination in Employment Act of 1967, as so redesignated by paragraph (1) of this subsection, as amended by adding at the end thereof the following new paragraph:

"(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.".

(b) Section 5 of the Age Discrimination in Employment Act of 1967, as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subsection:

"(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 7. Section 17 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 636) is amended by striking out ", not in excess of $5,000,000 for any fiscal year,".

definitions

ACCRUAL OF BENEFITS

In the case of a defined benefit pension plan, the process of accumulating pension credits for years of credited service, expressed in the form of an annual benefit to begin payment at normal retirement age. In the case of a defined contribution plan, the process of accumulating funds in the individual employee's pension account.

ACTIVE PARTICIPANT

Individual who is a participant and for whom at any time during the taxable year benefits are accrued under the plan on his or her behalf, the employer is obligated to contribute to or under the plan on his or her behalf, or the employer would have been obligated to contribute to or under the plan on his or her behalf if any contributions were made to or under the plan. For any taxable year of an individual in which there have been no contributions and there has been a complete discontinuance of contributions under the plan under which the individual is covered, the individual is not considered an "active" participant. An individual is *not* an "active" participant under a plan (1) with respect to any prior taxable year merely because he or she is given past service credit for prior years of service, (2) with respect to any taxable year of an individual beginning after separation from service covered under the plan

and before resuming service covered under the plan, whether or not he or she has a nonforfeitable right to benefits under such plans, or (3) for any taxable year of such individual in which such individual does not elect under the plan to participate in such plan. Item 3 does not apply in the case of an individual who elects not to be covered under the plan and subsequently elects to be covered if, under the plan, such individual can receive benefits based upon all prior years in which such individual could have been covered had he or she so elected, upon the payment by him (or her) of an amount specified under the plan for such prior years. In such case, the individual shall be treated as an active participant under the plan for each such prior year with respect to which such payment is made.

ACTUARIAL ASSUMPTION

Factors which actuaries use in estimating pension costs, such as rate of interest on plan investments and the rates at which plan members are expected to leave the plan because of death or job termination.

ACTUARIAL EQUIVALENT

Benefit having the same present value as the benefit it replaces. The amount of annuity or pension that can be provided at the same cost as a specified annuity of a different type or a specified annuity payable from a different age. For example, a lifetime monthly benefit of $67.50 beginning at age 60 (on a given set of actuarial assumptions) may be said to be the actuarial equivalent of $100 per month beginning at age 65.

ACTUARIAL GAIN

Where the actual experience under the plan is more favorable than the actuary's estimate.

ACTUARIAL LOSS

Where the actual experience under the plan is less favorable than the actuary's estimate.

ACTUARIALLY REDUCED ANNUITY

Annuity payable to an employee who retires before normal retirement age in an amount less than would have been payable at normal retirement age. See 'Actuarial Equivalent.'

ACTUARIAL VALUATION

An examination of a pension plan to determine whether contributions are being made at a rate sufficient to provide the funds out of which the promised pension can be paid when due.

ACTUARY

A person professionally trained in the technical and mathematical aspects of insurance, pensions, and related fields. The actuary estimates how much money must be contributed to a pension fund each year in order to provide the benefits that will become payable in the future.

ADMINISTRATOR

(1) The person specifically designated by the terms of the instrument under which the plan is operated; (2) if an administrator is not so designated, the plan sponsor; (3) if an administrator is not designated and the plan sponsor cannot be identified, such person as the Secretary of Labor may prescribe.

AMORTIZATION

Paying off an interest bearing liability by gradual reduction through a series of installments, as opposed to paying it off by one lump sum payment.

ANNUITY

(1) A contract that provides an income for a specified period of time, such as a number of year or for life. (2) The periodic payments provided under an annuity

contract. (3) The specified monthly or annual payment to a pensioner. Often used to mean "pension."

BENEFICIARY

A person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit under that plan, based on the service of someone other than himself (or herself).

BREAK IN SERVICE

A calendar year, plan year, or other 12-consecutive-month period designated by the plan during which a plan participant does not complete more than 500 hours of service.

CASH-OUT

A lump sum payment to an employee of the employee's nonforfeitable interest upon termination of service prior to retirement.

CASH SURRENDER VALUE

The amount available in cash upon voluntary termination of a policy before it becomes payable by death or maturity.

CLASS YEAR PLANS

A plan with a five-year vesting schedule in which each year's contributions vest separately. The employee's right to the employer's contributions with respect to any plan year must be 100 percent vested not later than the end of the fifth plan year for which the contributions are made.

CONTRIBUTORY PLAN

A plan to which participants contribute as well as the employer. In some contributory plans, employees wishing to be covered must contribute; in others, employee contributions are voluntary.

CREDITED SERVICE

A period of time of employment which is recognized as service for plan purposes to determine eligibility to receive pension payments or to determine the amount of such payments.

DEFINED BENEFIT PLAN

A pension plan which specifies the benefits or the method of determining the benefits, but not the contribution, e.g., a specified amount per month at retirement (flat benefit), a stated percentage of compensation (fixed benefit), and stated percentage of compensation times years of service (unit benefit). The contributions under such a plan are determined actuarially on the basis of the benefits expected to become payable.

DEFINED CONTRIBUTION PLAN

A pension plan in which the contributions are fixed, but not the benefits, e.g., a fixed amount contributed for each hour worked or a fixed percentage of compensation. Examples are money purchase plans and profit sharing plans. Under ERISA, an "individual account plan" (also called "defined contribution plan") is defined as a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. The amount of the retirement benefit is whatever the amount accumulated in the participant's account will buy.

EARLY RETIREMENT AGE

An age by the terms of an employee pension benefit plan, which is earlier than normal retirement age, at which a participant may receive benefits under the

plan. The retirement allowance payable in the event of early retirement is often lower than the accrued portion of the normal retirement allowance.

ELIGIBILITY REQUIREMENTS

The term is used in two ways with different meanings. (1) Conditions which an employee must satisfy to participate in a plan, such as the completion of 1 year of service with the employer and attainment of a specified age, such as 25. (2) Conditions which an employee must satisfy to obtain a benefit, such as the completion of 10 years of service and the attainment of age 65 for a pension.

EMPLOYEE BENEFIT PLAN

Any plan, fund, or program established or maintained by an employer(s) engaged in commerce or in any industry or activity affecting commerce, or by an employee organization representing employees so engaged, or by both for the purpose of providing employees and former employees and their beneficiaries any benefits specified in the definition of employee welfare benefit plan or employee pension benefit plan.

EMPLOYEE PENSION BENEFIT PLAN

Any plan, fund or program which was established or maintained by an employer(s) engaged in commerce or in any industry or activity affecting commerce, or by an employee organization representing employees so engaged, or by both, to the extent that by its express terms or as a result of surrounding circumstances, such plan, fund, or program provides retirement income to employees, or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of

calculating the benefits under the plan, or the method of distributing benefits from the plan.

EMPLOYEE WELFARE BENEFIT PLAN

Any plan, fund, or program which was established or maintained by an employer(s) engaged in commerce or in an industry or activity affecting commerce, or by an employee organization representing employees so engaged, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or any benefit described in section 302(c) of the Labor-Management Relations Act, 1947 (other than pension on retirement or death, and insurance to provide such pensions) – and these latter are holiday and severance or similar benefits.

FIDUCIARY

(1) Indicates the relationship of trust and confidence where one person (the fiduciary) holds or controls property for the benefit of another person; (2) anyone who exercises power and control, management or disposition with regard to a fund's assets, or who has authority to do so or who has authority or responsibility in the plan's administration. Under ERISA, fiduciaries must discharge their duties solely in the interest of the participants and their beneficiaries, and are accountable for any actions which may be construed by the courts as breaching that trust.

FORFEITURE

Amounts contributed on behalf of terminated, non-vested participants. In a pension plan, such amounts must be applied to reducing future employer contributions. In a profit sharing plan, such amounts may be allocated to the accounts of remaining participants.

FULL VESTING

The form of vesting, either immediate or deferred, under which all accrued benefits of a participant become vested benefits.

FUNDING

A systematic program under which assets are set aside in amounts and at times approximately concurrent with the accruing of benefit rights under a retirement system.

GOVERNMENTAL PLAN

A plan established or maintained for its employees by the government of the U.S., by the government of any state or political subdivision thereof, or by any agency or instrumentality of the foregoing. The term also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions regarded under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act.

INDIVIDUAL ACCOUNT PLAN

See 'Defined Contribution Plan.'

INDIVIDUAL RETIREMENT ACCOUNT

Established by the ERISA, this permits employees not covered by a governmental plan or an employer sponsored plan to make annual tax-deductible contributions similar to the Keogh plan. The IRA entails the establishment of a trust or a custodial

account. The trustee may be a bank, another person, or an organization that meets IRS qualifications. The key requirements are (1) the annual contribution must be made in cash and cannot exceed $1,500, (2) the entire value of the account must be nonforfeitable, (3) no part of the funds may be invested in life insurance contracts, (4) the assets in the account cannot be commingled with any other property, and (5) distributions must be made in accordance with restrictions imposed by the law.

INSURED PLAN

A plan funded by means of contracts with an insurance company.

INTEGRATION WITH SOCIAL SECURITY

The benefits of the employer's plan must be dovetailed with social security benefits, if the plan provides for such integration, in such a manner that employees earning more than the taxable wage base will not receive combined benefits under the two programs which are proportionately greater than benefits for employers earning less than the taxable wage base.

JOINT AND SURVIVOR OPTION

A provision under the ERISA that when a plan participant reaches normal retirement age, or early retirement age if the plan had one, he/she must be allowed to choose in writing that the spouse *not* receive a survivor annuity if the participant dies before the spouse. The survivor annuity will automatically be provided if the participant does not choose against it, and meets the qualifications. The life-time pension benefits of the participant electing to have such a survivor annuity are then reduced accordingly to provide for the survivor.

KEOGH PLAN

Also know as an H.R. 10 plan, this allows a self-employed individual to establish a qualified pension or profit sharing plan, but with certain restrictions and limitations. The amount a self-employed individual can contribute for his own benefits is limited to 15 percent of earned income, not to exceed $7,500 per year.

LUMP SUM PAYMENT

Payment within one taxable year to the recipient of the entire balance payable to the participant from a trust which forms part of a qualified pension or employee annuity plan.

MONEY PURCHASE PLAN

A plan where the contributions are fixed. A type of pension plan in which the employer's contributions are determined for, and allocated with respect to, specific individuals, usually as a percentage of compensation. The benefits for each employee are the amounts which can be provided by the sums contributed for him or her.

MULTIEMPLOYER PLAN

As defined by section 3(37) of ERISA, (A) the term "multiemployer plan" means a plan (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between an employee organization and more than one employer, (iii) under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year by all employers making such contributions, (iv) under which benefits are payable with respect to each participant without regard to the

cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such plan, and (v) which satisfies such other requirements as the Secretary may by regulations prescribe. (B) For purposes of this paragraph (i) if a plan is a multiemployer plan within the meaning of subparagraph (A) for any plan year, clause (iii) of subparagraph (A) shall be applied by substituting "75 percent" for "50 percent" for each subsequent plan year until the first plan year following a plan year in which the plan had one employer who made contributions of 75 percent or more of the aggregate amount of contributions made under the plan for that plan year by all employers making such contribution, and (ii) all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of the Internal Revenue Code of 1954, determined without regard to section 1563(e)(3)(C) of such Code) shall be deemed to be one employer. Any plan which does not meet this definition is not a "multiemployer plan" under ERISA. A plan to which more than one employer contributes, but which does not meet one or more factors enumerated above is sometimes referred to as a "multiple employer" plan.

NAMED FIDUCIARY

A fiduciary who is named in the plan instrument or who, pursuant to a procedure specified in the plan, is identified by a person who is an employer or an employee organization with respect to the plan or by such an employer and such an employee organization acting jointly.

NONCONTRIBUTORY PENSION PLAN

One in which the employer pays the entire cost of the pension.

NONFORFEITABLE PENSION BENEFIT

A claim obtained by a pension plan participant or beneficiary to that part of an immediate or deferred benefit which arises from the participant's service, which is unconditional and which is legally enforceable against the plan.

NORMAL RETIREMENT AGE

The age, as established by a plan, when retirement normally occurs. Since unreduced social security benefits are available at 65, that is the most common normal retirement age. ERISA defines "normal retirement age" as the earlier of (A) the time a plan participant attains normal retirement age under the plan or (B) the later of (i) the time a plan participant attains age 65, or (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

PARTICIPANT

Any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become (or whose beneficiaries are or may become) eligible to receive a benefit from an employee benefit plan.

PENSION PLAN

A plan which provides retirement benefits by the purchase of insurance or annuity contracts or the establishment of a trust fund, or a combination of both.

PLAN SPONSOR

(1) The employer, in the case of a plan established or maintained by a single employer, (2) the employee organization, in the case of a plan established or

maintained by an employee organization, (3) the association, committee, joint board of trustees, etc. In the case of the plan established or maintained by two or more employers or jointly by one or more employees and one or more employee organizations.

PLAN TERMINATION

Describes the final phase of an interrupted pension program. Essentially all participants must vest 100 percent. However, assets will have to be distributed according to the plan formula. No money may return to the employer, except in the case of an actuarial error.

PLAN TERMINATION INSURANCE

Insurance to protect defined benefit pension plan participants from loss of pension benefits due to failure of employer to properly fund. This is administered by the Pension Benefit Guaranty Corporation (PBGC).

PLAN YEAR The calendar, policy, or fiscal year by which the records of the plan are kept.

PRIVATE PENSION PLANS

Pension plans established by private (in contrast to governmental) agencies, including commercial, industrial, labor, and service organizations, nonprofit organizations, and nonprofit religious, educational, and charitable institutions.

PROFIT SHARING PLAN

A plan established and maintained by an employer to provide participation in profits by employees or their beneficiaries. It includes a definite predetermined formula for allocating contributions among the participants and for distributing funds accumulated under the plan.

PROFIT-SHARING RETIREMENT PLAN

A program where the employee's retirement benefit is based upon the employer's contributions to a fund and the earnings of the fund. The employer's contributions are based in a formula related to profits.

QUALIFIED PLAN

A pension, deferred profit sharing, or stock bonus plan that meets the requirements of section 401(a) of the Internal Revenue Code of 1954 and the applicable regulations. Such IRS approval qualifies the plan for favorable tax treatment.

ROLLOVER

See 'Tax-Free Rollover.'

SAVINGS PLAN

A plan requiring the participants as well as the employer to contribute. The ordinary contributory pension plan is not normally considered a savings plan because the employee has no choice as to how much he or she shall contribute. Savings plans generally provide a range of contributions. Savings plans can be combined with pension or profit sharing plans. Where the employer's contributions are in the form of company stock, the plan is known as a stock bonus plan. "Savings plans" are also known as "thrift plans."

SERVICE

Employment taken into consideration under a pension plan, including paid leave and periods for which back pay are due.

SOCIAL SECURITY

Federal program of old-age and related benefits covering most workers in the United States.

STOCK BONUS PLAN

A plan established and maintained by an employer to provide benefits similar to those of a profit sharing plan, except that the contributions by the employer are not necessarily dependent upon profits and the benefits are distributable in stock of the employer which is to be shared among employees or their beneficiaries, such a plan is subject to the same requirements as a profit sharing plan.

STOCK PURCHASE PLAN

A deferred profit sharing plan which provides that an employee's share of the fund may be invested at his or her option in the employer's securities, insurance contracts, or governmental obligations.

SURVIVOR ANNUITY

See 'Joint and Survivor Annuity.'

TARGET BENEFIT PLAN

A defined contribution plan for which contributions are based upon an actuarial valuation designed to provide a "target" benefit to each participant upon retirement.

TAX-FREE ROLLOVER

A new provision under the ERISA permitting employees to safeguard distributions to and from qualified plans and IRAs from taxation at present. Rollovers can occur from: (1) A qualified plan to an IRA, (2) an IRA to a qualified plan, or (3) an IRA to an IRA.

TERMINATION

See 'Plan Termination.'

THRIFT PLAN

See 'Savings Plan.'

VESTING

A plan may provide that an employee will, after meeting certain requirements, retain a right to the benefits he or she has accrued, or some portion of them, even if employment under the plan terminates before retirement. An employee who has met such requirements is said to have a vested right. Voluntary and mandatory employee contributions are always fully vested.

WELFARE PLAN

A plan which provides medical, surgical, or hospital care or benefits in the case of sickness, accident, disability, death or unemployment; it may also include other benefits such as vacation or scholarship plans.

Source:

What You Should Know About the Pension and Welfare Law--A Guide to the Employee Retirement Income Security Act of 1974, U.S. Department of Labor, Labor-Management Services Administration, Pension and Welfare Benefit Programs, January 1978

NOTES TO CHAPTER I

1. "Stabilization of Fringe Benefits," *Industrial and Labor Relations Review*, Jan. 1954, p. 221.

2. Allen, Donna, *Fringe Benefits: Wages or Social Obligation?*, Cornell University, Ithaca, N.Y., 1964, pp. 25-26 incl.

3. Hickey, Joseph A., "Unemployment Insurance Covers Additional 9 Million Workers," *Monthly Labor Review*, U.S. Dept. of Labor, Bureau of Labor Statistics, May 1978, p. 14.

4. Definition confirmed by Division in letter to author, Nov. 28, 1978.

5. *What You Should Know About the Pension and Welfare Law*, U.S. Dept. of Labor, Labor-Management Services Administration, Pension and Welfare Benefit Programs, Jan. 1978, p. 66.

6. Bell, Donald R., "Prevalence of Private Retirement Plans," *Monthly Labor Review*, U.S. Dept. of Labor, Bureau of Labor Statistics, Oct., 1975, footnote 3, page 16.

7. *Public Personnel Administration--Policies and Practices for Personnel*, Section 70.011, Prentice-Hall, Inc., Englewood Cliffs, New Jersey, 1973.

8. For discussion of EEO laws see Leshin, *Equal Employment Opportunity and Affirmative Action in Labor-Management Relations-A Primer*, UCLA Institute of Industrial Relations, updated Feb. 1978.

NOTES TO CHAPTER II

1. The Civil Service Reform Act of 1978 replaced the U.S. Civil Service Commission with the Office of Personnel Management which has taken over the civil service system functions of the expired commission. A separate, independent body, the Merit Systems Protection Board, now handles employee appeals. A third independent agency, the Federal Labor Relations Authority, will handle the federal government's labor relations with employee organizations. The Civil Service Reform Act amends Section 7702, Chapter 77 of Title 5, United States Code. For text of Section 7702, also see Senate Report 95-1272, beginning on page 33; an explanation of the section's complex procedural relationship between the EEOC and the Merit Systems Protection Board is found on pages 139-143.

2. 400 U.S. 542 (1971).

3. 110 *Congressional Record*, Feb. 3, 1946, p. 2485.

4. These EEOC opinion letters have been extracted from the Supreme Court decision in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

5. Senate Committee Report No. 95-331, 95th Congress, 1st Session, 1977, p.2.

6. 429 U.S. 125 (1976).

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7. 434 U.S. 136 (1977).

8. House Committee Report, No. 95-948, 1978, p.7.

9. Senate Committee Report, *op. cit.*, p. 6.

10. *Ibid.*, p. 6.

11. *Ibid.*, p. 9.

12. *Ibid.*, p.10.

13. *Ibid.*, p.10.

14. House Committee Report, *op. cit.*, p. 9; Senate Committee Report, *op. cit.*, p. 10.

15. House Committee Report, *op. cit.* p. 10.

16. *Rosen v. Public Service Electric & Gas Co.*, 477 F. 2d 90 (3rd. Cir., 1973).

17. 98 S. Ct. 1370 (1978).

18. Calif. Gov't. Code 7500 (West, 1977 Cum. Supp.).

19. *EEOC v. Colby College et. al.* CA. 1, No. 78-1010, Dec. 18, 1978.

20. Interpretation of Law Professor Raymond Goetz, University of Kansas, in a paper prepared for the ABA's Section on Labor Relations Law, August 7, 1978. See *Daily Labor Report*, No. 154, August 9, 1978, p. D-6.

21. *Ibid.*, p. D-6.

NOTES TO CHAPTER III

1. 98 S. Ct. 866 (1978).

2. 98 S. Ct. 444 (1977).

3. Conference Committee Report No. 95-950, 95th Congress, 2d Session, 1978, p. 8.

4. House Committee Report No. 95-527, Part 1, 95th Congress, 1st Session, 1977, p. 12.

5. 29 CFR Parts 850 & 860, published Dec. 12, 1978.

6. 29 CFR Part 860, published Dec. 12, 1978.

7. Senate Committee Report No. 95-493, 95th Congress, 1st Session, 1977, p. 5.

8. *Congressional Record*, p. S4450, March 23, 1978.

9. Bureau of National Affairs, Inc. *Fair Employment Practice Manual*, Part 2, Supplement 341, April 1, 1978, p. 6.

10. 29 CFR Part 860, published September 20, 1978.

11. House Committee Report, *op. cit.*, p. 9.

12. *Ibid.*, p. 11.

13. *Daily Labor Report*, No. 206, Oct. 24, 1978, p. B-1, Bureau of National Affairs, Inc.

NOTES TO CHAPTER III - Cont'd.

14. *Ibid.*, No.216, November 7, 1978, p. A-3.

15. Statement before Senate Special Committee on Aging on Work and Retirement Issues, *Daily Labor Report*, No. 138, July 18, 1978, p. E-1.

16. Section 1420.1, California Labor Code.

17. Proposed Regulation on Employee Benefit Plans, 29 CFR, Part 860, published Sept. 20, 1978.

18. *Daily Labor Report*, No. 206, Oct. 24, 1978, A-1, Bureau of National Affairs, Inc.

19. *Congressional Record*, S4450, March 23, 1978.

20. Solicitor of Labor Carin Clauss, *Daily Labor Report*, No. 145, p. A-5, Bureau of National Affairs, Inc.

21. Clauss, *Daily Labor Report*, No. 201, Oct. 17, 1978, p. A-6.

22. The Conference Board,"Older Workers," *Economic Road Maps*, No. 1835, New York, July, 1978.