Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion

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A QUESTIONABLE EXPANSION

In response to the problems of unemployment and premature forced retirement of the older worker, Congress in 1967 passed the Age Discrimination in Employment Act (ADEA) to promote employment based on ability rather than age and prohibit arbitrary age discrimination against persons between the ages of forty and sixty-four. In the ten years since the ADEA became law, however, social developments and judicial interpretations have necessitated a second look at the legislation. The uncertainty surrounding the abilities of older workers when the Act was originally drafted has been reduced by gerontological research. Studies have indicated that chronological age is a poor indicator of ability to perform a job. Also, the opportunity to continue working beyond the age of sixty-five has become a question of economic survival, physical health,


6. See 1977 Senate Report, supra note 5, at 3. The upper age limit was originally selected because it was a customary retirement age at which many public and private pension benefits became payable—not for any scientiﬁc reason. See H.R. Rep. No. 527, 95th Cong., 1st Sess. 2 (1977) [hereinafter cited as 1977 House Report].

7. The inadequacy of income maintenance programs and the comparatively higher percentage of older persons with annual incomes below the poverty level—14.6% of Americans 65 and older are below poverty compared to 11.6% of the entire population—indicate a need for older people to continue working. See 1977 Senate Report, supra note 5, at 3-4.
and psychological well-being for older Americans. In addition, questions concerning the appropriate application of certain provisions of the Act have divided courts and in some cases made the effectiveness of the Act uncertain. This has led Congress to conclude that the Act's provisions must be clarified and expanded to meet the needs of workers over sixty-five. Accordingly, Congress enacted the Age Discrimination in Employment Act Amendments of 1978 in order to "strengthen and broaden the provisions of the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." This Note will examine the substantive and procedural changes brought about by the 1978 Amendments and will evaluate their effectiveness in remediying the Act's limitations and achieving its purpose.

I. PROVISIONS OF THE ACT

A. Substantive Amendments

The ADEA makes it unlawful for an employer, employment agency, or labor union to discriminate on the basis of age with respect to hiring, discharge, and wages, as well as in the terms, conditions, or privileges of employment. The broad proscriptions of the Act are subject to three exceptions: it is lawful (1) to discharge or refuse to hire an employee "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentia-
tion is based on reasonable factors other than age"; (2) to observe the terms of a bona fide seniority system or pension plan "which is not a sub-
terfuge to evade the purposes of [the Act]"; or (3) to discharge or discipline for good cause. While judicial interpretations of the bona fide occupational qualification and good cause provisions have been fairly straightforward, the purpose and scope of section 4(f)(2), the bona fide employee

8. See 1977 Senate Report, supra note 5, at 4; Hearings on S. 1784 Before the Sub-
comm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 166-183 (1977) (statement by Albert E. Gunn, Assistant Director for Hospitals, The University of Texas System Cancer Center, M.D. Anderson Hospital, Hospital and Tumor Institute, Houston Tex.) (hereinafter cited as 1977 Senate Hearings).
9. See notes 15-21 and accompanying text; notes 46-50 and accompanying text; and notes 58-60 and accompanying text, infra.
12. 29 U.S.C. § 623(a)-(c) (1976); 29 U.S.C. § 630(b)-(e) (1976). The law applies to em-
ployers engaged in interstate commerce having 20 or more employees, employment agencies serving such employees, and labor organizations with 25 or more members.
14. Each provision has been narrowly construed by the courts on a case by case basis with an aim toward balancing the right of the employee to be free from age discrimination against the right of the employer to determine reasonable business standards. Guided by
benefit plan exception, remains unsettled. Since pension plans often contain mandatory retirement provisions, numerous courts have faced the issue of whether mandatory retirement below the age of sixty-five pursuant to a retirement, pension or insurance plan is allowed by the Act.

In United Air Lines, Inc. v. McMann, the Supreme Court recently settled a dispute in the lower courts by upholding mandatory retirement provisions under the bona fide employee benefit plan exception. McMann, a United Air Lines employee who was forced to retire at age sixty in compliance with a company retirement plan, brought suit, alleging that the involuntary retirement provision of the plan violated the Act. Adopting a

Department of Labor Regulations, 29 C.F.R. § 860.102(b)-(e) (1976) (regulations calling for limited application and narrow construction of the bona fide occupational qualification exception), courts have sanctioned the occupational qualification defense in limited instances where the safety and convenience of the public are at stake. See, e.g., Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975) (maximum hiring age of 35 for intercity bus drivers upheld when facts indicated that raising the age would increase the risk of harm to passengers).

Courts have interpreted the differentiation on reasonable factors provision to merely require a good faith effort to make employment decisions on performance-related versus age-related factors. See, e.g., Stringfellow v. Monsanto Co., 320 F. Supp. 1175 (W.D. Ark. 1970) (termination of employees based on performance evaluations not discriminatory even though nearly all terminated employees were over 40). See also 29 C.F.R. § 860.103(c)-(e) (1976) (differentiation provision allows employers to disqualify employees on grounds other than age).

Finally, to discharge or discipline for good cause, an employer must show the employee's failure to satisfactorily fulfill his or her business responsibility. See, e.g., Surrisi v. Conwed Corp., 510 F.2d 1088 (8th Cir. 1975) (discharge based on employee's failure to increase sales to the employer's satisfaction was for good cause).


Section 4(f)(2) provides:

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


See 1977 Senate Report, supra note 5, at 9. The Committee cited a 1974 Bureau of Labor Statistics study of pension plans finding that 41% of workers covered by private pension plans were subject to mandatory retirement. Id.


Compare Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978) (pension plans with early retirement provisions are not prohibited under the Act as long as they provide adequate benefits), with McMann v. United Air Lines Inc., 542 F.2d 217 (4th Cir. 1976), rev'd, 434 U.S. 192 (1977) (pension plans with early retirement provisions are prohibited unless they contain a non-arbitrary justification for the provision).

discarded fifth circuit theory, the majority found that any pension plan initiated prior to the date of the Act qualifies under the exception whether or not it contains early retirement provisions. The Court reasoned that a pre-Act plan could not have been adopted as a subterfuge to evade either the Act or its purpose. Although the United Air Lines majority based its interpretation on the absence of "clear, unambiguous" statutory language and congressional intent to undermine the bona fide retirement plans existing when the Act was passed, the dissent demonstrated that both the language and legislative history could support another interpretation. Relying on the House and Senate committee reports and statements made by the bill's sponsors during congressional debate, the dissent suggested that section 4(f)(2) was merely meant to allow employers to exclude newly-hired older workers from the employee benefit plans. The legislative history shows that Congress was concerned that requiring equal participation by newly hired workers in employee benefit plans would discourage employment of older workers since, to be economically feasible, such plans require a minimum number of years of service that would not always be provided by the newly hired older worker. The practical effect of the Supreme Court's decision in United Air Lines will, however, be short lived since the Court's interpretation is expressly rejected in one of the substantive amendments to the ADEA.

19. See Brennan v. Taft Broadcasting Co., 500 F.2d 212 (5th Cir. 1974).
20. 434 U.S. at 203.
21. The Court rejected the circuit court's theory that a pre-Act plan could still violate the Act's purposes, noting that since the Act is the vehicle by which its purposes are expressed, a subterfuge to evade one also evades the other. Id. at 197-198.
22. Id. at 199. Language of the original administrative version would clearly have permitted forced early retirement pursuant to a retirement plan. "It shall not be unlawful... to separate involuntarily an employee under a retirement policy or system..." Id. at 199 n.6. Statements made by Senator Javits in proposing the enacted version of § 4(f)(2), set forth in note 15 supra, can be read to indicate congressional intent not to disrupt existing retirement and pension plans. See 1967 Senate Hearings, supra note 1, at 27-28. Secretary of Labor Wirtz interpreted both the proposed and enacted versions to protect employee benefit plans. Id. at 53. See 29 C.F.R. § 860.110(a) (1969). Contra, DEPT. OF LABOR ANN. REP. ON AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 17 (stating the current Labor Department position that pre-65 retirement plans are unlawful subject to limited exceptions).
Under the 1978 Amendments, language added to section 4(f)(2) makes it clear that mandatory retirement of an employee within the protected age group pursuant to a bona fide employee benefit plan violates the Act.\textsuperscript{26} Rejecting the Supreme Court’s interpretation, the House-Senate conference report specifically stated that plan provisions in effect prior to the date of enactment are not exempt because they antedate the Act.\textsuperscript{27} Committee reports of both houses emphasize that the amendment merely clarifies original congressional intent, as correctly construed by the newly hired older employee’s participation in pension, retirement, or insurance plans.\textsuperscript{28} As a clarification, the amendment took effect immediately upon enactment, prohibiting early mandatory retirement provisions in existing employee benefit plans subject to one exemption: early retirement provisions in employee benefit plans and seniority systems which are contained in collective bargaining agreements in effect on September 1, 1977 will be sanctioned under the Act until the termination of the agreement or on January 1, 1980, whichever occurs first.\textsuperscript{29} This exemption recognizes that early retirement provisions in existing collective bargaining agreements were bargained for in good faith and it provides labor and management with the opportunity to renegotiate contracts to comply with the Act.\textsuperscript{30}

In addition to clarifying section 4(f)(2), the 1978 Amendments enlarge the coverage of the Act by raising the upper age limit for non-federal employees from sixty-five to seventy, effective January 1, 1979, and by removing the age limit for federal employees, effective September 30, 1978.\textsuperscript{31} The amendments retain the bona fide occupational exceptions without change,\textsuperscript{32} but add broad exemptions which remove two groups from the Act’s coverage. Non-federal employees between the ages of sixty-five and sixty-nine who served in a “bona fide executive” or “high policymaking” position for at least two years before retirement and who are entitled to a

\textsuperscript{26} ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), as amended, includes the following language after “individual”: “and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . [covered by the Act] because of the age of such individual.” 1978 Amendments, supra note 10, at § 2(a).

\textsuperscript{27} See 1978 Conference Report, supra note 25, at 8.

\textsuperscript{28} See 1977 House Report, supra note 6, at 7-8; see 1977 Senate Report, supra note 5, at 9-10.

\textsuperscript{29} 1978 Amendments, supra note 10, at §§ 2(a) (b).

\textsuperscript{30} See 1978 Conference Report, supra note 25, at 8.

\textsuperscript{31} See 1978 Amendments, supra note 10, at §§ 3(a), 3(b)(1), 3(b)(2), 5(a), amending, 29 U.S.C. §§ 628(b), 631 (1976). The 1978 Amendments also provide for studies by the Secretary of Labor and the Civil Service Commission to determine the effect of raising and removing the age limit respectively. Id. at §§ 5(g)(1)-(2), 6(a)(1)(A)-(C).

\textsuperscript{32} See 1978 Conference Report, supra note 25, at 7. The conferees rejected a proposed Senate amendment to clarify the bona fide occupational qualification exception, finding that it neither added to nor changed the present law. Id.
pension of at least $27,000 may be mandatorily retired. The intent of the conference committee is that only those persons who meet the retirement income test and qualify as a bona fide executive or high policymaking employee will be subject to mandatory retirement. The annual retirement benefit, which may be from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, must be immediate, nonforfeitable, and equivalent to a straight life annuity. In calculating the $27,000 figure, amounts attributable to Social Security, employee contributions and contributions of prior employees are excluded. According to the Senate committee report, this provision is designed to insure that the employee's retirement income reflects the level of retirement income actually provided by the employer who compels retirement.

An employee who qualifies as a bona fide executive under the Fair Labor Standards Act of 1938 and meets additional criteria specified by the conferees qualifies as a bona fide executive under the amendment. To satisfy these criteria, an employee must either head "a significant and substantial local or regional operation of a corporation" or possess comparable or greater levels of responsibility than that of the regional level. Top level executives who do not satisfy the bona fide executive test may nevertheless fall within the exemption if they meet the definition of a "high policymaking" employee—one who has little or no line of authority, but plays a significant role in the development and implementation of corporate policy. As indicated by the Senate Committee report, this amend-

33. ADEA § 12(c)(1), 29 U.S.C. § 631, as amended, provides:
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, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

1978 Amendments, supra note 25, at § 3(a).

34. See 1978 CONFERENCE REPORT, supra note 25, at 9. This requirement should prevent low level managers, supervisors, or blue collar workers from being mandatorily retired under the amendment.

35. 1978 Amendments, supra note 25, at § 3(a). See note 33 supra.

36. See 1977 SENATE REPORT, supra note 5, at 8. The conferees raised the retirement income test of the Senate amendment from $20,000 to $27,000 per year and rejected the Senate provision for cost of living adjustments by the Secretary of Labor. 1978 CONFERENCE REPORT, supra note 25, at 9.


38. As defined by 29 C.F.R. § 541.1 (1977), a bona fide executive is one whose primary duty consists of management.

39. See 1978 CONFERENCE REPORT, supra note 25, at 9. Examples of greater levels of responsibility include heads of major departments or divisions of a corporation, or, in a large corporation, the immediate subordinates of the heads of divisions who also exercise
ment was offered to reduce the possible impact of eliminating mandatory retirement on the hiring and promoting of younger workers. Its purpose is intended to permit employers to replace key workers in order to keep channels of promotion open for younger employees.40

For similar reasons, the 1978 Amendments also permit mandatory retirement of tenured college and university faculty members between the ages of sixty-five and sixty-nine.41 Unlike the bona fide executive exemption, this exemption expires automatically on July 1, 1982.42 According to the Senate Committee Report, the amendment would facilitate the hiring of younger professors, particularly women and minorities, and alleviate the financial burden on already hard pressed institutions of having to retain higher paid senior employees for the increased time mandated by the Act.43

The thrust of the substantive amendments taken as a whole appears to be toward an expansion of the Act's coverage. While it is not clear to what extent the bona fide executive and tenured faculty exemptions will allow older workers who would otherwise be covered to be mandatorily retired,44 the raising and elimination of the upper age limit and the prohibition against mandatory early retirement provisions in employee benefit plans seem to enlarge the Act's protection. This same thrust is evident in the procedural amendments and clarifications.

B. Procedural Amendments

The ADEA provides for enforcement of its substantive provisions by both governmental and private suits.45 However, several procedural pre-requisites must be met before a suit can be initiated. In a private cause of action, an aggrieved employee must notify the Secretary of Labor of his intention to sue sixty days before filing suit and within 180 days after the alleged discriminatory act occurred.46 In a suit by the government, the

Executive authority. Examples provided by the conferees include the chief economist or the chief research scientist of a corporation. Id.

41. 1978 Amendments, supra note 10, at § 3(a).
42. Id. at § 3(b)(3).
43. See 1977 Senate Report, supra note 5, at 8-9. The committee also justified the amendment by noting the difficulty of discharging tenured faculty for cause. Id. at 9.
44. A Senate amendment exempting tenured elementary and secondary public school teachers over 65 from the Act's coverage was rejected by the conference committee. Id. See 1978 Conference Report, supra note 25, at 9.
45. See notes 95-97 and accompanying text, infra.
46. ADEA § 7(d), prior to amendment, provided in pertinent part:
Secretary of Labor is directed by the Act to attempt to eliminate the alleged discriminatory practice through informal attempts at "conciliation, conference and persuasion," before instituting an action.\textsuperscript{47}

Courts have been divided over whether the 180-day notice\textsuperscript{48} and the Secretary of Labor’s compliance with the statutory directive of conciliation\textsuperscript{49} are jurisdictional prerequisites to bringing suit. If they are deemed jurisdictional, the plaintiff’s failure to comply normally bars suit. In contrast, a non-jurisdictional interpretation allows the court to review the circumstances surrounding non-compliance and invoke equitable principles to dismiss the statutory requirement and maintain the suit.\textsuperscript{50}

The 1978 Amendments resolved conflicts in the circuit courts on both issues in favor of the non-jurisdictional interpretation. To accomplish this with the 180-day notification requirement, the Amendments retained the provision but relabelled it a "charge" rather than a "notice of intent to sue."\textsuperscript{51} By this change in the language, the conferees intended to make it

No civil action may be commenced . . . until the individual has given the Secretary not less than sixty days notice [which] shall be filed . . . within one hundred and eighty days after the alleged unlawful practice occurred.


47. 29 U.S.C. § 626(b) (1976). Compliance with this section requires investigation of the alleged violation and attempted conciliation. Conciliation is satisfied upon notification to the violator: (1) of what action constitutes compliance, (2) that back wages may be recovered, (3) of the possibility of legal action, and (4) that the violator will be given an opportunity to respond to the violations in light of the possible remedy. See Usery v. Sun Oil Co. (Delaware), 423 F. Supp. 125, 128-29 (N.D. Tex. 1976).


50. Since federal courts only have jurisdiction statutorily conferred upon them by Congress, see 1 MOORE’S FEDERAL PRACTICE ¶ 0.60, at 608 (2d ed. 1976), a jurisdictional prerequisite is an absolute requirement. If the conditions of jurisdiction are not met, the court must dismiss the case. Fed. R. Civ. P. 12(h)(3).

Generally, where a statute of limitations has run, an individual loses the right to invoke a legal remedy. Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1177, 1185 (1950). Unlike the inability of parties or the court to remedy non-compliance with a jurisdictional prerequisite, noncompliance with the statute of limitations can be waived by the defendant’s failure to raise it as a defense. Fed. R. Civ. P. 12(h)(1). Additionally, the court can toll the statute of limitations or estop the defendant from invoking the statute where equity requires. See generally Comment, Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act, 44 U. OF CHI. L. REV. 457, 459-60 (1977).

51. ADEA § 7(d), note 46 supra, is amended to read in pertinent part: "No civil action may be commenced . . . until 60 days after a charge . . . has been filed with the Secretary. Such a charge shall be filed . . . ." (emphasis added). 1978 Amendments, supra note 10, at § 4(b).
clear that the "charge" requirement is not a prerequisite to bringing suit, thus allowing for equitable modifications for failure of timely notification. The conferees further noted that the language is not intended to alter the purpose of the notice requirement which is to allow timely notification of defendants and afford the Secretary of Labor an opportunity to eliminate the alleged unlawful practices.  

The Amendments apply the same non-jurisdictional approach to the conciliation requirement. Prior to the legislation, employers had successfully argued that the Secretary's non-compliance with the requirement before the expiration of the Act's two year statute of limitations barred the suit entirely. To avoid this result, the conferees amended the Act to provide for the tolling of the statute of limitations during conciliation. The tolling begins when the Department of Labor informs the prospective defendant(s) that it is prepared to commence conciliation, and continues for one year. In the event that the statute still expires, the conferees made it clear that the district courts have equitable discretion to stay any pending actions, thus permitting conciliation to be completed before the suit continues.

A final jurisdictional question arises in determining the correct forum for enforcement of age discrimination: federal courts enforcing the ADEA or state courts enforcing similar state statutes. Two provisions of the

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52. In relabelling the 180-day notification as a "charge," the conferees specifically rejected a Senate amendment that would have completely eliminated the requirement. See 1978 Conference Report, supra note 25, at 12. By retaining the provision, Congress appears to have left open the possibility that a plaintiff could be barred from court where tolling the 180-day charge is not justified by equitable considerations. Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd, 434 U.S. 99 (1977), has been cited by the conferees to support their non-jurisdictional interpretation; it offers some guidance as to when it is appropriate for the court to invoke equitable modifications. The Supreme Court affirmed the tenth circuit's reasoning that untimely notice of intent to file suit did not bar a plaintiff from court because the purposes of the Act were fulfilled when she contacted a Labor Department official who began conciliation and notified the employer 539 F.2d at 1261. It is not clear, however, what other circumstances will merit equitable modifications.


55. See, e.g., Usery v. Sun Oil Co. (Delaware), 423 F. Supp. 125 (N.D. Tex. 1976) (when investigation of alleged discrimination is incomplete and 1 1/2-year delay is inexcusable, Secretary is barred from bringing suit).

56. ADEA § 7(e), 29 U.S.C. § 626(e), was amended by adding: 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 shall be tolled, but in no event for a period in excess of one year. 1978 Amendments, supra note 10, at § 4(e)(1).

ADEA permit states to enforce their own age discrimination laws simultaneously with the federal government's enforcement of the Act. Under section 14(a), if an action is filed under the ADEA, the federal action supersedes any pending state action. Additionally, section 14(b) provides that "no suit may be brought under [the ADEA] before the expiration of sixty days after proceedings have been commenced under the State law. . . ."  

The courts debated whether section 14(b) required an aggrieved individual to seek state remedies as a condition precedent to instituting a federal suit. While section 14(b) was not amended by the 1978 law, the conference committee expressly adopted a non-jurisdictional interpretation which was contained in the report accompanying the Senate amendments. According to the Senate Report, an individual is free to proceed in court under state or federal law; the section 14(b) sixty-day waiting period applies only if the individual proceeds initially under state law and files a concurrent suit in federal court.  

In consistently resolving this series of jurisdictional questions by adopting a less restrictive non-jurisdictional interpretation, these procedural amendments and clarifications show a strong congressional intent to refocus litigation from procedural matters to the merits of the case. While it is clear that the procedural changes expand the Act's protection by facilitating access to the courts, the overall effect of the substantive amend-
ments, although apparently consistent with the procedural changes, demands closer scrutiny.

II. 1978 Amendments—Illusory Expansion?

On first impression, the substantive changes provided by the 1978 Amendments appear to expand the Act’s coverage greatly. A more detailed look at the legislative history surrounding the amendments, however, suggests that the actual broadening effect of these provisions may be less apparent than at first blush.

A. Uncapping the Act

Industry groups criticizing the Amendments predicted that raising the Act’s coverage and restricting mandatory retirement would allow older people to flood the work force, thereby reducing the opportunity for employment and promotion of younger workers, especially women and minorities. In rebuttal to these largely unsupported fears, testimony before the Senate and House committees indicated that only 150,000 to 200,000 older workers in the private sector, representing less than one-half of one percent of the work force, would remain on their jobs if the ADEA age limit were raised. A similar minimal effect was projected for uncapping the limit for federal employees and for restricting mandatory retirement, which previously kept workers between sixty and sixty-five out of the job market.

While industry groups argued that the Amendments would have damaging effects on employers, older employees and society in general, Con-

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65. See 1977 Senate Hearings, supra note 8, at 78 (statement of Marc Rosenblum, Am. Instit. for Research), 70 (statement of Donald Elisburg, Dep’t of Labor), 97 (statement of Michael D. Batten, Kirschner Assoc.). For response to fears about reduced employment for younger workers, see id. at 329 (Labor Dep’t report); 1977 House Hearings, supra note 64, at 79 (statement of Rep. Claude Pepper).
66. See 1977 Senate Hearings, supra note 64, at 236 (statement of Joseph W. Lowell, Jr., U.S. Civil Serv. Comm’n). In 1976, 1,509 of 79,469 retirees, representing 0.6% of the total federal work force, were mandatorily retired after age 70. Id. See also 1977 Senate Hearings, supra note 8, at 185 (statement of Lauren Selden, NRTA-AARP) (A projected 2,000 of 2.3 million federal employees will remain on the job past 70 if the Act is uncapped.).
67. See 1977 Senate Hearings, supra note 8, at 78 (statement of Marc Rosenblum) (An estimated 60,000 workers would be protected under amended § 4(f)(2)).
68. See 1977 Senate Hearings, supra note 8, at 89-90 (statement of Marc Rosemblum), 37 (Special Comm. on Aging report); 1977 House Hearings, supra note 64, at 247-52 (state-
gress was nevertheless persuaded by a large volume of testimony that either rebutted these arguments or raised counter points that outweighed business concerns. While congressional reliance was not misplaced, and the present expansion of the ADEA coverage is laudable, Congress can be criticized for taking such a timid step in light of the overwhelming support for expanding the Act's coverage and in view of public opinion opposing mandatory retirement. Despite urging by interested groups and its own members, Congress failed to eliminate mandatory retirement across the board. The legislators justified retaining the ceiling in the private sector by noting the lack of research on workers above the age of seventy. By uncapping the Act in the federal sector, Congress intended to allow the Government to pave the way as the model employer and apply its lessons to the private sector. This step may be unnecessary, however, since the same information upon which Congress relied to support the present amendments can arguably be applied to support uncapping the Act entirely.

Although the estimates for the minimal increase in the private labor force only reflect the impact of raising the age limit to seventy, the reasons for the small increase between sixty-five and seventy apply with equal or greater force to workers over seventy. Estimates were based on declining labor participation rates for older workers and a trend toward early retirement due to availability of pensions, access to early Social Security benefits and the desire for leisure or second careers. These trends, which are

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69. See 1977 Senate Hearings, supra note 8, at 38-41 (Special Comm. on Aging report), 90-91 (statement of Marc Rosenblum), 320-21, 333-38 (Labor Dep't report). See generally 1977 Senate Hearings, supra note 8, at 354-61 (health and psychological effects of mandatory retirement), 362-70 (productivity of older workers).

70. Groups supporting the prohibition of mandatory retirement include, among others, the National Association of Retired Federal Employees, American Federation of Government Employees (affiliate of AFL-CIO), National Association of Retired Persons/National Retired Teachers Association, American Medical Association, and National Council of Senior Citizens. See 1977 House Hearings, supra note 64, at 10; 1977 Senate Hearings, supra note 8, at 176.

71. A recent Harris Poll indicates that 86% of Americans between the ages of 18 and 64 support the prohibition of mandatory retirement, and only 37% of hiring and firing decision makers support a fixed retirement age. See 1977 House Hearings, supra note 64, at 17.


73. See 1977 Senate Report, supra note 5, at 7.

74. See generally 1977 House Report, supra note 6, at 11-12.

75. See 1977 Senate Hearings, supra note 8, at 329-30, 342-43 (Labor Dep't report).
expected to continue regardless of the amendments, would proportionally restrict any additional increase in the labor force that would result from eliminating the age limit. The increases projected from uncapping the Act in the federal sector lend further support to the argument that totally uncapping the Act in the private sector will have the same diminutive effect on the labor force.

Industry representatives have opposed the Act's increase in the retirement age ceiling on other grounds as well. Incapable older workers would have to be fired rather than be allowed to retire with dignity on a fixed schedule. Employers would be forced to make individual determinations of fitness which are time consuming, less convenient and less equitable than a fixed reference point by age. Since retirement would no longer be certain, employers would also be hindered from predicting staffing needs. Counter arguments, relied on by Congress to raise the age limit to seventy, apply equally toward eliminating the age limit entirely. Chronological age alone has been found to be a poor indicator of performance ability. Further, mandatory retirement often causes financial hardship for older persons and seriously threatens the health and emotional well-being of those who want to remain active and productive through work. In raising the age to seventy, Congress determined that these interests of older workers outweighed industry's inconvenience. Since Congress is willing to force industry to fire for cause or develop standards of fitness to remove employees before the age of seventy, the additional


77. *See 1977 Senate Hearings, supra* note 8, at 185 (statement of Lauren Selden).


79. For studies indicating that chronological age and ability to perform are unrelated, see Green, *Age, Intelligence and Learning, 12 INDUS. GERONTOLOGY* 29 (1972), cited in *1977 Senate Hearings, supra* note 8, at 358-59; McFarland, *The Older Worker in Industry, HARV. BUS. REV.* 505 (1973), cited in *1977 Senate Hearings, supra* note 8, at 362-63; Maier & Kerr, *Capabilities of Middle-Aged and Older Workers, A Survey of Literature, 3(3) INDUS. GERONTOLOGY* 147 (1976), cited in *1977 Senate Hearings, supra* note 8, at 379-88.

The typical retiree's combined package of Social Security, pension and savings reduce pre-retirement income by about one-half, which is further reduced by inflation. *See 1977 Senate Hearings, supra* note 8, at 91 (statement of Marc Rosenblum), 180-81 (statement of Albert E. Gunn).

According to the official judgment of the American Medical Association, "[t]he sudden cessation of productive work and earning power of an individual, caused by compulsory retirement, often leads to physical and emotional illness and premature death" often caused "by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation" that accompanies forced retirement. The AMA further states, "[t]hese losses could be reduced if older persons had more opportunities to remain productive." *See id.* at 176-77 (statement of Albert E. Gunn).

80. *See generally 1977 Senate Hearings, supra* note 8, at 85-86 (statement of Marc Rosenblum).
burden of applying those same standards to the small percentage of workers who voluntarily choose to work beyond seventy is certainly outweighed by the burden on the individuals above that age who need to work for financial or emotional reasons, and who under the present law may be forced out of the job market. Thus, congressional reluctance to uncap the Act is unwarranted when the effect on the labor force is arguably proportional to the minimal impact of raising the age to seventy.

B. Pension Plan Compromise

Like the higher age limit, elimination of mandatory retirement appears on the surface to have expanded the scope of the Act, but upon closer look, this may be misleading. Although it closes a major loophole which previously allowed mandatory retirement, the bona fide pension plan exception contains crucial legislative intent that may restrict additional rights of employees under the Act.81 In response to business concerns about the economic effect of a higher retirement age on private pension plans, including those protected under the Employee Retirement Income Security Act (ERISA),82 the Social Security system and other employee benefit plans, Congress adopted an interpretation of section 4(f)(2) which insulates these pension plans from the amendments.83 The concerns stem from the fact that these plans typically key payment of benefits to a "normal retirement age." Depending on the terms of the plan, payment is usually set between sixty and sixty-five.84 In addition, annual benefits are calculated by factoring in the number of years worked, age and salary, resulting in the accrual of benefits at a higher rate during those years in which salaries are higher.85 Thus, industry representatives were justifiably concerned that raising the age or uncapping the Act would require restructured plans, increased costs, more difficult estimates and perhaps termination.86

In response to the Senate committee's questions concerning potential conflicts between ERISA and the proposed amendments, the Department of Labor stated that an employer would not be required to credit years of service in accruing benefits after the normal retirement age, and that no further accrual of benefits would be required if an employee worked be-

81. See 1978 Amendments, supra note 10, at 52(a).
82. See 29 U.S.C. §§ 1001-1381 (1976). In general, ERISA provides disclosure requirements and standards for the establishment, operation and administration of employee benefit plans designed to safeguard employees and their beneficiaries.
83. See 1977 Senate Report, supra note 5, at 13-16; notes 87-89 and accompanying text infra.
86. See 1977 Senate Hearings, supra note 8, at 159 (statement of Arthur C. Prine, Jr.).
yond the normal age. The Department also maintained that the employer's failure to provide for accruing benefits would not constitute age discrimination under the ADEA. The Labor Department justified this interpretation by relying on the language of section 4(f)(2), sanctioning the adherence to a bona fide pension plan which is not a subterfuge to evade the Act, and by noting that this section "was intended to allow age to be considered in funding a plan and in determining the level of benefits to be paid." Although this explanation expressly referred to plans under ERISA, legislative history clearly indicates that it applies to all pension plans.

While section 4(f)(2) gives the older worker the right to work beyond the normal retirement age, the Labor Department's interpretation of this section in effect removes the employee's right to receive equal pay for that work. If employers exercise their rights to stop the accrual of benefits or to refuse to credit years of service after the normal retirement age, those working beyond that age will receive less compensation in terms of retirement benefits than those who do not work beyond normal retirement. In other words, the individual who chooses to work beyond normal retirement works at a discount because of lost pension benefits.

Contrary to industry fears, this interpretation will result in cost savings to pension plans rather than in increases. The longer the employee remains in the work force, the shorter the period during which retirement payments will have to be made, thus lowering the funding assumptions of the plan. Savings also stem from the added years of accumulated interest while the uncollected benefits remain in the fund and the added years gained by the employer without the cost of contributing to a retirement plan.

87. See 1977 Senate Report, supra note 5, at 14-16.
88. Id. at 16.
89. See, e.g., 1977 Senate Hearings, supra note 8, at 337 (Labor Dep't report asserting that private pension plans need not provide for accrual of benefits after the normal retirement age).
90. According to an official from the Department of Labor, under a typical "defined benefit plan" with a normal retirement age of 60, 29 U.S.C. § 1002(35) (1976), an employee who works for 30 years between the ages of 30 and 60 receives a pension of $7,200 a year upon retirement. (Figure based on a beginning salary of $10,000 a year with no promotions and a standard cost of living increase). In contrast, an employee with the same salary and employment history who works between the ages of 40 and 70 receives a yearly pension of only $3,240 if the employer exercises the right under the Act to stop accruing the employee's benefits at the age of 60. If accrual of benefits continued until 70, the employee would receive a pension of $9,860 for the same work. Interview with Michael McCarthy, Analyst, Wage & Hour Division, U.S. Department of Labor (May 30, 1978).
91. See 1977 Senate Report, supra note 5, at 16. 1976 figures estimate that the Amendments' impact on the Social Security system indicates a certain but relatively small savings. See 1977 Senate Hearings, supra note 8, at 337 (Labor Dep't report) ($644-$832
It is clear from the legislative history that this interpretation played an integral part in rebutting business concerns about existing pension plans and in appeasing the opposition to the Amendments. Whether Congress viewed this as a necessary compromise or an opportunity to determine the impact of a straight equal pay interpretation on existing pension plans, it clearly intended to retain the pension plan exemption. Although the actual effect of this interpretation is hard to predict, the potential inequity is glaring. In order to prohibit mandatory retirement under a bona fide pension plan under section 4(f)(2), Congress may have compromised a basic prohibition of the Act under section 623(a): "It shall be unlawful for an employer . . . [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . . ." 94

C. Bona Fide Executive and Tenured Faculty Exemptions

Compared to both the substantive and procedural amendments, the potential effects of the bona fide executive and tenured faculty exemptions are difficult to predict, in large part due to the dearth of debate on the provisions. In the case of the bona fide executive exemption, the nature of the two-prong test involving income and job definition also adds to this difficulty. As they stand in the conference report, the criteria for identifying a "bona fide executive" or "high policymaking" employee are vague. Regulations promulgated by the Secretary of Labor could remedy this condition and provide needed guidelines for interpretation. In the interim, however, the criteria potentially invite varied interpretations by employers and courts. Likewise, it is difficult to determine what salary level will produce a pension of $27,000 because of the adjustments that must be factored in. It may be sufficient to recognize that Congress has singled
out those employees between sixty-five and sixty-nine who hold significant responsibility and will receive sizable pensions to receive no protection under the Act.

By allowing a group to qualify for mandatory retirement on the basis of income and job responsibility alone without requiring a determination of vocational competence, this amendment on its face contradicts its stated purpose—to broaden and strengthen the Act's coverage and further eliminate arbitrary discrimination based on age. While the purpose of the exemption, to keep promotional channels open for younger workers, must be balanced against the purposes of the Act, there are alternatives to the exemption which would achieve both ends. Existing management techniques to avoid blocked lines of progression for executives include limiting the years of service in any one position, rotating personnel between divisions and offering increased benefits for early retirees. Additionally, employers are already free under the Act to fire for cause or develop performance standards tests under section 4(f)(3). In light of these alternatives, Congress may have been ill-advised to respond totally to business needs by removing this group from the Act's coverage.

Like the bona fide executive exemption, congressional response to concerns of college and university administrators in the form of a temporary tenured faculty exemption may also be too extreme. Although the difficulty of firing tenured faculty for cause and the desire to create jobs for younger professors are important considerations, critics of the provision indicate that less drastic measures more in line with the purposes of the Act were available.

III. CONCLUSION

Eleven years after the enactment of the Age Discrimination in Employment Act of 1967, Congress passed long overdue amendments designed to broaden the Act's coverage, combat arbitrary age discrimination in employment and resolve conflicting court interpretations which impeded the Act's effectiveness. In the procedural realm, the 1978 Amendments achieved this purpose. By adopting a non-jurisdictional interpretation for each procedural requirement at issue, Congress facilitated access to the courts. In contrast, the substantive amendments could restrict as much as

98. See 1977 SENATE REPORT, supra note 5, at 1.
100. Id. at 33. Also statistics indicate that the need for the tenured professor exemption may be lacking. Only .027% of the tenured faculty who are eligible work past age 65.
broaden the Act's coverage. By raising the Act's age ceiling to seventy in the private sector and uncapping the Act in the public sector, the legislators took a needed step toward eliminating age discrimination. In failing to uncap the Act entirely, however, they exhibited a less than total commitment to this cause. The purposes of the Amendments were further frustrated by the removal of two groups from the Act's coverage on the basis of age and type of work without consideration of competency. Finally, the Amendments closed a major loophole in the Act by restricting mandatory retirement pursuant to bona fide pension plans. Although it enabled the employee to work beyond the normal retirement age, Congress compromised the employee's right to receive equal pay for that work.

Examined in their entirety, the 1978 Amendments fall short of their stated purpose. Although legislators cannot be faulted for making concessions when necessary to save legislation, the final outcome of the Amendments suggests that political considerations may have prevailed over congressional commitment to eliminate arbitrary age discrimination in employment.

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