

NOTES

ALL BETTS ARE OFF: HOW EMPLOYERS SHOULD VIEW THE OLDER WORKERS' BENEFIT PROTECTION ACT

The Age Discrimination in Employment Act of 1967 (hereinafter "ADEA" or "Act")¹ prohibits arbitrary discrimination by public and private employers against older employees. However, the ADEA's drafters recognized that employers should not be completely prohibited from distinguishing among their employees based upon age.² More specifically, they believed that the Act should include an exception which would allow employers to vary the levels of benefits paid to older workers.³

To address this specific issue, Congress added §4(f)(2) to the Act.⁴ Legislators maintained that without such an exemption, the Act would discourage employers from hiring older workers due to excessive benefit costs.⁵ As a result, employers were relieved of the duty to provide older workers with equal benefits if they took such action pursuant to the terms of any "bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of (the ADEA)."⁶

Prior to 1989, some courts which had interpreted this provision found that the exemption should be limited to those situations where there was a specific business purpose or cost justification reason for the disparate treatment.⁷ Other courts analyzing §4(f)(2) believed that the burden was on employers to invoke

1. Pub. L. No. 90-202, 81 Stat. 602 (1967), as amended 29 U.S.C. §621 *et seq.* (West 1985 and Supp. 1990).

2. See Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 23 (1967) [hereinafter *Senate Hearings*].

3. In the House, Representative Hawkins sponsored H.R. 13054 as a means of addressing this issue. Senator Javits, introduced S. 788 because the Johnson Administration's bill, S. 830, failed "to provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired." *Senate Hearings, supra* note 2, at 24.

4. 81 Stat. 602, (codified as amended at 29 U.S.C. §623(f)(2) (1985)).

5. Senator Javits believed "the increased costs involved in providing certain types of benefits" to older workers would prejudice employers against older workers. S. Rep. No. 723, 90th Cong., 1st Sess. 14 (1967).

6. 29 U.S.C. §623(f)(2) (1985 and Supp. 1987) provides in relevant part:

It shall not be unlawful for an employer . . . (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [this chapter], except that no such employee benefit plan shall excuse the failure to hire any individual . . . or permit the involuntary retirement of any individual . . . because of the age of such individual.

See also Charles B. Craver, *The Application of the Age Discrimination in Employment Act to Persons over Seventy*, 58 GEO. WASH. L. REV. 52, 96 n. 188 (1989).

7. EEOC v. City of Mt. Lebanon, 842 F.2d 1480, 1492 (3d Cir. 1988); *Betts v. Hamilton County Board of Mental Retardation*, 848 F.2d 692, 695 (6th Cir. 1988), *rev'd sub nom.* Public Employees Retirement System of Ohio v. *Betts*, 492 U.S. 158 (1989); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.) *cert. denied sub. nom.* Cook County College Teachers Union Local 1600, *etc. v. City Colleges of Chicago, Bd. of Trustees*, 486 U.S. 1044 (1988); EEOC v. *Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984).

the exemption as an affirmative defense rather than on employees to plead it as an element of their case.⁸

However, the Supreme Court, in *Public Employees Retirement System of Ohio v. Betts*,⁹ redefined an employer's liability for age discrimination with respect to employee benefit plans. The Court rejected the argument that age-based distinctions in such plans were exempt from coverage only when justified by increased costs or other economic considerations.¹⁰ The Court also struck "a further blow against the statutory rights of older workers,"¹¹ by characterizing §4(f)(2) as a description of the type of employee conduct prohibited in the employee benefit context, and not as an affirmative defense employers must raise.¹² In taking this approach, the Court discarded the ADEA's legislative history, rejected the position of the Department of Justice and Equal Employment Opportunity Commission (EEOC) and overturned more than twenty years of executive branch regulations and judicial precedent.¹³

Congress and the President responded by recently passing the Older Workers' Benefit Protection Act (OWBPA)¹⁴ to strengthen the ADEA. This addendum clarifies that age discrimination in virtually all forms of employee benefits is unlawful.¹⁵ In addition, the OWBPA ensures that older employees will not be forced or manipulated into giving up their rights to seek relief under the ADEA.¹⁶

This note will attempt to analyze these amendments and assess their impact on employers. Part I will examine the history and scope of §4(f)(2). Part II will discuss the *Betts* case and the reasoning behind it. Part III will focus on the OWBPA in detail and will delineate the various changes these amendments bring to the ADEA. Part IV will investigate what areas employers should concentrate on in attempting to comply with the OWBPA. Finally, the note will conclude by suggesting further changes or modifications that must occur within the OWBPA in order for it to achieve its goal of balancing needed protection for older workers with the employers' freedom to design and administer benefit plans.

I. SETTING THE STAGE

When the Johnson Administration proposed an age discrimination bill in 1967,¹⁷ they failed to include a provision preventing age distinctions in employee benefit plans. Congress immediately realized that such an omission would cause

8. *Trans World Airlines, Inc v. Thurston*, 469 U.S. 111 (1985); *Cipriano v. Board of Educ. of N. Tonawanda*, 785 F.2d 51 (2d Cir. 1986).

9. 492 U.S. 158 (1989).

10. *Id.* at 175.

11. *Id.* at 186 (Marshall, J., dissenting).

12. *Id.* at 181. See also Catherine R. Urban, Note, *Section 4(f)(2) of the Age Discrimination in Employment Act: No Justification? Public Employees Retirement System v. Betts*, 24 IND. L. REV. 161, 165 (1991).

13. S. Rep. No. 260, 101st Cong., 2d Sess., reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS at 1519 (hereinafter *Senate Report*).

14. Pub. L. No. 101-433, 104 Stat. 978 as amended by Pub. L. No. 101-521, 104 Stat. 2287 (1990).

15. See *infra* notes 81-106 and accompanying text.

16. See *infra* notes 107-124 and accompanying text.

17. *Senate Report* at 1511. See also Bruce E. Reinhart, Note, *Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have A Plan?*, 135 U.P.A. L. REV. 1055 (1987).

employers to avoid employing older people.¹⁸ It correctly assumed that employers would oppose having to offer older workers the same benefits offered to its younger employees due to cost considerations.¹⁹ As a result, both the Senate and House proposed amendments to their bills which would give employers flexibility in designing their particular benefit plans.²⁰ This addition, eventually known as §4(f)(2), provided specific situations where an employer could offer distinct benefit plans to its different employees and was included in the final version of the ADEA.²¹

Responsibility for enforcing this new law fell to the Department of Labor (DOL).²² As part of this duty, the DOL attempted to interpret §4(f)(2). The DOL's findings resulted in what has come to be known as the "equal benefit or equal cost" principle.²³ Under this concept, an age-based distinction is allowed for employee benefits provided it is justified by age-related cost increases for benefits.²⁴

In the ensuing years a conflict arose among courts about whether an employee benefit plan that pre-dated the ADEA and which caused involuntary retirement was authorized under §4(f)(2).²⁵ The Supreme Court attempted to resolve the issue in *United Air Lines v. McMann*²⁶ by holding that an employee benefit plan which preceded the ADEA could not constitute a subterfuge to evade the statute or its purposes.²⁷

Congress reacted swiftly to the *McMann* holding by reemphasizing the "equal benefit or equal cost" interpretation of §4(f)(2). This interpretation was codified in part in the 1978 amendments to the ADEA.²⁸ These new amendments rejected the Court's ruling in *McMann* by stating that no employee benefit plan shall require or permit the involuntary retirement of any individual because of the individual's age.²⁹ However, Congress neglected to revise or repeal the term

18. *Senate Hearings* at 6 (prepared statement of Senator Javits).

19. *Id.* at 24 (prepared statement of Senator Javits).

20. 113 CONG. REC. 34,439, 34,754 (1967).

21. The proposed amendment to §4(f)(2) was described by Senator Javits as a "fairly broad exemption for bona fide retirement and seniority systems." 113 CONG. REC. 34,746 (1967); the bill which finally became law was the Senate bill, modified somewhat by the language of the House bill. 1967 U.S. CODE CONG. & ADMIN NEWS at 2213.

22. *Senate Report* at 1512. See also Pub. L. No. 90-202, §§ 6-7, 81 Stat. 602, 604 (1967)(original Act gave responsibility of administration to Secretary of Labor).

23. See 29 C.F.R., Section 860.120(a)(1970).

24. *Id.* See also *Senate Report* at 1513.

25. Compare, *Brennan v. Taft Broadcasting, Co.* 500 F.2d 212 (5th Cir. 1974)(mandatory retirement pursuant to an employee benefit plan that pre-dated the ADEA was lawful); with, *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976)(under §4(f)(2), a forced, age-based retirement pursuant to a pre-ADEA plan would be considered a "subterfuge" to evade the ADEA absent an employer's showing of a legitimate business purpose for such an action)

26. 434 U.S. 192 (1977).

27. *Id.* at 196.

28. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-556, §2(a), 92 Stat. 189 (1978) codified as amended at 29 U.S.C. §523(f)(2) (1982) (hereinafter 1978 Amendments). See Judith A. McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C.L. REV. 347 (1988); Thomas W. Millet, Note, *Federal Age Discrimination in Employment Act: The Pension Plan Exception After McMann and the 1978 Amendments*, 54 NOTRE DAME L. REV. 323 (1978).

29. See 1978 Amendments. The House Conference Report accompanying these amendments made clear that the purpose of §4(f)(2) was to "make absolutely clear one of the original purposes of this

"subterfuge" or any part of the surrounding language of §4(f)(2), and thus the term's meaning remained unclear.³⁰

Another attempt at clarifying §4(f)(2) occurred a year later when the DOL added a provision to its interpretative regulations on employee benefits.³¹ This addition reiterated the earlier concepts of cost justification. It also specified that the only cost relevant to the issue of subterfuge was the cost of the particular challenged benefit.³²

When enforcement authority for the ADEA was transferred from DOL to the EEOC in July of 1979, these interpretative regulations were unaffected.³³ In fact, prior to *Betts*, many courts addressing issues under §4(f)(2) relied extensively on the regulations as a basis for their holdings.³⁴ However, other courts expressly repudiated the position taken under the 1979 regulations.³⁵ This conflict forced the Supreme Court to address this issue in *Public Employee Retirement System of Ohio v. Betts*.³⁶

II. THE CONTROVERSY IS SPARKED

In 1933, Ohio established the Public Employees Retirement System of Ohio (PERS), which provides state and local employees with retirement benefits in one of two forms.³⁷ First, PERS offers retirement benefits based upon age and service. Additionally, it extends disability benefits to employees who are under the age of sixty and who have at least five years of service.³⁸

In 1976, amendments to the PERS statutory scheme mandated that disability payments constitute at least thirty percent of the employee's final salary.³⁹ However, the amendments failed to include a corresponding minimum payment in the case of age and service benefits.⁴⁰ This distinction was at the heart of the controversy in *Betts*.

provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age." H.R. CONF REP NO. 950, 95th Cong, 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 528, 529. See also Stephen S. Rappoport, *Age Discrimination A Legal and Practical Guide for Employers*, (1989).

30. See Daniel O'Meara, *Protecting the Growing Number of Older Workers*, (1989).

31. The amendment provided in part:

[w]here employee benefit plans do meet the criteria in Section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker, is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met.

29 C.F.R. §860.120 (1979).

32. 29 C.F.R. §860.120(d)(1) (1979).

33. Reorg. Plan No. 1 of 1978, 3 C.F.R. Section 321, reprinted in, 92 Stat. 3781 (1978). See also 44 Fed. Reg. 37974 (1979).

34. See *supra* notes 7-8 and accompanying text.

35. *Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.) cert. denied, 456 U.S. 975 (1982); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974); *Germann v. Levy*, 553 F.Supp. 700 (N.D. Ill. 1982).

36. 492 U.S. 158 (1989).

37. *Id.* at 162.

38. *Id.*

39. *Id.* at 163.

40. *Id.*

The case concerned a woman named June M. Betts who had been employed since 1978 by a county agency covered by PERS.⁴¹ In 1985, upon reaching the age of 61, Betts had to retire from the agency as a result of health problems.⁴² Despite her medical condition, Betts' age precluded her from receiving disability payments under PERS.⁴³ Moreover, the age and service benefits to which she was entitled amounted to less than one half of the minimum disability payments she would have received, because there was no thirty percent floor with respect to age and service benefits.⁴⁴

Consequently, Betts filed a charge against PERS with the EEOC.⁴⁵ She also brought suit in federal court maintaining that PERS violated the ADEA by refusing to grant her application for disability benefits.⁴⁶ The district court granted summary judgment for Betts, concluding that the PERS plan was not entitled to protection under §4(f)(2), and a divided panel of the Sixth Circuit affirmed the decision.⁴⁷ However, the Supreme Court shocked the employment world by reversing these holdings in a carefully drafted opinion.⁴⁸

First, the Court reasoned that a benefit plan adopted prior to the enactment of the ADEA could not constitute a subterfuge to evade the purpose of the Act.⁴⁹ It reached this result by finding that although the 1978 amendments to the ADEA altered the outcome in *McMann*, the amendments' language failed to have an impact on the term "subterfuge."⁵⁰ Accordingly, the court found that the term should be given its ordinary meaning, and that employee benefit plans adopted prior to the ADEA's enactment could not be a subterfuge.⁵¹

Second, the Court applied its definition of subterfuge and determined that a plan which denied benefits on the basis of age would only constitute a subterfuge when employers intended the plan to discriminate in some non-fringe benefit aspect of the employment relationship.⁵²

Third, and most importantly, the Court held that the general prohibition on discrimination under the ADEA did not apply to employee benefit plans.⁵³ This view of §4(a)(1) sharply contrasted with that of those courts who had previously addressed this issue.⁵⁴ In the past these courts tended to find a *per se* violation of that provision if age caused an employee's benefits to be reduced or eliminated.⁵⁵

Finally, the Court shifted the burden of proof in §4(f)(2) cases. The Court decided that it was up to the employee to show that an employer's plan was

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* See also 848 F.2d 692 (6th Cir. 1988).

48. See *infra* notes 49-56 and accompanying text.

49. *Betts*, 492 U.S. at 168.

50. *Id.*

51. *Id.*

52. *Id.* at 177. The Court interpreted the ADEA's legislative history to support this proposition. See also Rappoport, *supra* note 29, at 352.

53. *Betts*, 492 at 177. The Court concluded that "Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment." *Id.*

54. See *supra* notes 7 and 8.

55. *Karlen*, 837 F.2d at 320; *City of Mt. Lebanon*, 842 F.2d at 1494.

implemented with an intent to discriminate when the employee brought an action under the above portion of the statute.⁵⁶

The potential effect of *Betts* was quite favorable to employers. It appeared to insulate employers from virtually any claim surrounding employee benefits.⁵⁷ The ruling exempted any *bona fide* benefit plan established prior to the ADEA from scrutiny under the Act.⁵⁸ With regard to post-ADEA benefit plans, *Betts* allowed an employer to implement age-based distinctions in benefit plans which were not justified by differences in plan costs.⁵⁹ As long as an employer made sure the benefit plan did not violate the express provisions of the Act, employees were prevented from utilizing the ADEA to attack the plan.⁶⁰

Additionally, with the burden of proof placed on the employee to demonstrate that their particular plan's features adversely affected some non-fringe benefit aspect of the employment relationship, employers could be confident of prevailing on this issue in the future.⁶¹ Employees would find it considerably difficult to overcome the "severe evidentiary and practical obstacles" needed to prove discrimination with unlawful motives.⁶²

Consequently, Congress attempted to equalize the positions of both sides through the passage of the Older Workers Benefit Protection Act.

III. CONGRESSIONAL REACTION

Congress' reaction to the stunning decision in *Betts* was swift. Both the Senate and House wasted little time in drafting legislation designed to refute the position enunciated by the Supreme Court.⁶³ Underlying these various proposals

56. *Betts*, 492 U.S. at 181. Applying its reasoning to the case, the Court noted *Betts* had not met the burden of showing that PERS intentionally discriminated in a non-fringe benefit aspect of employment. Thus, the Court believed summary judgment was inappropriate and remanded the case to give *Betts* a chance to show a genuine issue of material fact existed. *Id.* at 181-82.

57. See Rappoport, *supra* note 29, at 358.

58. See *supra* notes 49-51 and accompanying text. See also Robert Mirabella, Comment, *Age Discrimination in Employee Benefit Plans and the Scope of the Section 4(f)(2) Exemption: Public Employees Retirement System v. Betts*, 32 B.C.L. REV. 273 (1990);

As one individual testifying on behalf of S. 1511 stated, "*Betts* has the potential to permit employers who have been discriminating the longest - those with benefit plans that pre-date the ADEA - to continue to discriminate with absolute immunity. The worst offenders are [thus] permitted to continue to discriminate.

Older Workers Benefit Protection Act, S. Hearing 101-308, 101st Cong., 1st Sess., 184 (1989).

59. See *supra* note 49 and accompanying text. See also *Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir. 1989) (county that adopted a new formula for computing service and disability retirement benefits after the ADEA was made applicable to it did not violate the Act, because there was no showing that the formula change demonstrated the county's intent to discriminate in some non-fringe benefit aspect of the employment relationship); cf. *Mitchell v. Mobil Oil Corp.* 896 F.2d 463 (10th Cir.) *cert den* 111 S.Ct. 252 (1990).

60. *EEOC v. Chrysler Corp.*, 729 F.Supp. 1002 (S.D.N.Y. 1990); See also Stephen N. Shulman & Charles F. Abernathy, *The Law of Equal Employment Opportunity* (1990).

61. See *supra* note 53. *EEOC v. Bethlehem Steel*, 727 F.Supp. 952 (E.D. Pa. 1990); *Gabarczyk v. Bd. of Educ. of Sch. Dist. of Poughkeepsie*, 738 F.Supp. 118 (S.D.N.Y. 1990). See also Joseph E. Kalet, *Age Discrimination in Employment Law* (2d ed. 1990).

62. *Betts*, 492 U.S. 158, 186 n.5. (Marshall, J., dissenting); See Craver, *supra* note 6, at 97-98. See also Neil H. Abramson, *Early Retirement Incentives under the ADEA*, 11 INDUS. REL. L.J. 323 (1989).

63. See S. 1293, 101st Cong., 1st Sess. (1989); S. 1511, 101st Cong., 1st Sess. (1989); H.R. 3200, 101st Cong., 1st Sess. (1989). Eventually the Senate focused on S. 1511 and persuaded the House to consider this version in lieu of H.R. 3200. See *infra* notes 69-77 and accompanying text.

was the desire to reaffirm the supposed original meaning of §4 of the ADEA.⁶⁴

Supporters of the provisions included the EEOC, senior citizen organizations and certain civil rights groups.⁶⁵ They claimed the legislation was necessary to prevent what they thought would be unfair treatment of older workers.⁶⁶ Opponents to the proposed amendments enjoyed the backing of other organizations and businesses.⁶⁷ They responded by arguing that the legislation would hurt those it was designed to protect because of its harsh repercussions.⁶⁸

However, aversion to the proposals, was not limited to lobbyists.⁶⁹ In the Senate, those against S. 1511 voiced concern that measures which prohibited an employer from replacing long-term disability benefits and severance pay without the worker's approval would adversely affect voluntary early retirement programs.⁷⁰ They also believed such action would hurt other similar benefit packages.⁷¹

Resistance was also apparent with regard to the original language in S. 1511 requiring that early retirement plans clearly satisfy all three specifically stated purposes of the ADEA.⁷² The sentiment was that this standard would be too onerous for employers.

Additionally, those opposed to the new measures fought against language which would have allowed employers to "integrate" or offset disability and severance payments with accrued pension benefits only when an employee voluntarily retired.⁷³ It was thought that if that language remained, the amendments would have severely curtailed an employer's flexibility in this area.

Finally, the proponent's attempts to make the bill retroactive to the date of *Betts* was contested on the grounds that it would be unfair to ask employers to have foreseen the passage of this bill.⁷⁴

64. See 135 CONG. REC. S9949(daily ed. Aug 3, 1989)(statement of Sen. Pryor): [this bill] would amend section 4(f)(2) by deleting the term "subterfuge" and codifying [the] EEOC's long-accepted equal benefit or equal cost test. . . . The bill would also assure that pre-1967 employee benefit plans are subject to the provisions of the ADEA, and assure that the 4(f)(2) exclusion is an affirmative defense under the ADEA, and the employer has the burden of proving that defense.

Id.

65. These included the American Association of Retired Persons (AARP), the National Senior Citizens Law Center and UNUM Life Insurance Company. See *Older Workers Benefit Protection Act*, S. Hearing 101-308, 101st Cong., 1st Sess. (1989) (hereinafter OWBPA Hearings).

66. At the OWBPA hearings on this matter, Horace Deets, Executive Director of the AARP, thanked Congress for the "opportunity to express [the] AARP's strong support for legislation that would restore the rights of older workers to fair treatment in employee benefits." *Id.* at 168.

67. Among those who voiced concern were the Association of Private Pension and Welfare Plans, the Chamber of Commerce of the United States, the National Association of Manufacturers and the ERISA Industry Committee.

68. Mark S. Dichter represented the aforementioned organizations at the hearing and testified that "[t]he [bill] would also result in the elimination of many early retirement programs. Thus, the older workers that we all want to protect would be best served by the defeat of S. 1511/ S. 1293." OWBPA Hearings at 265.

69. *Senate Report* at 1550-1551.

70. *Id.* at 1559-1560.

71. *Id.*

72. See 136 CONG. REC. S13,599 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch). See also *infra* note 130.

73. *Senate Report* at 1559.

74. *Id.* at 1562.

Following compromise on each of these issues, the Senate eventually adopted an amended version of S. 1511.⁷⁵ The result, known as the Older Workers Benefit Protection Act, still remained particularly weighted against employers. In fact, many who agreed to the compromise continued to have concerns about the long-term effect of the proposal.⁷⁶ However, the bill progressed through the House and was eventually signed into law by President Bush.⁷⁷

The OWBPA basically consists of two sections. Title I reverses the holding in *Betts* through a number of intricate changes and additions to §4 of the ADEA.⁷⁸ Title I's main purpose is to codify the cost justification requirement on employers set forth in the Code of Federal Regulations (CFR) and accompanying documents. Title II addresses the issue of waivers and releases of age discrimination claims.⁷⁹ This part imposes a series of tests which employers must satisfy before a court may consider whether a "knowing and voluntary" waiver has occurred.⁸⁰

A. Employee Benefits

Title I begins by reasserting Congress' opposition to discrimination against older workers in the employee benefit area.⁸¹ It states that *Betts* made these changes necessary.⁸² In order to rectify the apparent effect of *Betts*, this section makes six major alterations to the current language of the ADEA.

The amendments clarify that the ADEA's prohibition against age discrimination in "compensation, terms, conditions or privileges of employment" covers

75. See 136 CONG. REC. S13,613 (daily ed. Sept. 24, 1990).

76. *Id.* at S13,599 (statement of Sen. Hatch) ("I would not be surprised if we are back on the floor of the Senate in 2 or 3 years time debating amendments to this very bill"); Senator Grassly also voiced his uneasiness about the proposal when he stated,

I am not sure we have seen the last of this legislation. As I noted earlier, employee benefit law is extremely complicated. Furthermore, we have not considered this legislation under the best of circumstances, by which I mean that we really have not had much time to consider [the final] version of the bill.

Id. at S13,608.

77. Passed in House on October 3, 1990. 136 CONG. REC. H8738 (daily ed. October 3, 1990); The President signed it into law on October 16, 1990.

78. See *infra* notes 81-106 and accompanying text.

79. See *infra* notes 107-124 and accompanying text.

80. Prior to the Act, the test to determine the validity of the release of ADEA claims was grounded in the analysis that has been applied to claims arising under Title VII, 42 U.S.C. §2000e *et seq.* Specifically, it was that an employee could validly waive claims of discrimination so long as the waiver was made "knowingly and willfully." See *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).

Other courts have applied the "totality of the circumstances" approach, or aspects of it, described in *Coventry* to evaluate the release form itself and the circumstances under which it was executed. Among the factors they considered were (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law. See *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988); See also, *Lancaster v. Buick Buick Honda Co.*, 809 F.2d 539 (8th Cir.) *cert den.* 482 U.S. 928 (1987); *Rogers v. General Electric Co.*, 781 F.2d 452 (5th Cir. 1986); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983).

81. Older Workers' Benefit Protection Act, Pub L. No. 101-433, §101, 104 Stat. 978 (1990).

82. *Id.*

all employee benefits, including those given through a *bona fide* employee benefit plan.⁸³ This wording expressly refutes the Court's finding in *Betts* that ADEA §4(a)(1) did not apply to employee benefits. The Senate Report added that Congress placed this language here, instead of with §4(a)(1), for a very specific reason.⁸⁴ It wanted to reestablish that the ADEA prohibitions on discrimination must be interpreted in a way similar to the language prohibiting discrimination in employee benefits under Title VII.⁸⁵ Congress also clarified that, while every benefit would now be subject to §4(a)(1) concerns, the amendment would not affect any limitations courts had imposed on the types of benefit plans that are protected by §4(f)(2).⁸⁶

Title I next addresses the controversial term "subterfuge" and removes it from the language of §4(f)(2).⁸⁷ By codifying the "equal benefit, equal cost" principle, Congress has affirmed the policy that age discrimination with respect to employee benefits will only be tolerated when similar benefits will result in unequal costs for the employer.⁸⁸

There are two different types of cost comparisons which an employer may utilize to satisfy this standard. If the employer chooses to invoke what is known as a "benefit by benefit" cost comparison analysis, the employer is required to compare benefit costs for employees who differ in age. Under this approach, the employer will make any adjustments in the benefit amount or level on an individual benefit basis. Alternatively, the employer can make the necessary calculations using a "benefit package cost comparison," so that cost comparisons and adjustments are made for covered plans in the aggregate. This method is well suited for "cafeteria style" benefit programs in which an employer designates a specified dollar amount that can be used by each eligible employee to purchase what benefits the employee finds desirable.⁸⁹ Note, however, that an employer is not allowed to invoke this method under certain circumstances.⁹⁰

There are notable exceptions to the "equal benefit equal cost" requirement. The amendment specifically allows for discrepancy among early retirement plans so long as the action taken is consistent with the relevant purpose or purposes of the Act.⁹¹

83. *Id.* at §103.

84. *Senate Report* at 1522.

85. *Id.*

86. *Id.* at 1523.

87. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §103(1), 104 Stat. 978 (1990).

88. *Id.* at §103(2)(B)(i). The cost consideration need not be actuarially based, but employers must use reasonable data to justify lower benefits. Employers must also indicate the actual cost which would be incurred if the benefit were provided over a certain number of years. See Thomas J. Wiencek, *How the Older Workers' Benefit Protection Act affects employers*, 37 PRAC. LAW. 69, 71 (1991). See also *infra* notes 133-34 and accompanying text.

89. Wiencek, *supra* note 88, at 71.

90. The benefit package approach is not permitted (1) for benefit plans that do not fall within an employee benefit plan exception; (2) for retirement or pension plans; (3) to justify reductions in health insurance benefits greater than would be justified under a benefit by benefit system; or (4) to justify any benefit reduction greater than one that would be claimed under the benefit by benefit approach unless the employer offsets this reduction by offering the employees another benefit. See Wiencek, *supra* note 88, at 72.

91. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, § 103(2)(B)(ii), 104 Stat. 979 (1990). The sponsors of this proposal emphasized that the ADEA has employed such a standard for over 20 years. The common approach has been to consider only the purpose or purposes that are

Additionally, the new language carves out an exception for the two most widely used types of early retirement incentives: pension benefits and social security "bridge" payments.⁹² Employees participating in these type of incentive programs can sue for age discrimination only if they demonstrate that their participation was involuntary.⁹³ They may not rely on the theory that such a plan was not consistent with the relevant purpose or purposes of the Act. However, employers who establish minimum ages as a condition of eligibility for early or normal retirement benefits must also abide by certain requirements.⁹⁴

Title I further emphasizes that employers choosing to utilize this section must recognize it as an affirmative defense.⁹⁵ Contrary to the Court's interpretation in *Betts*, this section clarifies that it is an employer's duty to prove the action taken was lawful.⁹⁶ Once an employee presents a *prima facie* case that an employer violated the statute, the burden shifts to the employer. This burden must be distinguished from the instance where the question arises about the voluntariness of an employee's retirement. In the latter case, Title I reaffirms that the employee, and not the employer, shoulders the responsibility of proving that an early retirement incentive was received involuntarily.⁹⁷

The issue of integration or offsetting disability and severance payments with accrued pension benefits is settled through Title I as well.⁹⁸ The amendments provide that only when an employee decides to begin receiving a pension or reaches normal retirement age, can an employer integrate long term disability payments with pension benefits.⁹⁹ Severance reductions are now only permitted in proportion to the retiree health benefits an employer offers.¹⁰⁰ Employers should also note that in the case of a plant shutdown, the added benefits or "sweeteners" extended to older workers can now be offset against normal severance pay.¹⁰¹

relevant to the issue at hand. The Report notes that the purpose implicated in considering an early retirement incentive plan or any particular feature of that plan is the purpose of prohibiting arbitrary age discrimination in employment. 136 CONG. REC. S13,596 (daily ed. Sept. 24, 1990).

92. *Id.* at §§ 4(l)(1)(A), 4(l)(2)(A). A social security "bridge" payment is usually a fixed monthly payment intended to substitute for social security benefits that will become available to the person participating in the plan either at age 62 (when they are eligible for reduced Social Security benefits) or age 65 (when they are eligible for unreduced Social Security benefits). *Senate Report* at 1526.

93. *Senate Report* at 1526. *See also* 136 CONG. REC. S13,600 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch).

94. An employer must show that this type of plan feature is a permanent part of a pension plan, that it is subject to modification in a prospective basis by amendment of the plan, and that this modification is consistent with any other applicable law. This permanent plan feature must be continually available to participants in the plan who satisfy the eligibility requirements, regardless of whether any unforeseen event occurs. Wiecek, *supra* note 88, at 74.

95. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §4(f)(2)(A), 104 Stat. 979 (1990). *See also* 136 CONG. REC. S13,596 (daily ed. Sept. 24, 1990) (prepared statement of Sen. Metzenbaum).

96. *See supra* notes 53-59 and accompanying notes in text. *See also Senate Report* at 1535.

97. *But see infra* note 128.

98. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §4(l)(2)(F), 104 Stat. 980 (1990).

99. *Id.* *See also* 136 CONG. REC. S13,597 (daily ed., Sept. 24, 1990) (prepared statement of Sen. Hatch).

100. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, § 4(l)(2)(A), 104 Stat. 979. (1990).

101. *See* 136 CONG. REC. S13,600 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch) The original bill restricted the integration of "sweeteners" to situations where an employer also provided a specific package of retiree health benefits. *Id.*

Responding to the inexplicable distinction drawn in *Betts*, Title I ensures that the ADEA will not recognize any difference between pre- and post-ADEA employee benefit provisions.¹⁰² Thus, employers must be aware that subject to the exceptions noted above, any form of age discrimination in employee benefits is prohibited, regardless of when the particular program originated.

The final portion of Title I gives the effective date for these modifications.¹⁰³ Those employee benefits established or modified on or after October 16, 1990, are subject to the OWBPA immediately.¹⁰⁴ Non-collectively bargained private employers, who established benefit programs prior to the OWBPA, enjoyed a 180 day grace period from the date the amendments became effective.¹⁰⁵ As a result, private employers falling into the above category should check that all benefit plans have satisfied the new requirements prior to April 15, 1991.

However, employers covered by collectively-bargained plans are in an unique position. Since they cannot unilaterally alter the affected portions of these plans to comply with the OWBPA, the amendments offer special relief. Employers falling within this particular group have until the earlier of the termination of their current agreement or June 1, 1992, to align themselves with the new laws.¹⁰⁶

B. Waivers and Releases

Title II was enacted to address waivers and releases of age discrimination claims.¹⁰⁷ The goal was to protect older employees from being coerced or manipulated into relinquishing any rights or claims under the Act. The amendments sought to achieve this by developing a series of tests to measure whether

102. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §105(a)(2), 104 Stat. 981 (1990).

103. *Id.* at §105. See also *supra* note 74.

104. *Id.* at §105(a)(1).

105. *Id.* at §105(a)(2).

106. *Id.* at §105(b).

107. For a brief history and analysis of waivers and releases, see 2 HOWARD C. EGLIT, AGE DISCRIMINATION §§ 16.47A, 16.47B (1990). Eglit begins by noting, "[r]eleases of liability are common in all areas of the law: in return for some type of consideration proffered by the defendant, the plaintiff agrees to waive his or her right to pursue legal redress by releasing the claim against the defendant." *Id.* at §16.47A.

S. 54, introduced by Senator Metzenbaum among others, was the predecessor to Title II. It was drafted to resolve the turmoil which resulted from the EEOC's actions in the wake of *Runyan v. NCR*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986). *Runyan* prompted the EEOC to issue a sweeping rule permitting all employees to waive their ADEA rights in almost any circumstance without EEOC approval.

Critics of this policy pushed for reform via S. 54, as they believed the "waiver rule" protected employers by insulating them from liability when the employers enhanced benefit programs in an illegal manner. The proponents to this bill contended that it would protect employees from signing away their rights at a time when they are unable to determine if they were subject to discrimination. Those in favor of S. 54 felt the bill would encourage employers to deal with employees in a fair manner and to structure voluntary and involuntary severance programs in a non-discriminatory manner. These supporters also maintained that the bill equalized the bargaining positions of the employer and employee.

Opponents to the bill testified that while making sure employees have the proper information and time to formulate a decision on a waiver, mandating regulations on such would only serve the purpose of hindering the negotiation process. See *Hearing before the Subcommittee of the Committee on Labor and Human Resources*, 101st Cong., 1st Sess. 102 (1989).

the waiver was made knowingly and voluntarily.¹⁰⁸ Employers should recognize that this section requires the party who asserts the waiver's validity to satisfy each of the tests.¹⁰⁹ Otherwise, the release will fail to meet the knowing and voluntary standard. This section begins by listing the various tests. The law now mandates that the waiver be part of an agreement that can be understood by the average person under similar circumstances.¹¹⁰ The waiver must also specifically refer to rights or claims covered by the ADEA.¹¹¹ Employers may not entice an employee to waive rights or claims which arise subsequent to the signing of the waiver.¹¹² Only rights and claims being exchanged for consideration above that which the employee is already entitled to are capable of being waived.¹¹³ Employers must encourage the employee, in writing, to seek the aid of an attorney prior to signing the agreement.¹¹⁴ Employers shall give employees at least 21 days, or in the case of termination programs offered to a group, at least 45 days to consider the agreement.¹¹⁵ Finally, the employer must incorporate a revocation provision in the agreement allowing the employee to change his mind within seven days of signing.¹¹⁶

Title II also imposes additional obligations on employers seeking waivers in connection with exit incentives or employment retirement programs offered to a group or class of employees.¹¹⁷ At the time the agreement is offered to the affected employee, the employer must provide the following information: the names of those included in the program, the factors determining eligibility and the time period during which the program exists.¹¹⁸ Additionally, the names and job descriptions of those chosen for the program must accompany this information.¹¹⁹ Finally, the employer is required to publish the ages of those working in similar jobs who were not eligible for the program.¹²⁰

Waivers and releases executed in settlement of pending EEOC charges or actions filed in court must satisfy the first five requirements listed above.¹²¹ Time requirements are relaxed in these cases, as employers only have to give a "reasonable" amount of time for employees to consider and sign the agreement.¹²² Thus, in the case of pending agency or court proceedings, the 21 day waiting period does not apply. Employers need not provide a revocation privilege when waivers or releases are obtained in these situations.

Consistent with present ADEA law, Title II specifies that no waiver or release may affect the EEOC's rights and responsibilities to enforce the Act.¹²³

108. See *infra* notes 110-116 and accompanying text.

109. 136 CONG. REC. S13,597 (daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum).

110. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §7(f)(1)(A), 104 Stat. 983 (1990).

111. *Id.* at §7(f)(1)(B).

112. *Id.* at §7(f)(1)(C).

113. *Id.* at §7(f)(1)(D).

114. *Id.* at §7(f)(1)(E).

115. *Id.* at §7(f)(1)(F).

116. *Id.* at §7(f)(1)(G).

117. *Id.* at §7(f)(1)(H).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at §7(f)(2).

122. *Id.* at §7(f)(2)(B).

123. *Id.* at §7(f)(3).

It also precludes an employer from using a waiver to justify interfering with the employee's right to participate in any EEOC action.¹²⁴

IV. WHAT DOES IT ALL MEAN?

Immediate reaction to the OWBPA among employers will probably range from antagonism to resignation. The surprise and happiness which accompanied the announcement of *Betts* will be replaced by trepidation and worry. Employers may fear that the new amendments will hinder and interfere with how they structure benefit packages and waivers and releases.

Although the new changes take a step towards promoting fairness in the area of employee benefits, it is not altogether clear how courts will interpret some of the language found in this section. This is especially true with regard to determining whether voluntary early retirement plans are acceptable. At first glance employers may believe that under the OWBPA the burden is on employees to demonstrate that their retirement was involuntary.¹²⁵ The legislative history indicates that voluntariness is determined among a series of factors which the sponsors considered relevant,¹²⁶ a standard that differs from the original intention of the drafters.¹²⁷ However, as one commentator notes, since the burden of proof is on the employer to show that an early retirement incentive plan is lawful in any civil enforcement proceeding brought under the ADEA, courts are apt to force employers to prove the other element of lawfulness, namely that the plan is voluntary.¹²⁸

Focusing on waivers and releases provides further reason for employers to have concern. The ambiguous language and imprecise standards impose too great a burden on employers and subject them to unnecessary liability.

Until the time for redrafting commences, however, employers must focus on particular points of the enacted law. In Title I, the first relevant language employers should focus on is found at §4(f)(2)(B)(ii).¹²⁹ The current wording allows some latitude for employers to work with when offering voluntary early retirement programs. Generally, the relevant purpose of the Act is to prohibit arbitrary age discrimination.¹³⁰ Employers seeking to satisfy this standard should

124. *Id.* at §7(f)(4).

125. 136 CONG. REC. S13,596 (daily ed. Sept. 24, 1990).

126. Among the factors the committee deemed relevant were: whether the employee had sufficient time to consider his or her options; whether accurate and complete information has been provided regarding the benefits available under the early retirement incentive plan; and whether there have been threats, intimidation and/or coercion. 136 CONG. REC. S13,596 (daily ed. Sept. 24, 1990).

The committee further stated that the burden of proving this issue remains with the employee. *Id.*

127. The original bill would have forced employers to meet every purpose of the ADEA in implementing early retirement incentive plans. Critics of the bill noted that this would have been an impossible burden to meet. *Id.* See also *supra* note 71.

128. Niall A. Paul, *The Older Workers' Benefit Protection Act: Forcing a New Look at Early Retirement Incentives and Waivers*, 17 EMPL. REL. L.J. 29, 37 (1991). While the Manager's Statement to the OWBPA indicates that the language of the Act means that the employee retains the burden of proof regarding the issue of involuntariness, most courts will probably adhere to an opposite standard. The courts will probably attempt to obfuscate the various burdens and require that employers demonstrate that the employee's participation in a plan is voluntary. *Id.* at 40.

129. See *supra* notes 87-94 and accompanying text.

130. See *supra* note 1. Among the relevant purposes of the Act are to promote the employment of older workers based on ability rather than age, to prohibit arbitrary age discrimination in employment, and to help employers and workers find ways to solve the problems associated with age discrimination. *Id.*

find it attainable. Even employers who choose to differentiate among the plans they offer their employees are capable of satisfying this purpose. Furthermore, since the language is flexible, courts interpreting this subsection should employ a liberal approach when checking that a purpose of the plan is to avoid discrimination.

As written, the amendments enable employers to provide early retirement incentives in the form of flat dollar amounts, service-based benefits or a percentage of one's salary to all employees once the workers reach a particular age.¹³¹ Similar treatment would be allowable for pension arrangements. The law also permits an employer to offer a plan that gives employees credit for a designated number of years, provided they attain a certain age and retire within a certain time period.¹³²

Recognizing that the remainder of §4(f)(2)(B) is devoted to the "equal benefit, equal cost" rule, employers must make note of a certain privilege which could affect how they comply with this provision. The Senate Report stipulates that employers seeking to satisfy this rule may base necessary cost data on generally accepted actuarial principles.¹³³ However, cost data may also be determined by looking to other reasonably relevant information such as the effect of aging on disability incidence and costs.¹³⁴

The ability to integrate certain benefits should be considered a minor victory for employers. Employers argued during the drafting stages of the OWBPA, that they possess limited funds to designate for employee benefits.¹³⁵ They claimed they could not afford to allow a select group of employees to collect both forms of payment. The new §4(l)(3) enables employers to offset retiree health benefits and shut down related pension subsidies.¹³⁶ When the detailed requirements for pension benefits are satisfied, the employer may offset these against the workers' disability payments.

Another key point about the new language is that it takes into account the two most common forms of exit incentives—pension subsidies and social security bridge payments.¹³⁷ Officials believe two-thirds of employers provide one of these two opportunities.¹³⁸ This so-called "safe harbor" for these forms of benefits gives employers some freedom in structuring these programs. Employers may continue to set a minimum eligibility age to receive benefits from a pension

131. See *supra* notes 92-94 and accompanying text.

132. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §4(l)(2)(D), 104 Stat. 980 (1990).

133. 136 CONG. REC. S13,597 (daily ed. Sept. 24, 1990) (prepared statement of Sen. Metzenbaum).

134. See *supra* notes 88-90.

135. Senate Report at 1559. Fred Rumack, Executive Director of the Association of Private Pension and Welfare Plans, testifying on the need for integrating benefits, stated, "through this coordination of severance and pension benefits, employers are able to target limited funds available for severance benefits to laid-off long-term employees who are unable to tap their pension resources in order to provide for their needs during unanticipated unemployment." *Id.* citing *Hearings by the Subcommittee on Labor and the Senate Special Committee on Aging*, 101st Cong., 1st Sess., (1989).

136. See *supra* notes 98-101 and accompanying text.

137. See *supra* notes 92-94 and accompanying text.

138. 136 CONG. REC. S13,603 (daily ed. Sept. 24, 1990) (prepared statement of Sen. Pryor).

plan,¹³⁹ for the Act draws an analogy to a similar practice authorized under the Employee Retirement Income Security Act of 1974.¹⁴⁰

Additionally, §4(l)(1)(C) allows employers to provide social security bridge payments to employees who are eligible.¹⁴¹ However, employers must ensure the supplemental payments do not exceed a worker's Social Security benefits. Furthermore employers utilizing these programs should know that they are restricted in attempting to stop payments of these benefits.¹⁴²

The new language in Title II presents greater challenges to employers and must be dealt with carefully. Waivers and/or releases under the ADEA are exercised by employers in a variety of different contexts.¹⁴³ Whether implemented as a result of an individual's discharge or in the case of voluntary or involuntary group layoffs, these agreements provide necessary assurances to the employers.¹⁴⁴ Although Title II doesn't eliminate this opportunity for employers, it forces companies to rethink their approach to this area.

In order to comply with the stringent requirements of the OWBPA, employers must initially come up with an agreement which both sides can comprehend.¹⁴⁵ For this reason, employers must ensure that the language involved is clear and simple. Particular attention must be paid to the employee's background and level of schooling. Employers should also be conscious of the need for translation. No matter how simply worded a release is, it has no value if the worker is not completely proficient in English.

With respect to the litany of requirements described in §7(f)(1)¹⁴⁶, it is advisable for employers to devise a system easily suited to verification. Agreements must be cross-proofed to make sure they address the relevant issues. Employers should carefully scrutinize the document(s) to check that employees are advised to seek legal aid when deciding whether to accept a waiver.¹⁴⁷ Dates pertaining to termination, vesting, etc. should be highlighted and an accurate record of this information maintained. Additionally, an employer has to be cognizant of all previous arrangements which an employee claims fall outside the scope of the

139. Older Workers' Benefit Protection Act, Pub. L. No. 101-433, §4(l)(1)(A), 104 Stat. 979 (1990).

140. *Senate Report* at 1559.

141. *See supra* notes 93-94 and accompanying text.

142. *See Senate Report* at 1527. Enforcement of this provision is administered under Title II of the Social Security Act (42 U.S.C. §401 *et seq.*).

143. *See supra* notes 107-124 and accompanying text. The Senate Report provides three different scenarios in which waivers and releases are utilized. First, where an employee is discharged and offered something of value in exchange for waiving any and all claims associated with the discharge. Second, where a company is forced to resort to involuntary lay-offs, they may try to avoid potential litigation by offering money or benefits in resolution of any claims resulting from the lay-off. Finally, where companies must reduce their operations, they may try to achieve their goal through the use of early-out incentive programs. In this case, employers offer a sufficient sum of money to the employee for retiring early, and the employee agrees not to sue the company for age discrimination. *Senate Report* at 1565.

144. Opponents of the OWBPA expressed concern that employees would accept a generous benefit one day and turn around and sue the next. They saw waivers as a means of stopping disputes short of litigation. *Senate Report* at 1564.

145. *See supra* note 110.

146. *See supra* notes 110-117 and accompanying text.

147. *See supra* note 114 and accompanying text.

agreement.¹⁴⁸ This last recommendation is important since employees may only waive those rights to which they are not already entitled.¹⁴⁹

Employers contemplating exit incentives for a class of employees face even more stringent demands under §7(f)(1)(H) of the ADEA.¹⁵⁰ In order to satisfy those additional requirements, prior planning is a necessity. When evaluating the records of those who qualify for certain programs, employers must realize that the treatment of one employee will affect the entire group.

Employers are also responsible for keeping track of how long an individual is eligible for such a program.¹⁵¹ This information should be available and ready whenever group termination appears imminent. Thus, updating the information is invaluable and should be undertaken prior to any possible group offerings.

Finally, employers are obligated to keep a current list of job titles of those participating in any program.¹⁵² This information should be organized according to department, in order to keep similar job classifications together. To conserve time, employers should track the ages of employees in the same file. This file should be kept above and beyond all other personnel benefit records. Arranging the data in this fashion facilitates organization during group program offerings. The larger the offering, the more important it becomes, because each affected employee is entitled to receive all the aforementioned data when they are offered a waiver.

V. PERHAPS A CHANGE IS IN ORDER

An analysis of the OWBPA would not be complete without offering suggestions on how to improve its effectiveness. While there is little doubt that change was needed as a result of *Betts*, the sweeping reform which arose smacks of the same unfairness it was designed to eliminate. Whether because the amendments were too hastily written or not considered carefully enough,¹⁵³ one can argue that they impose too great a burden on employers. This is particularly true in the area of waivers. The potential effect on employers could be disastrous as they attempt to comply with the costly and rigid requirements necessary for each waiver they seek to offer. For example, it may be difficult for the employer to know what is understood by the average individual when the employer attempts to draft a waiver that complies with the OWBPA. By employing such a standard, the OWBPA is setting employers up for numerous lawsuits.

Similarly, the term "group" as it is applied to a group exit incentive plan is also left undefined. This is troublesome for employers because courts may interpret this word to mean whenever a plan is offered to more than one individual. If interpreted in this manner, the language will have a considerable effect on employers due to the measurable difference in the requirements for

148. See *supra* note 113 and accompanying text.

149. *Id.*

150. See *supra* notes 117-120 and accompanying text.

151. Consistent with the theme of this portion of the amendment, employers should be prepared to provide the employee with this information in writing.

152. See *supra* notes 118-120 and accompanying text.

153. 136 CONG. REC. S13,599 (daily ed. Sept. 24, 1990) (prepared statement of Sen. Hatch). See also *Senate Report* at 1550.

waivers to individuals and the requirements for waivers to workers situated in a class.

A third instance of the ambiguity of the current language may be found by examining the standard listed for determining whether all employees in a group exit plan comprehend the terms of a waiver. As it is worded now, if an employee is able to produce individual workers who did not understand the waiver, then it is possible that all waivers signed in conjunction with a plan would be in jeopardy. Clearly this standard is overly harsh for employers. Although some standard is definitely needed, it must be one that is fair for both sides.

Substantively, one possible alternative to modify the onerous provisions found in §7(f)(1) would be to rescind §7(f)(1)(H)(ii). While this provision may have been designed to safeguard against violations against the Act, the earlier litany of requirements should adequately address that concern.¹⁵⁴ Additionally, if this provision was implemented as a further method of aiding the employee in deciding about a waiver, a question arises as to whether it achieves this goal. Will it mean more data which will confuse the employee? Will it impede the overall goal of reaching an amicable settlement? By eliminating this section, those issues will never arise. Removing this requirement would also cut down significantly on an employer's time in arranging the necessary data for releases.¹⁵⁵

It is arguable that Courts interpreting these provisions will construe them quite strictly. Should this be true, any defect in the aforementioned process would render the waiver invalid. For this reason, the OWBPA should be further amended by reducing or removing the reference to a revocation period under §7(f)(1)(G).¹⁵⁶ With all the time provided employees to decide whether to accept the waiver and all the information they receive to help them with this decision, an "escape hatch" no longer appears to be needed. Allowing this requirement to exist casts uncertainty into the settlement process. It unfairly affects employers who should be able to reasonably rely on the terms of the agreement.

One could also argue that with this last grace period, the earlier time restrictions of the OWBPA¹⁵⁷ will be superfluous. Employees will be tempted to rely on this extra safety net, thereby eschewing early and careful scrutiny of the agreement.

Finally, this provision may tend to cause animosity between employer and employee. Numerous chances at revocation do little to bridge any gaps which exist between the parties. In fact, they may bring about distrust that could result in the employer being less inclined to continue offering such attractive packages.

VI. CONCLUSION

The Age Discrimination in Employment Act emphasizes that an employer may not, in general, differentiate among his treatment of employees. However, exceptions such as §4(f)(2) afford the employer some opportunity to be flexible within the employee benefits realm. While various courts have tended to interpret

154. See *supra* notes 110-117 and accompanying text.

155. The savings attributed to this action could be reflected in the generosity of the benefit package offered.

156. See *supra* note 116 and accompanying text.

157. See *supra* note 115.

these exceptions restrictively, the Supreme Court greatly expanded their dimension in *Public Employees Retirement System of Ohio v. Betts*. The result gave employers wide latitude in their approach to benefit plans.

The OWBPA attempts to rectify this imbalance. One of the main purposes of these amendments is to provide the proper interpretation for §4(f)(2) of the ADEA. However, while the OWBPA provides some needed clarification to the Act, it generates profound obstacles for employers trying to draft employee benefit plans and waivers and releases of ADEA claims.

If the current law is allowed to stand, we are likely to see the pendulum swing in the other direction. Soon it will be the employers who will be considered the oppressed. Some employers may not even survive.

In order to prevent this from happening the OWBPA must be cleaned up. Otherwise the amendments which were designed to provide protection, will have nothing left to protect.¹⁵⁸

Mark D. Pomfret*

158. An alternative proposal to S. 54, by Senators Hatch and Jeffords, would have come closer to the proper balance being urged. Their approach would have preserved an employee's options and choices while at the same time ensuring that the choices were knowing and voluntary. However, their modifications would achieve this without restricting an employee's choice, jeopardizing the employee's chances of receiving benefits, or backing the employee into unnecessary litigation. See also *Senate Report* at 1565.

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