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reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a “factor other than” age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as “reasonable factors other than age” will be scrutinized in accordance with the standards set forth at part 1607 of this title.

(e) When the exception of “a reasonable factor other than age” is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the “reasonable factor other than age” exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

§ 1625.8 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that

*** It shall not be unlawful for an employer, employment agency, or labor organization *** to observe the terms of a bona fide seniority system *** which is not a subterfuge to evade the purposes of this Act except that no such seniority system *** shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual. ***

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(b) Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a “subterfuge to evade the purposes” of the Act.

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the Act.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The “bona fides” of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

[53 FR 15673, May 3, 1988]

§ 1625.9 Prohibition of involuntary retirement.

(a)(1) As originally enacted in 1967, section 4(f)(2) of the Act provided:

It shall not be unlawful *** 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 ***.

The Department of Labor interpreted the provision as “Authoriz[ing] involuntary retirement irrespective of age: *Provided*, That such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2).” See 34 FR 9709 (June 21, 1969). The Department took the position that in order to meet the requirements of section 4(f)(2), the involuntary retirement provision had to be (i) contained in a bona fide pension or retirement plan, (ii) required by the terms of the plan and not optional, and (iii) essential to the plan’s economic survival or to some other legitimate business purpose—i.e., the provision was not in the plan as the result of arbitrary discrimination on the basis of age.

(2) As revised by the 1978 amendments, section 4(f)(2) was amended by adding the following clause at the end:

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and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual * * *.

The Conference Committee Report expressly states that this amendment is intended "to make absolutely clear one of the original purposes of this 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. Rept. No. 95-950, p. 8).

(b)(1) The amendment applies to all new and existing seniority systems and employee benefit plans. Accordingly, any system or plan provision requiring or permitting involuntary retirement is unlawful, regardless of whether the provision antedates the 1967 Act or the 1978 amendments.

(2) Where lawsuits pending on the date of enactment (April 6, 1978) or filed thereafter challenge involuntary retirements which occurred either before or after that date, the amendment applies.

(c)(1) The amendment protects all individuals covered by section 12(a) of the Act. Section 12(a) was amended in October of 1986 by the Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592, 100 Stat. 3342 (1986), which removed the age 70 limit. Section 12(a) provides that the Act's prohibitions shall be limited to individuals who are at least forty years of age. Accordingly, unless a specific exemption applies, an employer can no longer force retirement or otherwise discriminate on the basis of age against an individual because (s)he is 70 or older.

(2) The amendment to section 12(a) of the Act became effective on January 1, 1987, except with respect to any employee subject to a collective bargaining agreement containing a provision that would be superseded by such amendment that was in effect on June 30, 1986, and which terminates after January 1, 1987. In that case, the amendment is effective on the termination of the agreement or January 1, 1990, whichever comes first.

(d) Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals

to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

[46 FR 47726, Sept. 29, 1981, as amended at 52 FR 23811, June 25, 1987; 53 FR 5973, Feb. 29, 1988]

§ 1625.10 Costs and benefits under employee benefit plans.

(a)(1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization

to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals.

The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where 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. The exception must be narrowly construed. The following sections explain three key elements of the exception: