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MANDATORY RETIREMENT FOR PUBLIC SAFETY PERSONNEL

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The Age Discrimination in Employment Act (ADEA)¹ prohibits discrimination on the basis of age against individuals forty years old and above in all aspects of employment. The ADEA applies to government employers as well as to private employers.² As explained in this bulletin, although the Act generally bars mandatory retirement, Congress recently modified the Act to permit such provisions for public safety personnel.

In 1986, Congress amended the ADEA to lift the upper age limit on those protected by the Act (previously, only those age forty to seventy were protected) and abolish mandatory retirement for all but a select few types of employees. Under the terms of the amendment, public safety personnel (police officers, fire fighters, public safety officers, sheriff's deputies, corrections officers, highway patrol officers, jailers, and others in similar occupations)³, were still subject to mandatory retirement policies, but this exemption expired on December 31, 1993. Thus, for the last two and a half years, public safety personnel have been treated like other government employees—not required to retire upon reaching a certain age.

This year, Congress revisited the question of whether public safety personnel should be treated differently, and it reinstated a modified form of the mandatory retirement provision for these employees.

Included in the Omnibus Consolidated Appropriations Act of 1997⁴ is a provision entitled the Age Discrimination in Employment Amendments of 1996.

This provision permanently reinstates the public safety officer exemption retroactively to the date it expired, December 31, 1993. The amendments also broaden the exemption to permit state and local governments to enact new mandatory age requirements for the hiring and retirement of fire fighters and law enforcement officers after September 30, 1996. Note,

1. 29 U.S.C. § 621 et seq..

2. 29 U.S.C. § 630(b) defines *employer* to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency." The courts are split on whether the act covers public employers with fewer than twenty employees.

3. For example, driver's license examiners were held exempt from the act as public safety personnel in *EEOC v. Commonwealth of Mass.*, 864 F.2d 933, 1117 (1st Cir. 1988).

4. Public Law 104-208 (1996).

however, that a state or local government generally may not require public safety personnel to retire before reaching age fifty-five.

There is one important caveat to this last point. The amendments contain a "grandfather clause," which states that if a public safety employee is required to retire pursuant to a requirement of state or local law that was in effect on March 3, 1983, then such mandatory retirement does not violate the ADEA. Thus, it might be possible that a local government had a policy in effect at that time that mandated retirement at age fifty, for example. Under the terms of the amendment, this policy apparently could be enforced once again.

The amendments also require the secretary of Health and Human Services (HHS), in conjunction with the National Institute for and Health, to develop tests to assess the physical and mental fitness of individuals to be fire fighters and law enforcement officers. HHS is required to issue guidelines on these tests by September 30, 2000. After these guidelines are issued, HHS will then promulgate regulations that identify valid, nondiscriminatory job performance tests that employers must use to determine whether individuals are fit for continued employment.

So where does this leave public employers in the meantime? Clearly, they may not reinstate mandatory retirement for employees below age fifty-five, unless, as noted above, they had such a policy in effect in 1983. But to what extent may they require retirement above age fifty-five? Once the HHS guidelines are issued, we will have a better idea of the answer to that question. In the meantime, if an employer chooses to reinstate mandatory retirement for public safety personnel, it must be able to defend the age selected as a bona fide occupational qualification; that is, the employer must be able to demonstrate that the age chosen is justified by experience.

For example, in *Equal Employment Opportunity Commission v. Kentucky State Police*,⁵ a mandatory retirement age of fifty-five for state police officers was struck down as having been established arbitrarily and in violation of the ADEA. Other courts reached different results.⁶

As the courts deal with new challenges to mandatory retirement policies, clearer guidance should emerge. Public employers must consider whether they wish to reinstate mandatory retirement for public safety personnel and, if so, at what age.

5. 860 F.2d 665 (6th Cir. 1988).

6. *Compare* EEOC v. Pennsylvania, 829 F.2d 392 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) (mandatory retirement for state troopers was not justified), *and* Heiar v. Crawford County, Wisc., 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (same); *with* EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) (retirement age based on city's assertion that most younger officers would meet fitness goals was justified), *and* EEOC v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir.), *cert. denied*, 474 U.S. 828 (1985) (retirement age was justified).

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