

Table of Contents

CHAPTER 1. AGE IN AMERICAN SOCIETY AND IN THE AMERICAN WORKPLACE

- § 1:1 Roles of age in structuring society
- § 1:2 The uses and abuses of age distinctions
- § 1:3 Age demographics and the labor force
- § 1:4 Age in the workplace

CHAPTER 2. THE AGE DISCRIMINATION IN EMPLOYMENT ACT—INTRODUCTION

- § 2:1 The Age Discrimination in Employment Act: An
overview
- § 2:2 The ADEA's legislative history
- § 2:3 Interpretive tools: Interpretations, regulations, and Title
VII case law
- § 2:4 Exclusivity of the ADEA as a remedy for age
discrimination in employment
- § 2:5 —Preemption of state provisions by the ADEA

CHAPTER 3. THE AGE DISCRIMINATION IN EMPLOYMENT ACT—WHO IS PROTECTED AND WHICH ENTITIES MUST COMPLY WITH ITS REQUIREMENTS

I. IDENTIFYING THOSE WHO MAY INVOKE THE ADEA'S PROTECTION

- § 3:1 Introduction to the ADEA

A. PROTECTION UNDER THE ADEA

- § 3:2 Age as a benchmark for protection
- § 3:3 —Grievants who are under age 40
- § 3:4 —Claimants who turn 40 during litigation
- § 3:5 —Indirect ADEA claims by under-age-40 plaintiffs
- § 3:6 —Retaliation claimants
- § 3:7 —Disparate class within protected class

B. EMPLOYEE STATUS UNDER THE ADEA

- § 3:8 Employee status as a benchmark for protection
- § 3:9 —Job applicants, employees, and former employees

- § 3:10 —Employees
- § 3:11 —Job applicants
- § 3:12 —Former employees
- § 3:13 —Determination of employment status and burden of proof
- § 3:14 Employment Status as a benchmark for protection—Independent contractors
- § 3:15 Employee status as a benchmark for protection—Contingent workforce

C. HYBRID TEST, ECONOMIC REALITIES TEST, AND COMMON LAW TEST

- § 3:16 Status as a benchmark for protection—Hybrid approach
- § 3:17 —Economic realities test
- § 3:18 —The *Darden* common law agency test

D. STATUS OF DIRECTORS, PARTNERS, SHAREHOLDERS, AND ORGANIZATIONAL MEMBERS

- § 3:19 Employee status as a benchmark for protection—Shareholders and directors
- § 3:20 —Partners and shareholders in professional corporations
- § 3:21 —Organizational members

E. NONFEDERAL PUBLIC OFFICIALS, APPOINTEES, STAFF, AND STATE EMPLOYEES

- § 3:22 Employee status as a benchmark for protection—Nonfederal public officials, their appointees and personal staff, and state employees
- § 3:23 —Policymakers
- § 3:24 —Judges under *Pre-Gregory v. Ashcroft* case law
- § 3:25 —*Gregory v. Ashcroft* decision
- § 3:26 —Elected officials' personal staff members
- § 3:27 —Immediate advisor exception
- § 3:28 —State employees
- § 3:29 —Retaliation claims under the ADEA in the federal sector
- § 3:30 —Tenured university employees
- § 3:31 —Firefighters and law enforcement officers

F. BONA FIDE EXECUTIVES AND HIGH POLICYMAKER EXCEPTIONS

- § 3:32 Employee status as a benchmark for protection—Bona fide executive and high policymaker exceptions

TABLE OF CONTENTS

- § 3:33 — —Legislative history
- § 3:34 — —Definition
- § 3:35 — —Case law
- § 3:36 — —Bona fide executive and high policymaker—
Minimum retirement benefit

G. OTHER EMPLOYEE STATUS

- § 3:37 Employee status as a benchmark for protection—
Testers
- § 3:38 — —Priests and nuns
- § 3:39 — —Conjugal partnerships
- § 3:40 — —Prison inmates
- § 3:41 — —Bankruptcy trustee and debtor
- § 3:42 — —In-house counsel
- § 3:43 — —Employees of national banks
- § 3:44 — —Medical interns and residents
- § 3:45 — —Noncitizens
- § 3:46 — —Apprentices
- § 3:47 — —Volunteers
- § 3:48 — —Members of the armed forces

H. “AGE-PLUS” DISCRIMINATION

- § 3:49 Claimants alleging “age-plus” discrimination

I. INTERFERENCE WITH THIRD-PARTY RELATIONSHIP

- § 3:50 Third party interference
- § 3:51 Third Party Interference—Case law
- § 3:52 — —Nature of the interfering entity and relationship to
the grievant
- § 3:53 Third party interference—Parens patriae standing
- § 3:54 — —Employment agencies and labor organizations
- § 3:55 — —Discriminatory advertising

II. THE ENTITIES THAT ARE REQUIRED TO COMPLY WITH THE ADEA

A. DEFINITION OF AN EMPLOYER UNDER THE ADEA

- § 3:56 Definition of an employer—In general
- § 3:57 — —Commerce power
- § 3:58 — —State instrumentality and interstate agency
- § 3:59 — —Other issues

B. NUMEROSITY REQUIREMENT UNDER THE ADEA

- § 3:60 Numerosity requirement—20 or more employees

- § 3:61 —Definition of a week
- § 3:62 —Annual work force variance
- § 3:63 —Part-time employees
- § 3:64 —Related entities
- § 3:65 — —Successor entities
- § 3:66 — —Joint employers
- § 3:67 —Application to government entities
- § 3:68 —Application to labor organizations
- § 3:69 —Foreign employees of a foreign corporation
- § 3:70 —Plaintiff's burden to establish

C. PENSION STATUS AND TRUSTS

- § 3:71 Modification of benefits—Pension status
- § 3:72 Trusts

D. STATE AND LOCAL GOVERNMENTS

- § 3:73 State and local governments—In general
- § 3:74 —Development of case law
- § 3:75 —*Seminole Tribe* and its aftermath
- § 3:76 —*Kimel* and its aftermath
- § 3:77 —Arm-of-the-state
- § 3:78 —Legislative immunity, qualified immunity, and sovereign immunity
- § 3:79 —Other case law

E. FEDERAL GOVERNMENT

- § 3:80 Federal government—In general

F. RELIGIOUS INSTITUTIONS

- § 3:81 Religious institutions—The ministerial exception
- § 3:82 —Applicability of ADEA
- § 3:83 —Inapplicability of the ADEA
- § 3:84 —Application of Religious Freedom Restoration Act (RFRA)

G. LABOR ORGANIZATIONS

- § 3:85 Labor organizations—In general
- § 3:86 —Collective bargaining agreements requiring arbitration of claims

H. ASSOCIATIONS, AGENCIES, FOREIGN EMPLOYERS, AND NATIVE AMERICAN TRIBES

- § 3:87 Associations

TABLE OF CONTENTS

- § 3:88 Employment agencies
- § 3:89 Foreign employers
- § 3:90 Native American tribes

I. AGENTS OF THE EMPLOYER

- § 3:91 Agents of the employer
- § 3:92 —Bankruptcy trustees
- § 3:93 —State government employees as agents
- § 3:94 —Liability for the acts of the agent
- § 3:95 —Liability of individual employees

CHAPTER 4. THE AGE DISCRIMINATION IN EMPLOYMENT ACT—PROHIBITIONS AND REQUIREMENTS

I. PROHIBITED PRACTICES

- § 4:1 Prohibited practices
- § 4:2 —Section 15 of the ADEA
- § 4:3 Prohibited employer practices
- § 4:4 —Recruiting and hiring practices
- § 4:5 —Compensation
- § 4:6 —Retirement benefits as a form of compensation
- § 4:7 —Harassment
- § 4:8 —Practices involving promotions
- § 4:9 —Other terms, conditions, and privileges of employment
- § 4:10 —Exceptions and Exemptions from the ADEA
- § 4:11 —Demotions and discharges
- § 4:12 —Retirement
- § 4:13 Retaliation by covered entities
- § 4:14 —Who is protected
- § 4:15 —Procedural predicates
- § 4:16 —Federal employees
- § 4:17 —Scope of the retaliation prohibition
- § 4:18 —Adverse employment actions
- § 4:19 —Actions expressed through actions Vis-à-vis third parties
- § 4:20 —Retaliation by labor organizations
- § 4:21 —Good faith as a defense
- § 4:22 —Protected conduct: participation
- § 4:23 —Protected conduct: opposition
- § 4:24 —Examples of protected opposition
- § 4:25 —Limits as to the form opposition may take
- § 4:26 —Reduced Protection for certain employees
- § 4:27 Prohibited labor organization practices

- § 4:28 Prohibited employment agency practices
- § 4:29 Discriminatory advertising by covered entities
- § 4:30 Preferences for older individuals by covered entities
- § 4:31 —ADEA does not recognize a cause of action for reverse age discrimination
- § 4:32 —Benefit Plans
- § 4:33 —Rationale for distinguishing between legal and wrongful preferences
- § 4:34 —Preferences as being required
- § 4:35 Use of proxies for age
- § 4:36 —Retirement status, eligibility for retirement, AND abbreviated future work life
- § 4:37 —High salaries
- § 4:38 —Seniority, tenure, and pension eligibility
- § 4:39 —Other proxies
- § 4:40 —*Hazen Paper Co. v. Biggins*
- § 4:41 —Post-*Hazen Paper* case law
- § 4:42 —*Smith v. City of Jackson* and Current Status of Disparate Impact Theories

II. POSTING AND RECORDKEEPING REQUIREMENTS

- § 4:43 Notice requirements
- § 4:44 Recordkeeping requirements

CHAPTER 5. THE AGE DISCRIMINATION IN EMPLOYMENT ACT—STATUTORY AFFIRMATIVE DEFENSES, REGULATORY EXEMPTIONS, AND WAIVERS OF LIABILITY

I. INTRODUCTION

- § 5:1 Application of the Age Discrimination in Employment Act—Exceptions

II. THE BONA FIDE OCCUPATIONAL QUALIFICATION DEFENSE

- § 5:2 Bona fide occupational qualification defense—Generally
- § 5:3 BFOQ defense—State and local government employers
- § 5:4 Agency interpretations
- § 5:5 Case law defining the BFOQ test
- § 5:6 “Particular business” requirement
- § 5:7 Establishing a particular age
- § 5:8 Deference to administrative and legislative determinations

TABLE OF CONTENTS

- § 5:9 Relevance of employers' costs and motives
- § 5:10 Safety considerations
- § 5:11 Age limits as BFOQs justifying involuntary retirement
- § 5:12 Age limits as BFOQs for hiring
- § 5:13 Jury's role in BFOQ cases

III. REASONABLE FACTORS OTHER THAN AGE EXCEPTION

- § 5:14 Reasonable Factors Other than Age Exception—
Generally
- § 5:15 Reasonable Factor Other than Age Exception—
Affirmative Defense
- § 5:16 What constitutes “reasonable factor other than age”
- § 5:17 What constitutes reasonable factor other than age—
Factors having a correlation with age and the impact
of *Hazen Paper Co. v. Biggins*
- § 5:18 —Post-*Hazen Paper* decisions
- § 5:19 —Cost
- § 5:20 —Post-*Hazen Paper* / *City of Jackson* / *Meacham* Case
Law

IV. EMPLOYEE BENEFITS AND EMPLOYEE BENEFIT PLANS

- § 5:21 Employee benefits and employee benefit plans—
Introduction
- § 5:22 The Older Workers Benefit Protection Act (OWBPA)—
Revised § 4(f)(2)
- § 5:23 — —Coverage of federal employees by the OWBPA
- § 5:24 —OWBPA-amended § 4(f)(2)
- § 5:25 Burdens of proof under § 4(f)(2)
- § 5:26 —Voluntary retirement incentive plans
- § 5:27 Defining benefit—Determining bona fides of a benefit
plan under § 4(f)(2)
- § 5:28 — —Cost-justification factor
- § 5:29 Equal benefit or equal cost principle and § 4(f)(2)
- § 5:30 —EEOC interpretation
- § 5:31 — —The case law
- § 5:32 Pension and retirement benefits under § 4(f)(2)
- § 5:33 —Who is protected under the ADEA
- § 5:34 —Attainment of minimum age for pension and
retirement benefits—Section 4(l)(1)(A) affirmative
defense
- § 5:35 —Pension subsidies and social security bridge
payments—Section 4(l)(1)(A) affirmative defenses
- § 5:36 —Freezing employer contributions and the accrual of
benefits

- § 5:37 — —Retiree health benefits and the ADEA
- § 5:38 — —The 1986 Amendments
- § 5:39 — — —Regulatory activity
- § 5:40 — — —Case law
- § 5:41 — —The 1986 amendments—Cash balance plans
- § 5:42 Application of § 4(f)(2)—Life insurance
- § 5:43 —Sickness and vacation benefits
- § 5:44 —Health insurance
- § 5:45 Severance pay and the § 4(l)(2) affirmative defense
- § 5:46 Application of § 4(f)(2) to disability benefits
- § 5:47 —Reductions—Section 4(l)(3) affirmative defense
- § 5:48 Government benefits
- § 5:49 Section 4(f)(2)'s application—Hiring decisions
- § 5:50 —Question of voluntariness of retirement plans
- § 5:51 —Burdens of proof
- § 5:52 —Implementation of OWBPA
- § 5:53 Safe harbor for age-gearred supplemental benefits for college faculty

V. THE BONA FIDE SENIORITY SYSTEM DEFENSE

- § 5:54 Bona fide seniority system defense—Introduction
- § 5:55 —Defining seniority system
- § 5:56 —Seniority systems—ADEA and Title VII case law

VI. THE GOOD CAUSE EXCEPTION

- § 5:57 Good cause exception

VII. THE MINISTERIAL EXCEPTION AND THE RELIGIOUS FREEDOM RESTORATION ACT

- § 5:58 Ministerial exception and Religious Freedom Restoration Act

VIII. THE FOREIGN LAWS DEFENSE

- § 5:59 Foreign laws defense

IX. THE GOOD-FAITH RELIANCE DEFENSE

- § 5:60 Defense of good faith—Agency pronouncements
- § 5:61 — —Adequacy of the document relied upon
- § 5:62 — — —Instances in which good faith reliance is argued

X. RELEASES FROM, OR WAIVERS OF, LIABILITY

- § 5:63 Releases from liability—Generally

TABLE OF CONTENTS

§ 5:64	Section 7(f) of the OWBPA—The Statute
§ 5:65	—§ 7(f)’s Relevance to federal employees
§ 5:66	—EEOC regulation
§ 5:67	—Knowledge and voluntariness
§ 5:68	—Wording of waiver agreements
§ 5:69	—Waiver of future rights
§ 5:70	—Consideration
§ 5:71	—Time periods
§ 5:72	—Informational requirements
§ 5:73	—Waivers settling charges and lawsuits
§ 5:74	—Burdens of proof
§ 5:75	—EEOC enforcement powers
§ 5:76	Section 7(f)’s requirements—Group termination and reduction programs
§ 5:77	—Identifying exit incentive and other termination programs
§ 5:78	—Other issues
§ 5:79	Section 7(f) of the ADEA—Burdens of proof
§ 5:80	Knowledge and voluntariness
§ 5:81	Requirement of consideration
§ 5:82	Public policy and other limitations on releases
§ 5:83	General propositions regarding releases—Admissibility into evidence—Employer’s effort to secure release from employee
§ 5:84	—Clarity of release’s language
§ 5:85	—Rescission of a release
§ 5:86	—Requesting an employee to sign a release—Violation in and of itself
§ 5:87	—Suit based on a defect in the waiver or the waiver process
§ 5:88	—Other issues
§ 5:89	—Mistakes in benefits—Invalidating releases
§ 5:90	Binding force of invalid releases
§ 5:91	Breach of a release agreement
§ 5:92	Employer’s rights following successful challenge of release
§ 5:93	Releases other than releases of liability

XI. ADMINISTRATIVE EXEMPTIONS

§ 5:94	Administrative exemptions—Apprenticeships
§ 5:95	—Medicare eligibility

CHAPTER 6. ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT IN THE NONFEDERAL SECTOR

I. PRIVATE ENFORCEMENT BY NONFEDERAL GRIEVANTS: ADMINISTRATIVE PREREQUISITES

A. ADEQUACY OF THE CHARGE

- § 6:1 Overview of issues arising prior to filing suit
- § 6:2 Administrative charges
- § 6:3 Complaints
- § 6:4 Elements of an adequate charge—Form
- § 6:5 —Substance
- § 6:6 Expanding the EEOC charge
- § 6:7 Claims not reasonably related to the initial charge
- § 6:8 Expanding the EEOC charge to include claims of retaliation
- § 6:9 Suing an entity not named in a charge—Substantial identity standard
- § 6:10 —Four-part test—Jurisdiction over unnamed individuals
- § 6:11 — —Other approaches for determining jurisdiction
- § 6:12 Location to file a charge
- § 6:13 Defendant's assertion or waiver of untimeliness defense
- § 6:14 Applying alternative statutes to overcome missed deadlines

B. TIMELINESS OF THE CHARGE

- § 6:15 Overview—Time requirements for filing a charge
- § 6:16 Commencement of the time period for filing a charge
- § 6:17 Triggering of the charge-filing period—Identifiable act or decision
- § 6:18 Determining the start of the charge-filing period—Ambiguity
- § 6:19 Clarity of the notice
- § 6:20 Determining start of charge-filing period—Lack of knowledge
- § 6:21 — —Factual scenarios
- § 6:22 Determining the start of the charge-filing period—Continuing violation
- § 6:23 Discriminatory compensation
- § 6:24 Continuing violations—Multiple refusals to hire
- § 6:25 —Present effects of a past wrong
- § 6:26 Lorraine and the Civil Rights Act of 1991

TABLE OF CONTENTS

- § 6:27 Equitable tolling and equitable estoppel applied to charge-filing
- § 6:28 Distinguishing between equitable tolling and equitable estoppel
- § 6:29 Halting running of the charge-filing period—Relevant
- § 6:30 Tolling of statute of limitations
- § 6:31 Equitable tolling and estoppel—Failure to post notices
- § 6:32 Number and placement of postings
- § 6:33 Fraud, deception, and other misconduct as bases for tolling or estoppel
- § 6:34 Reliance on employer’s misconduct required for tolling or estoppel
- § 6:35 Relevance to tolling and estoppel—Absence of intentional misconduct by the employer
- § 6:36 —Absence of intentional misconduct by employer—
Mistakes as basis for equitable relief

C. EEOC PROCEDURES

- § 6:37 Resort to state relief
- § 6:38 —Satisfaction of § 14(b)
- § 6:39 What constitutes a state law satisfying § 14(b)
- § 6:40 What constitutes a state agency satisfying § 14(b)
- § 6:41 Resort to state relief—Satisfying state procedural requirements
- § 6:42 —State time limits
- § 6:43 Filing with the EEOC—Requirement to file with state
- § 6:44 EEOC records and files—Access prior to suit—
Investigatory files
- § 6:45 EEOC records systems
- § 6:46 —Access to files pursuant to Freedom Of Information Act
- § 6:47 Title VII analogy
- § 6:48 Privilege and confidentiality
- § 6:49 EEOC conciliation and its effect on private suits

D. STATUTE OF LIMITATIONS FOR FILING SUIT

- § 6:50 Statute of limitations
- § 6:51 Burden of proof and waiver of defense
- § 6:52 Accrual of cause of action
- § 6:53 Suits brought by the EEOC
- § 6:54 EEOC notice—“Right-to-sue” letter
- § 6:55 Equitable tolling and equitable estoppel
- § 6:56 Equitable estoppel
- § 6:57 Role of the jury in determining equitable relief
- § 6:58 The 60-day waiting period for filing suit
- § 6:59 Stay vs. Dismissal for early-filed suits

§ 6:60 Plaintiff's compliance

II. ENFORCEMENT BY PRIVATE NONFEDERAL GRIEVANTS —THE JUDICIAL PROCESS

A. JURISDICTION

- § 6:61 Jurisdiction of the court
- § 6:62 The complaint
- § 6:63 The answer
- § 6:64 Federal and state court jurisdiction
- § 6:65 Removal from state to federal court
- § 6:66 Venue
- § 6:67 Federal court supplemental jurisdiction
- § 6:68 —Claims arising under state antidiscrimination statutes
- § 6:69 —Damages recoveries as a supplemental issue
- § 6:70 —Other supplemental jurisdiction issues
- § 6:71 —State common-law claims
- § 6:72 Court-appointed counsel
- § 6:73 Availability of jury trials
- § 6:74 Bifurcation of claims in determining right to jury trial
- § 6:75 Legal or equitable claims
- § 6:76 Waiver of right to jury
- § 6:77 Appellate review of jury verdicts

B. REPRESENTATIVE ACTIONS

- § 6:78 ADEA representative actions differ from other federal class action suits
- § 6:79 Some Rule 23 provisions apply to ADEA representative actions
- § 6:80 Tolling the statute of limitations in representative actions
- § 6:81 Notice to opt-in members of ADEA representative action
- § 6:82 Factors to determine whether to issue notice to potential plaintiffs
- § 6:83 Content of the notice in a representative action
- § 6:84 Defining “similarly situated” in a representational action
- § 6:85 Defendant assistance in identifying and contacting notice recipients
- § 6:86 Form of consent in representative actions
- § 6:87 Timing of consent in representative actions
- § 6:88 Effect of an EEOC suit on a representative action

C. JOINING AN EXISTING CASE

- § 6:89 Reliance on a charge filed by another grievant—Single-filing rule

TABLE OF CONTENTS

- § 6:90 Timeliness of claims—Non-charge-filing plaintiffs required for single filing rule
- § 6:91 Piggybacking
- § 6:92 Basis for excusing failure to file a charge
- § 6:93 Joinder
- § 6:94 Survival of a private action following a party's death
- § 6:95 Private suit filed subsequent to EEOC suit
- § 6:96 Private suit filed prior to EEOC suit
- § 6:97 Intervention by the EEOC in private suits

III. ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

- § 6:98 EEOC investigative authority
- § 6:99 Obligation to cooperate with investigation
- § 6:100 Subpoena power
- § 6:101 Access to records and other data
- § 6:102 Conciliation by the EEOC
- § 6:103 —Multiple grievants
- § 6:104 —Consequence of failure to conciliate
- § 6:105 Resort by the EEOC to state remedies prior to filing suit
- § 6:106 The statute of limitations for EEOC suits
- § 6:107 EEOC lawsuits
- § 6:108 —Relation of EEOC to aggrieved persons
- § 6:109 —Other issues
- § 6:110 Jurisdiction as to EEOC suits
- § 6:111 Jury trials in EEOC suits
- § 6:112 Intervention by private grievants in EEOC suits
- § 6:113 —Case law

IV. GENERAL ISSUES FOR BOTH—PRIVATE CLAIMANTS AND THE EEOC IN PURSUING ADEA CLAIMS

- § 6:114 Res judicata and collateral estoppel effects of court decisions
- § 6:115 Applicability of Title VII cases, *Kremer* and *Elliott*, to the ADEA
- § 6:116 Preclusive effect of federal court decisions
- § 6:117 Res judicata and collateral estoppel effects of state administrative determinations
- § 6:118 Res judicata and collateral estoppel effects of federal administrative determinations
- § 6:119 Effect of an ADEA action on state administrative claims
- § 6:120 Discovery

AGE DISCRIMINATION

- § 6:121 —Privileges and confidentiality in the discovery context
- § 6:122 Issues concerning the admissibility of evidence
- § 6:123 —Discrimination against people other than the plaintiff
- § 6:124 —Past actions involving plaintiff and past performance
- § 6:125 —Testimony by individuals other than the plaintiff
- § 6:126 —Admissibility of evidence regarding agency determinations
- § 6:127 —Admissibility of evidence of communication between plaintiff and agencies
- § 6:128 —Settlements and termination agreements
- § 6:129 —Miscellaneous issues

Table of Contents

CHAPTER 7. THE AGE DISCRIMINATION IN EMPLOYMENT ACT—LITIGATION

I. LITIGATING ADEA CLAIMS IN THE JUDICIAL FORUM

- § 7:1 Introduction
- § 7:2 Different routes to proving wrongdoing

A. MATTER OF DISCRIMINATORY INTENT

- § 7:3 Matter of discriminatory intent
- § 7:4 —Quantum of proof as to causation
- § 7:5 —Standard of appellate review

II. INDIVIDUAL DISCRIMINATORY TREATMENT CLAIMS GROUNDED ON CIRCUMSTANTIAL EVIDENCE

A. DISCRIMINATORY TREATMENT ANALYSIS

- § 7:6 Discriminatory treatment analysis—*McDonnell Douglas/Burdine/Hicks/Reeves* paradigm
- § 7:7 —*McDonnell Douglas/Burdine/Hicks* paradigm—
Overview
- § 7:8 — —Legitimate, nondiscriminatory reason
- § 7:9 — —Establishing pretext—The “Burdine” standard
- § 7:10 — —Litigation and appellate review

B. REFUSALS TO HIRE AND TO PROMOTE

- § 7:11 Refusals to hire and to promote
- § 7:12 —Age of person actually hired or promoted
- § 7:13 —Applicant’s qualifications
- § 7:14 — —Overqualified applicant
- § 7:15 — —University faculty tenure decisions
- § 7:16 — —Retaliatory action to deter hiring
- § 7:17 —Applying for the position
- § 7:18 — —Availability of position
- § 7:19 Refusals to recall and to rehire

C. ESTABLISHING PRIMA FACIE CASE OF DISCRIMINATION

- § 7:20 Establishing prima facie case of discrimination

- § 7:21 —Refusal to train
- § 7:22 —Compensation
- § 7:23 —Discipline

D. PRIMA FACIE ELEMENTS OF RETALIATION

- § 7:24 Prima facie elements of retaliation
- § 7:25 —Establishing a claim
- § 7:26 —Adverse employment action
- § 7:27 —Causation
- § 7:28 —Retaliation in the federal employment sector

E. HARASSMENT

- § 7:29 Harassment cases

F. HOSTILE WORK ENVIRONMENT

- § 7:30 Hostile work environment

G. DISCHARGE AND DEMOTIONS

- § 7:31 Discharge and demotion—Demotion cases
- § 7:32 —Discharge cases
- § 7:33 Discharge and demotion cases—Employment contracts
- § 7:34 —Plaintiff's qualifications
- § 7:35 — —Evaluation of qualifications
- § 7:36 — —Second-guessing employer determinations
- § 7:37 — —Point at which performance is at issue
- § 7:38 — —Changed conditions
- § 7:39 — —Judicial estoppel
- § 7:40 —Indicators of satisfactory performance—Salary increases and positive performance appraisals
- § 7:41 — —Length of tenure

H. SAME ACTOR INFERENCE

- § 7:42 Same actor inference

I. EMPLOYER ASSESSMENT

- § 7:43 Employer assessment—Subjective qualifications

J. CONSTRUCTIVE DISCHARGE

- § 7:44 Constructive discharge—Objective standard
- § 7:45 — —Prima facie claim for constructive discharge
- § 7:46 — —Examples

K. TIMING AND AGE

- § 7:47 Establishing a prima facie case—Timing and age of replacements

TABLE OF CONTENTS

- § 7:48 — —Where comparison individual is older than the grievant

L. NONREPLACEMENT OF GRIEVANT

- § 7:49 Nonreplacement of the grievant

M. REDUCTION IN FORCE

- § 7:50 Reduction in force—Cases
- § 7:51 —Plaintiff's qualifications
- § 7:52 — —Question of performance
- § 7:53 — —Transfer rights
- § 7:54 —Express evidence of intent
- § 7:55 — —Requirements
- § 7:56 — —Criticism of the *Williams* formulation
- § 7:57 —Reduced evidence of intent cases

N. LABOR ORGANIZATION CONDUCTION

- § 7:58 Labor organization conduct

O. USE OF STATISTICS

- § 7:59 Establishing prima facie case—Use of statistics
- § 7:60 — —Sample size
- § 7:61 — —Identifying the comparison group
- § 7:62 Establishing age discrimination claim—Use of statistical evidence
- § 7:63 Rebuttal based on statistics

P. RESPONSE AND REBUTTAL

- § 7:64 Responding to prima facie case—Defendant's options
- § 7:65 Rebuttal of circumstantial evidence case
- § 7:66 —Retaliation
- § 7:67 Rebuttal of cases
- § 7:68 —Overqualified plaintiff
- § 7:69 —Lack of versatility
- § 7:70 —Decision-making criteria that are proxies for age

Q. PRETEXT

- § 7:71 Question of pretext
- § 7:72 —Court's initial standard—*Texas Dept. of Comm. Affairs v. Burdine*
- § 7:73 —"Rise" of pretext plus—*St. Mary's Honor Center v. Hicks*
- § 7:74 —"Fall" of pretext plus—*Reeves v. Sanderson Plumbing Products*

R. DECISION MAKER

§ 7:75 Same decision maker for hiring/firing

III. CIRCUMSTANTIAL EVIDENCE IN NON-MCDONNELL DOUGLAS SITUATIONS

§ 7:76 Circumstantial evidence in non-*McDonnell Douglas* configuration

IV. PATTERN-OR-PRACTICE CASES

§ 7:77 Pattern-and-practice claims

§ 7:78 —Reduction in force cases

V. MIXED MOTIVES ANALYSIS

§ 7:79 Application of *Price Waterhouse* mixed-motive analysis

§ 7:80 —Impact of the Civil Rights Act of 1991

§ 7:81 *Gross v. FBL Financial Services* and its progeny

§ 7:82 —Significance for other federal antidiscrimination statutes

VI. DIRECT EVIDENCE CASES

§ 7:83 Direct evidence cases—In general

§ 7:84 —Litigants' burdens

§ 7:85 —Documentary evidence

§ 7:86 —Oral statements

VII. DISPARATE-IMPACT ANALYSIS

§ 7:87 Disparate-impact analysis—In general

§ 7:88 —Employer defenses to a disparate-impact claim

§ 7:89 Disparate-impact claims—Cognizable under the ADEA

§ 7:90 —*Smith v. City of Jackson*—First reviews

§ 7:91 Disparate-impact analysis—Prima facie case

§ 7:92 — —Claims based on disparate-impact vis-a-vis subgroups

§ 7:93 — —Establishing specific causation

§ 7:94 —Response from defendant

§ 7:95 — —Attacking the statistical data

§ 7:96 —Application to cost-based policies

VIII. SUMMARY JUDGMENT, DIRECTED VERDICTS, AND JUDGMENTS AS A MATTER OF LAW

A. SUMMARY JUDGMENT

§ 7:97 Summary judgment

TABLE OF CONTENTS

- § 7:98 —Where intent is at issue
- § 7:99 —Judicial attitudes
- § 7:100 —Pattern-or-practice cases
- § 7:101 —Relevance of *St. Mary's Honor Center v. Hicks*
- § 7:102 —Failure to establish a prima facie case
- § 7:103 — —Discriminatory treatment cases
- § 7:104 — —Disparate-impact cases
- § 7:105 —Rebuttal of prima facie case
- § 7:106 — —Pre-*Hicks* case law
- § 7:107 —Applying the *Reeves* pretext standard

B. COMPARATORS

- § 7:108 Comparators—In general

C. SAME-ACTOR INFERENCE

- § 7:109 Application of “Same Actor” inference

D. REMARKS AND COMMENTS

- § 7:110 Remarks and comments as evidence

E. STATISTICS

- § 7:111 Statistical evidence

F. DIRECTED VERDICTS AND JUDGMENTS AS A MATTER OF LAW

- § 7:112 Directed verdicts and judgments as a matter of law

IX. JURY INSTRUCTIONS AND EVIDENTIARY CONSIDERATIONS

- § 7:113 Jury instructions
- § 7:114 —Discriminatory treatment circumstantial evidence cases
- § 7:115 Mixed-motive jury instructions after *Gross v. FBL Financial*
- § 7:116 Jury instruction regarding pretext
- § 7:117 Evidentiary considerations

X. SETTLEMENTS AND CONSENT DECREES

- § 7:118 Judicial scrutiny of E.E.O.C. settlements and consent decrees

CHAPTER 7A. ARBITRATION AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

I. POLICY REGARDING ARBITRATION

- § 7A:1 Arbitration in the collectively bargained contract setting
- § 7A:2 Presumption in favor of arbitration

II. SUPREME COURT CASES AND THEIR PROGENY

- § 7A:3 Arbitration and the ADEA—Supreme Court cases and their progeny
- § 7A:4 Supreme Court cases and their progeny—*Alexander v. Gardner-Denver Company*
- § 7A:5 —*Gilmer v. Interstate/Johnson Lane Corporation*
- § 7A:6 —*Wright v. Universal Maritime Service Corporation*
- § 7A:7 —*Circuit City Stores, Inc. v. Adams*
- § 7A:8 —*EEOC v. Waffle House, Inc.*
- § 7A:9 —*14 Penn Plaza LLC v. Pyett*
- § 7A:10 —Recent decisions

III. REQUIREMENTS OF ARBITRATION AGREEMENTS

- § 7A:11 Validity of agreements to arbitrate—Knowledge, voluntariness, collective bargaining agreements, and other issues
- § 7A:12 Form and substance of the arbitration agreement

IV. DUE PROCESS PROTOCOL FOR ARBITRATION

- § 7A:13 Due process protocol

V. RELIEF, FEES, AND EXPENSES

- § 7A:14 Relief in the arbitral forum
- § 7A:15 Fees and expenses

VI. SUITS BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

- § 7A:16 EEOC suits

VII. JUDICIAL REVIEW

- § 7A:17 Judicial review of arbitral awards

TABLE OF CONTENTS

VIII. SUBSEQUENT RELIEF

§ 7A:18 Double recoveries

**CHAPTER 8. THE AGE DISCRIMINATION
IN EMPLOYMENT ACT—REMEDIES, FEES,
AND COSTS**

I. GENERAL PROPOSITIONS

- § 8:1 Relief in an ADEA case
- § 8:2 Plaintiff's burden
- § 8:3 Defendant's task
- § 8:4 —Mixed motives cases' *Same Decision* defense
- § 8:5 —After-acquired evidence
- § 8:6 Dual recoveries by the plaintiff
- § 8:7 Eleventh Amendment immunity
- § 8:8 —Application to state governments—*Seminole Tribe*
and *Boerne v. Flores*
- § 8:9 —Application in employment discrimination cases
- § 8:10 Tax treatment of ADEA awards—Generally
- § 8:11 —The *Schleier* Ruling
- § 8:12 —Other issues

**II. MONETARY RELIEF IN ACTIONS INVOLVING
DEFENDANTS OTHER THAN THE FEDERAL
GOVERNMENT**

- § 8:13 Back pay awards
- § 8:14 —Determining when accrual starts
- § 8:15 — —Discharge and demotion situations
- § 8:16 — —Refusal to hire situations
- § 8:17 — —Denial of promotion
- § 8:18 —Cessation of accrual
- § 8:19 —Cessation of accrual because of a post
discrimination, pretrial event
- § 8:20 — —Particular intervening events—Closure of the
plant or elimination of the plaintiff's job
- § 8:21 — — —Plaintiff's resignation
- § 8:22 — — —Incapacity of the plaintiff
- § 8:23 — —Other situations
- § 8:24 —Cessation of accrual because of an offer of
employment, promotion, or reinstatement
- § 8:25 — —Comparability of the job offered to the earlier job
- § 8:26 — —Offer conditioned on giving up claim as affecting
reasonableness of the rejection of the offer
- § 8:27 — —Psychological distress as justifying rejecting an
offer

- § 8:28 — —Discord as justifying rejection of the
reinstatement offer
- § 8:29 —Calculating the amount of back pay due
- § 8:30 — —Continuing violations
- § 8:31 Fringe benefits—Pension benefits
- § 8:32 —Lost pension benefits—Plaintiff hired or restored to
a prior position
- § 8:33 — —Plaintiff is not reinstated
- § 8:34 — — —Relief other than the award of lost benefits in
liquidated form
- § 8:35 —Life insurance
- § 8:36 —Health insurance and health insurance benefits
- § 8:37 —Disability benefits
- § 8:38 —Other fringe benefits
- § 8:39 Mitigation of damages
- § 8:40 —Plaintiff's task
- § 8:41 — —Disability or death and settlement efforts
- § 8:42 — —Comparability and location of the successor job
- § 8:43 — —Self-Employment or retraining
- § 8:44 — —Impact of a defendant's offer to hire or reinstate
the plaintiff
- § 8:45 — —Duration of the mitigation requirement
- § 8:46 —Defendant's burden
- § 8:47 Setoffs
- § 8:48 —Interim earnings, severance or vacation pay, leave
or sabbatical time, sick leave, and stock bonuses—
Interim earnings
- § 8:49 —Interim earnings, severance or vacation pay, leave
or sabbatical time, sick leave, and stock bonuses—
Severance pay
- § 8:50 —Interim earnings, severance or vacation pay, leave
or sabbatical time, sick leave, and stock bonuses—
Vacation pay and other accumulated leave time
- § 8:51 —Interim earnings, severance or vacation pay, leave
or sabbatical time, sick leave, and stock bonuses—
Sick Pay
- § 8:52 —Interim earnings, severance or vacation pay, leave
or sabbatical time, sick leave, and stock bonuses
—Stock bonuses
- § 8:53 —Pension, retirement, and disability benefits—
Pension benefits
- § 8:54 — —Retirement benefits
- § 8:55 —Unemployment compensation and entitlements
- § 8:56 — —Other entitlement programs
- § 8:57 Front pay, or damages in lieu of reinstatement
- § 8:58 Front pay or damages in lieu of reinstatement—Front
pay—Procedural issues—Matter of burdens
- § 8:59 — — —Who decides

TABLE OF CONTENTS

§ 8:60	— — —Relationship of liquidated damages to front pay and back pay
§ 8:61	— — —Standard of appellate review
§ 8:62	—Substantive standards relevant to determining front pay award—Generalizations regarding the determination of front pay awards
§ 8:63	— —Requirement that reinstatement have been requested
§ 8:64	— —Refusal by the plaintiff to accept reinstatement
§ 8:65	— —Relationship of risk to the computation of damages
§ 8:66	— —Mitigation of damages
§ 8:67	—Specific instances of front pay decisions
§ 8:68	—Specific instances of front pay decisions Burdens of proof
§ 8:69	—Calculating amount of front pay—Taking account of pension benefits
§ 8:70	— —Taking account of future elements of compensation
§ 8:71	— —Discounting future compensation and benefits
§ 8:72	Liquidated damages awards
§ 8:73	—Willfulness and good faith
§ 8:74	—Municipal employers
§ 8:75	—E.E.O.C. suits
§ 8:76	—Standards of appellate review
§ 8:77	— <i>Thurston</i> and <i>McLaughlin</i> decisions
§ 8:78	— —Liquidated damages as punitive in nature
§ 8:79	— —Application of the <i>Thurston</i> formulation to the <i>Thurston</i> facts
§ 8:80	— — <i>McLaughlin v. Richland Shoe Co.</i>
§ 8:81	—Significance of the defendant's good faith
§ 8:82	—Analyzing the <i>Thurston</i> standard
§ 8:83	— —The First Circuit's approach
§ 8:84	— —Case Law in the Second Circuit
§ 8:85	— —The Third Circuit approach: The outrageousness formulation
§ 8:86	— —The Fourth Circuit approach
§ 8:87	— —The Fifth Circuit approach
§ 8:88	— —The predominant factor formulation used in the Sixth Circuit
§ 8:89	— —Seventh Circuit case law
§ 8:90	— —The Eighth Circuit's ill-defined approach
§ 8:91	— —The Ninth Circuit's approach
§ 8:92	— —Predominant factor standard endorsed by the Sixth and Tenth Circuits and the E.E.O.C.
§ 8:93	— —The Eleventh Circuit's ill-defined approach
§ 8:94	— <i>Hazen Paper Co. v. Biggins</i>

- § 8:95 — —Ignorance of the ADEA
- § 8:96 —Willfulness in retaliation and disparate impact situations
- § 8:97 —Willfulness in various factual situations
- § 8:98 — —General Propositions
- § 8:99 — —Knowledge of the ADEA versus knowledge of a violation of the ADEA
- § 8:100 — —Employer knowledge
- § 8:101 — —Imputed or actual management knowledge
- § 8:102 — —Establishing recklessness
- § 8:103 —Willfulness in relying upon, rejecting, or not seeking legal advice
- § 8:104 —Determining amount of liquidated damages
- § 8:105 — —Setoffs
- § 8:106 — —Partial liquidated damages
- § 8:107 — —Court delay
- § 8:108 Compensatory damages awards for pain and suffering
- § 8:109 —Other claims for compensatory damages—
Retaliation claims
- § 8:110 Punitive damages
- § 8:111 —Retaliation claims
- § 8:112 Prejudgment interest—The FLSA backdrop
- § 8:113 — —Historical background
- § 8:114 —Determining when due—Full liquidated damages awarded to ADEA plaintiff
- § 8:115 — —No liquidated damages are awarded
- § 8:116 — —Partial liquidated damages are awarded
- § 8:117 —Determining when prejudgment interest is due—
Discretionary bases for not awarding prejudgment interest
- § 8:118 —Determining when due—Jury involvement
- § 8:119 — —The effect of *Thurston's* defining liquidated damages as being punitive
- § 8:120 — —Interest awards under state statutes or other federal statutes
- § 8:121 —Determining amount due—Base on which interest is to be computed
- § 8:122 — —Rate to be used
- § 8:123 — —Compounding
- § 8:124 Postjudgment interest

III. NONMONETARY RELIEF IN ACTIONS INVOLVING DEFENDANTS OTHER THAN THE FEDERAL GOVERNMENT

- § 8:125 Injunctive relief in suits brought by private parties
- § 8:126 —Preliminary relief
- § 8:127 —Broad injunctive relief

TABLE OF CONTENTS

- § 8:128 —Other issues
- § 8:129 Injunctive relief in government enforcement actions
- § 8:130 Availability of declaratory relief
- § 8:131 Reinstatement
- § 8:132 —The parties' burdens
- § 8:133 —Retroactive and pending trial
- § 8:134 —Additional relief
- § 8:135 —Former position is unavailable
- § 8:136 —Other factors—Rejection of offer
- § 8:137 — —Past misconduct by the plaintiff
- § 8:138 — —High-level employee
- § 8:139 — —Hostility and discord
- § 8:140 Hiring and promotion
- § 8:141 Award of retroactive seniority

IV. RELIEF IN NONEMPLOYMENT CONTEXTS

- § 8:142 Damages for breach of a release
- § 8:143 Relief obtainable against labor organizations
- § 8:144 —Monetary relief
- § 8:145 —Injunctive relief
- § 8:146 —The E.E.O.C. position
- § 8:147 —Other Issues
- § 8:148 Relief against employment agencies—Refusing to refer job applicants
- § 8:149 Discriminatory advertising
- § 8:150 Bans on shipments of goods

V. ATTORNEY'S FEES AND COSTS IN CASES INVOLVING DEFENDANTS OTHER THAN THE FEDERAL GOVERNMENT

- § 8:151 Attorney's fees
- § 8:152 —Standard of review
- § 8:153 —Federal Rule of Civil Procedure 68
- § 8:154 —Liability of state and local governmental defendants
- § 8:155 —Awards to defendants
- § 8:156 —Fee awards for pre-trial, post-trial, appellate, and collateral work—Fees for work prior to trial
- § 8:157 — —Litigating Fees
- § 8:158 — —Appellate work
- § 8:159 — —Collateral work
- § 8:160 —Standards for determining the amount of the attorney's fee award—The lodestar and its increase or decrease
- § 8:161 —ADEA cases applying *Perdue*, *Hensley*, *Hewitt*, and *Blum v. Stenson*

- § 8:162 —ADEA cases applying *Hensley, Hewitt, and Blum v. Stenson*—Enhancement of the fee to reflect delay
- § 8:163 —Amount of award and what it may include
- § 8:164 — —Expert witness fees
- § 8:165 — —Proportionality of the fee award vis-à-vis the plaintiff's recovery
- § 8:166 —Contingent fee and other fee agreements—Fixed fee agreements
- § 8:167 — —Contingent fee agreements
- § 8:168 — —*Delaware Valley II*
- § 8:169 — —*Blanchard v. Bergeron* and *Venegas v. Mitchell*
- § 8:170 Attorney's fees in nonfederal government suits—Contingent fee and other fee agreements—Lower court case law
- § 8:171 Attorney's fees—Effect of suit by E.E.O.C. on private attorney's fees
- § 8:172 Costs
- § 8:173 —Expert witness fees
- § 8:174 —Rule 68 offer

VI. FEDERAL SECTOR ENFORCEMENT ACTIONS

- § 8:175 Relief obtained from the federal government

VII. ARBITRATION

- § 8:176 Relief in arbitral forum

CHAPTER 9. THE AGE DISCRIMINATION IN EMPLOYMENT ACT: FEDERAL EMPLOYEES AND JOB APPLICANTS

I. ADEA AND FEDERAL EMPLOYMENT

- § 9:1 Introduction
- § 9:2 General propositions regarding the ADEA's application in the federal sector
- § 9:3 Who is protected

II. GRIEVANCE PROCEDURES

- § 9:4 Individual claims through internal agency processes
- § 9:5 —Efforts to settle
- § 9:6 —Representation of the complainant
- § 9:7 —Status of witnesses
- § 9:8 —Timing computations
- § 9:9 —Joint processing and consolidation of complaints
- § 9:10 —Pre-complaint stage—Timing issues

TABLE OF CONTENTS

- § 9:11 — —The counselor's tasks
- § 9:12 — —Alternative dispute resolution
- § 9:13 — —Administrative complaint
- § 9:14 — —Joint processing and consolidation of complaints
- § 9:15 — —Grounds for dismissal of the complaint
- § 9:16 — —Investigation of the complaint
- § 9:17 — —Administrative hearing
- § 9:18 — —Offer of resolution
- § 9:19 — —Discovery, hearing and decision
- § 9:20 — —Final action by the agency
- § 9:21 Pursuit of class claims through the administrative process
- § 9:22 Negotiated grievance procedures

III. MIXED CASES

- § 9:23 Mixed cases—Complaint—Definitions
- § 9:24 — —Election of administrative recourse
- § 9:25 — —Dismissal
- § 9:26 — —Processing of mixed case complaints
- § 9:27 — —Petitions to the E.E.O.C. from MSPB decisions
- § 9:28 — —Recourse in Federal Court

IV. APPEALS AND RELIEF

- § 9:29 Appeals to the Equal Employment Opportunity Commission
- § 9:30 Relief in the administrative process—General propositions
- § 9:31 — —Relief for job applicants
- § 9:32 — —Relief for employees
- § 9:33 — —Attorney's fees and costs
- § 9:34 — —Time within which relief is to be granted grievant
- § 9:35 — —Interim relief

V. ENFORCEMENT AND EXHAUSTION

- § 9:36 Enforcement and clarification of final E.E.O.C. decisions—Compliance and clarification
- § 9:37 — —Compliance with settlement agreements
- § 9:38 — —Compliance actions in federal court
- § 9:39 Exhaustion of administrative remedies once administrative process invoked

VI. JUDICIAL RELIEF

- § 9:40 Seeking judicial relief—Post-administrative process
- § 9:41 — —Litigation
- § 9:42 — —Limitations

VII. PROCEDURAL PREDICATES

- § 9:43 Procedural predicates to suing
- § 9:44 —Notice of intent to sue
- § 9:45 —Notice of intent—E.E.O.C. obligations
- § 9:46 —Statute of limitations—Filing suit
- § 9:47 — —Commencement of the running of the statute of limitations
- § 9:48 — —Equitable tolling and estoppel
- § 9:49 — —How long after discrimination occurred must suit be filed
- § 9:50 —Prior resort to state remedies
- § 9:51 —Res judicata and collateral estoppel
- § 9:52 —Venue and jurisdiction
- § 9:53 —Class actions
- § 9:54 —Juries

VIII. ESTABLISHING AND DEFENDING AGAINST LIABILITY

- § 9:55 Establishing and defending against liability—Theories of liability
- § 9:56 —Availability of exceptions and defenses in nonfederal sector disputes
- § 9:57 —Who can be held liable
- § 9:58 —Sovereign immunity

IX. RELIEF

- § 9:59 Relief—In general
- § 9:60 Court-ordered relief—Back pay
- § 9:61 —Front pay
- § 9:62 —Hiring, promotion, reinstatement
- § 9:63 —Damages for pain and suffering, punitive damages, and liquidated damages
- § 9:64 —Prejudgment interest
- § 9:65 —Postjudgment interest
- § 9:66 Relief—Attorney’s fees and costs

Table of Contents

CHAPTER 10. EMPLOYMENT DISCRIMINATION: CONSTITUTIONAL AND OTHER NONSTATUTORY PARAMETERS AT THE FEDERAL AND STATE LEVELS

I. PARAMETERS AT THE FEDERAL AND STATE LEVELS

§ 10:1 Introduction

II. CONSTITUTIONAL ANALYSIS APPLIED TO AGE DISTINCTIONS

A. CONSTITUTIONAL ANALYSIS

§ 10:2 Age and the Constitution

§ 10:3 Eleventh Amendment immunity

B. EQUAL PROTECTION ANALYSIS

§ 10:4 Equal protection analysis—Minimum, strict, and
intermediate judicial scrutiny

§ 10:5 —Minimum rationality scrutiny

§ 10:6 —Strict scrutiny for suspect classifications

§ 10:7 —Strict scrutiny for fundamental interests

§ 10:8 —Intermediate scrutiny

C. DUE PROCESS ANALYSIS

§ 10:9 Due process analysis—Substantive and procedural
due process

§ 10:10 —Substantive due process

§ 10:11 —Procedural due process

§ 10:12 —Irrebuttable presumptions

D. AGE AND EQUAL PROTECTION CLAUSE

§ 10:13 Age and the Equal Protection Clause—*Massachusetts
Board of Retirement v. Murgia*

§ 10:14 —Equal protection analysis

§ 10:15 —Procedural due process

§ 10:16 —The irrebuttable presumption doctrine

§ 10:17 —*Vance v. Bradley* and *Gregory v. Ashcroft*

- § 10:18 *City of Cleburne v. Cleburne Living Center*—*Murgia* revisited
- § 10:19 *Board of Trustees of University of Alabama v. Garrett*
- § 10:20 Equal Protection decisions concerning retirees—
Lower courts

E. CONSTITUTIONAL CLAIMS

- § 10:21 Constitutional claims in refusal to hire cases
- § 10:22 —Adults deemed too old
- § 10:23 Refusals to hire old and young adults—Adults deemed too young

F. CHILD LABOR LAWS

- § 10:24 Child labor laws—In general
- § 10:25 —Constitutionally based challenges

G. CONTRACTS

- § 10:26 Impairments of contracts
- § 10:27 —Case law
- § 10:28 —Supreme Court decisions in the modern era

H. STATE CONSTITUTIONS

- § 10:29 State constitutions

III. COMMON-LAW CLAIMS

- § 10:30 Common-law claims—In general
- § 10:31 Governmental lack of authority
- § 10:32 Erosion of the employment-at-will doctrine—Public policy exception
 - § 10:33 — —Ascertaining what constitutes public policy
 - § 10:34 — —Statutes as sources of public policy
 - § 10:35 — —Action versus inaction
- § 10:36 Claims based on a breach of contract theory
 - § 10:37 —Employee handbooks and implied contracts
- § 10:38 Claims based on breach of contract theory—Covenant of good faith and fair dealing
- § 10:39 Other common-law actions

CHAPTER 11. OTHER BARS TO AGE DISCRIMINATION IN EMPLOYMENT— FEDERAL AND STATE STATUTES, EXECUTIVE ORDERS, AND REGULATIONS

- § 11:1 Introduction

TABLE OF CONTENTS

I. EXPRESS FEDERAL PROHIBITIONS OF AGE DISCRIMINATION

A. FEDERAL AND STATE EMPLOYEES AND JOB APPLICANTS

- § 11:2 Government Employee Rights Act of 1991
- § 11:3 Senate employees, applicants, and presidential appointees
- § 11:4 State employees and job applicants
- § 11:5 Enforcement vis-à-vis senate employees and job applicants
- § 11:6 Presidential appointees
- § 11:7 Enforcement vis-à-vis State and local government employees and job applicants
- § 11:8 Question of immunity in GERA cases
- § 11:9 United States General Accounting Office (GAO) employees
- § 11:10 Federal labor organizations
- § 11:11 Congressional Accountability Act

B. GERA REGULATIONS

- § 11:12 GERA regulations
- § 11:13 —Charge filing
- § 11:14 —Referral of complaints
- § 11:15 —Computation of time
- § 11:16 —Dismissal of the complaint by the EEOC
- § 11:17 —Settlement and alternative dispute resolution
- § 11:18 —Investigations
- § 11:19 —Hearings
- § 11:20 —Decisions
- § 11:21 —Appeals
- § 11:22 —Judicial review

C. AIR CARRIERS

- § 11:23 Displaced airline industry employees

D. PERSONNEL ADMINISTRATION BY FEDERAL GRANTEES

- § 11:24 Merit systems of personnel administration by federal grantees

E. JOB TRAINING PARTNERSHIP/WORKFORCE INVESTMENT ACT

- § 11:25 Job Training Partnership Act and Workforce Innovation and Opportunity Act of 2014

F. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 11:26 Employee Retirement Income Security Act

G. CIVIL SERVICE REFORM ACT OF 1978

§ 11:27 Civil Service Reform Act of 1978—In general

§ 11:28 —Merit system principles and prohibited personnel practices

H. FEDERAL TRANSIT ACT

§ 11:29 Federal Transit Act—In general

§ 11:30 —Relation to the Age Discrimination Act

§ 11:31 —Substantive scope of the FTA discrimination ban

§ 11:32 —Government enforcement

1. Private enforcement of the Federal Transit Act

§ 11:33 Federal Transit Act—Private enforcement

§ 11:34 — —Immunity of state recipients of federal financial assistance from suit

§ 11:35 — —Exhaustion of administrative remedies

§ 11:36 — —Statute of limitations

§ 11:37 — —Suit under 42 U.S.C.A. § 1983

2. Establishing A Violation of the Federal Transit Act

§ 11:38 Federal Transit Act—Establishing a violation

§ 11:39 — —Title VI/Section 504 analogy

§ 11:40 — —Title VII analogy

§ 11:41 — —Conclusion

3. Relief Available under the Federal Transit Act

§ 11:42 Federal Transit Act—Relief from the funding agency

§ 11:43 —Damages and equitable relief

I. FULL EMPLOYMENT AND BALANCED GROWTH ACT OF 1978

1. Introduction and Discrimination Ban of FEBGA

§ 11:44 Full Employment and Balanced Growth Act of 1978—Introduction

§ 11:45 —Discrimination ban

2. Government Enforcement of FEBGA

§ 11:46 Full Employment and Balanced Growth Act of 1978—Government enforcement

TABLE OF CONTENTS

§ 11:47 —Regulations

3. Private Enforcement of FEBGA

§ 11:48 Full Employment and Balanced Growth Act of 1978—
Private enforcement

§ 11:49 —Exhaustion of administrative remedies

§ 11:50 —The immunity of state recipients of federal
financial assistance from suit

§ 11:51 —Statute of limitations

§ 11:52 —Suit under 42 U.S.C.A. § 1983

4. Violation and Relief under the FEBGA

§ 11:53 Full Employment and Balanced Growth Act of 1978—
Establishing violation and relief

J. GENERAL MARITIME LAW

§ 11:54 General Maritime Law—In general

K. DISCRIMINATION BY GOVERNMENT CONTRACTORS

§ 11:55 Discrimination by government contractors—Executive
Order No 11141 and state laws

§ 11:56 —Executive Order No 11141

§ 11:57 —Federal regulations implementing Executive Order
11141

§ 11:58 —State laws

L. FEDERAL REGULATIONS

§ 11:59 Federal regulations—In general

II. INDIRECT FEDERAL PROHIBITIONS ON AGE- BASED EMPLOYMENT DISCRIMINATION

§ 11:60 Americans with Disabilities Act

§ 11:61 Volunteerism programs

III. POTENTIAL FEDERAL LIMITATIONS ON EMPLOYMENT DISCRIMINATION

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

§ 11:62 Title VII of the Civil Rights Act of 1964—Introduction

B. AGE DISCRIMINATION ACT OF 1975

§ 11:63 Age Discrimination Act of 1975—Introduction

§ 11:64 —Application to employment discrimination

C. SUITS UNDER 42 U.S.C.A. § 1983

§ 11:65 Suits under 42 U.S.C.A. § 1983—In general

§ 11:66 —Pursuit of constitutional claims

D. SUITS UNDER 42 U.S.C.A. §§ 1981 AND 1982

§ 11:67 Suits under 42 U.S.C.A. §§ 1981 and 1982—In general

E. SUITS UNDER 42 U.S.C.A. § 1985(3)

§ 11:68 Suits under 42 U.S.C.A. § 1985(3)—In general

IV. STATE STATUTES

§ 11:69 State statutes

§ 11:70 —Federal case law under the ADEA applies to state antidiscrimination laws

§ 11:71 —Primary state statutes regulating ADEA

APPENDICES

APPENDIX A. United States Constitution, Amendment XIV

APPENDIX B. Age Discrimination in Employment Act of 1967, as amended, Pub L No 90-202, 81 Stat 602 (codified at 29 U.S.C.A. §§ 621–634)

APPENDIX C. Age Discrimination Claims Assistance Act of 1988, Pub L No 100-283, 102 Stat 78, **as amended** by the Age Discrimination Claims Assistance Amendments of 1990, Pub L No 101-504, 104 Stat 1298 (appearing at 29 U.S.C.A. § 626 note)APPENDIX D. Older Workers Benefit Protection Act, Pub L No 101-433, 104 Stat 978 (1990), **as amended by** Pub L No 101-521, 104 Stat 2287

APPENDIX E. Equal Employment Opportunity Commission Regulations re Federal Employees, 29 C.F.R. pt 1614 (2000)

APPENDIX F. 29 C.F.R. part 1613 Appendix A (1992) Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination

APPENDIX G. Equal Employment Opportunity Commission Interpretations, 29 C.F.R. Pt 1625 (1993)

APPENDIX H. 29 C.F.R. §§ 521.1–521.3 (1993)

APPENDIX I. 29 C.F.R. § 541.1 (1993)

TABLE OF CONTENTS

APPENDIX J.	Equal Employment Opportunity Commission Regulations, 29 C.F.R. pt 1626 (1993)
APPENDIX K.	Equal Employment Opportunity Commission Regulations, 29 C.F.R. pt 1627 (1993)
APPENDIX L.	Equal Employment Opportunity Commission ADEA Opinion Letters
APPENDIX M.	EEOC Policy Statement No N-915: Notice re Polygraph Examinations (Feb 2, 1987)
APPENDIX N.	EEOC Policy Statement No N-915: Applicability of Title VII, ADEA and EPA to Public International Organizations (Feb 11, 1987)
APPENDIX O.	EEOC Policy Statement No N-915.004: Policy Statement on Control by Third Parties Over the Employment Relationship Between an Individual and His/Her Direct Employer (May 20, 1987)
APPENDIX P.	EEOC Policy Statement No N-915: Policy Statement on Whether Individuals Who are Partners, Officers, Members of Boards of Directors, or Major Shareholders in Organizations May be Considered Employees for Purposes of Title VII, the ADEA, and the EPA (July 24, 1987)
APPENDIX Q.	EEOC Policy Statement No N-915: The Issue of Whether the Commission Can Assert Jurisdiction Over Charges/Complaints Raising Issues of Discrimination Based on Age Arising from the Implementation of an Integrated Seniority List Developed Pursuant to an Airline Merger Approved Under the Federal Aviation Act by the Department of Transportation (Aug 10, 1987)
APPENDIX R.	EEOC Policy Statement No N-915: Policy Statement on Title VII Coverage of Independent Contractors and Independent Businesses (Sept 4, 1987)
APPENDIX S.	EEOC Policy Statement No N-915: Application of Section 4(f)(2) of the Age Discrimination in Employment Act to Defined Contribution Plans (Sept 4, 1987)
APPENDIX T.	EEOC Policy Statement No N-915: Application of Section 4(f)(2) of the Age Discrimination in Employment Act to Life Insurance and Long-Term Disability Plans (Nov 10, 1987)

AGE DISCRIMINATION

- APPENDIX U. EEOC Policy Statement No N-915.029:
Specific Exemptions from Coverage
Pursuant to § 9 of the Age Discrimination
in Employment Act (ADEA) (Jan 20, 1988)
- APPENDIX V. EEOC Policy Statement No N-915.024:
Effect of 1986 Amendments to ADEA on
Commission's Enforcement Activities (Apr
22, 1988)
- APPENDIX W. EEOC Policy Statement No N-915.029:
Cases Involving the Extension of
Additional Benefits to Older Workers
(June 30, 1988)
- APPENDIX X. EEOC Policy Guide No N-915.036: A
Determination of the Appropriateness of
Front Pay as a Remedy Under the Age
Discrimination in Employment Act (Oct
25, 1988)
- APPENDIX Y. EEOC Policy Guide No N-915.039:
Application of the Age Discrimination in
Employment Act of 1967 (ADEA) and the
Equal Pay Act of 1963 (EPA) to American
Firms Overseas, Their Overseas Subsidiar-
ies, and Foreign Firms (Mar 3, 1989)
- APPENDIX Z. EEOC Policy Guide No N-915.042: Cases
Involving the Definition of Willful
Violation Under the Age Discrimination in
Employment Act (ADEA) for Purposes of
Liquidated Damages and the Statute of
Limitations (May 1989)
- APPENDIX AA. EEOC Policy Guide No N-915.043: Job
Advertising and Pre-Employment Inquiries
Under the Age Discrimination in
Employment Act (ADEA) (July 3, 1989)
- APPENDIX BB. EEOC Policy Guide No N-915.045: Cases
Involving Charging Parties Who Have
Been Disqualified by Bona Fide
Occupational Qualifications or Other Age-
Based Statutory Provisions and Not Given
the Same Options Afforded Employees
Disqualified for Reasons Unrelated to Age
(Dec 5, 1989)
- APPENDIX CC. EEOC Policy Guide No N-915.046: Analysis
of the Section 4(f)(1) "Foreign Laws"
Defense of the Age Discrimination in
Employment Act of 1967 (Dec 5, 1989)
- APPENDIX DD. EEOC Policy Guide No N-915.052: Whether
Part-Time Employees Are Employees

TABLE OF CONTENTS

	Within the Meaning of § 701(b) of Title VII and § 11(b) of the Age Discrimination in Employment Act (Apr 20, 1990)
APPENDIX EE.	EEOC Policy Guide No N-915.053: The Scope of Available Remedies Under the Age Discrimination in Employment Act (ADEA) When a Violation Is Committed by a Labor Organization (May 11, 1990)
APPENDIX FF.	EEOC Policy Guide No N-915.054: Cases Involving the Deduction of Pension Payments from Back Pay Awards (May 11, 1990)
APPENDIX GG.	EEOC Policy Guide No N-916.060: The Processing of Charges Where There Is a Collective Bargaining Agreement or an Individual Employment Contract Requiring the Arbitration of Age- Discrimination-Related Issues (Aug 29, 1990)
APPENDIX HH.	EEOC Enforcement Guide No N-915.002: Enforcement Guide on the Effect of Section 112 of the Civil Rights Act of 1991 on the Supreme Court Decision in <i>Lorance v. AT&T Technologies, Inc.</i> , and Charges Involving Seniority Systems (Oct 20, 1993)
APPENDIX II.	EEOC Enforcement Guide No N-915.002: Enforcement Guidance on Coverage of Federal Reserve Banks (Oct 20, 1993)
APPENDIX JJ.	EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes
APPENDIX KK.	EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as Condition of Employment
APPENDIX LL.	EEOC Enforcement Guidance on Counting Employees to Determine if Employer Satisfies Jurisdictional Prerequisite for Coverage Under Title VII
APPENDIX MM.	EEOC Enforcement Guidance on Whether “Testers” Can File Charges and Litigate Claims of Employment Discrimination
APPENDIX NN.	EEOC Enforcement Guidance on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms
APPENDIX OO.	29 C.F.R. Part 1603: Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination Under

AGE DISCRIMINATION

Section 321 of the Government Employee Rights
Act of 1991

APPENDIX PP. EEOC Guidance on Retaliation (EEOC Manual
Section 8)

APPENDIX QQ. Enforcement Guidance on Remedies Available to
Undocumented Workers Under Federal
Employment Discrimination Laws

APPENDIX RR. EEOC Manual Section 2: Threshold Issues

Table of Laws and Rules

Table of Cases

Index