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RECENT DEVELOPMENTS IN THE LAW GOVERNING EMPLOYMENT BENEFITS FOR OLDER WORKERS: A MIXED BAG

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ABSTRACT

As the American population ages, the importance of laws prohibiting age discrimination increases. The law protecting older workers with respect to employment benefits constitutes a distinct and rapidly evolving subcategory of the law on age discrimination. The Age Discrimination in Employment Act of 1967 has been amended by Congress and interpreted by the U.S. Supreme Court on several occasions over the past decade. This article examines some of the recent legislative and judicial developments at the Supreme Court level that affect employment benefits for older workers.

In 1979, the median age of Americans in the workforce was 34.7, but that prime age will reach 40 in 2005. And in 2011, when the first wave of the "baby boomer" generation reaches retirement age, half of all American workers will be over 45 [1, p. 11]. Every seven seconds one of the seventy-six million "baby boomers" in the United States turns fifty [2]. The American population aged sixty-five to seventy-four is projected to grow by 74% between 1990 and 2020, while the population under sixty-five will grow by only 24% [1, p. 22]. When increases in life expectancy and optimistic plans for retirement lifestyles are added to these projections, the importance of various retirement plans and employee benefit options for large numbers of Americans becomes obvious. Employers that attempt

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to reduce the benefits they provide to older or retired workers can expect to face vigorous legal challenges.

This article examines the current state of the law on changes in benefits for older workers. It begins with an overview of the ADEA and specific amendments to that law regulating benefits for older workers, and analyzes administrative regulations and recent Supreme Court precedents regarding employee benefits. This article concludes with recommendations for employers considering making changes in the benefits they provide to older workers.

AN OVERVIEW OF THE LAW AND THE PROCESS

Although "age discrimination" is a relatively new concept, Congress, as well as the U.S. Supreme Court, has developed a significant body of law over the past four decades. A distinct subcategory of employment discrimination law involves employment benefits for older workers. From the perspective of either employers or employees, recent Supreme Court decisions in this area are a "mixed bag." These decisions, along with the specific statutes and administrative regulations governing benefits, are often confusing and sometimes appear to conflict with each other.

The ADEA

To understand the Court's recent pronouncements in this area of the law, it is necessary to begin with the provisions of the Age Discrimination in Employment Act of 1967 (ADEA) [3]. This law generally makes it unlawful for covered employers to discriminate against employees aged forty or more with respect to compensation or conditions of employment, because of an individual's age. The act prohibits employers from classifying employees by age in ways that negatively affect their employment status or from reducing employees' wages because of their age. When Congress passed the ADEA nearly four decades ago, it declared an intention "to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment" [3].

Lesser-known provisions of the ADEA, along with recent legislation and Supreme Court cases, form a substantial body of law that provides legal protection for American workers from forced retirement and governs changes in retirement and health plans. As the workforce ages, and as the demands of a competitive global economy cause employers to seek ways to renegotiate or otherwise reduce the benefits they provide to existing or retired workers, this body of law is sure to be invoked in the courts with increasing frequency.

The Shifting Burden of Proof

In the forty years since the enactment of the ADEA, the courts have clarified the elements necessary for age discrimination lawsuits and the defenses that employers may raise. To succeed under the ADEA, an employee must generally show that s/he 1) is 40 years of age or older; 2) was discharged or demoted; and 3) that when discharged or demoted the employee was performing his/her job in a way that met the employer's legitimate expectations. The requirement that some lower courts had established, that the employee also show that s/he was replaced by a younger worker, was eliminated by the Supreme Court in its 1996 decision, *O'Connor v. Consolidated Coin Caterers Corporation* (in this case the fifty-six-year-old plaintiff was replaced by a "younger" forty-year-old) [4].

To understand litigation regarding employment benefits, or any claim under the ADEA, it is necessary to understand the burden of proof that is placed on claimants under this law, and the administrative steps that must be taken prior to bringing a lawsuit. As with other kinds of discrimination complaints, the Equal Employment Opportunity Commission (EEOC) enforces age discrimination complaints. The EEOC has strict deadlines for filing complaints (general complaints must be filed within 180 days of the discrimination) and the process travels through a hierarchy of requirements for investigations and rulings. The EEOC complaint must be filed, but in the likely event that the EEOC does not then act on the complaint within 180 days, the employee can request a right-to-sue letter that authorizes a federal lawsuit against the employer under Title VII of the Civil Rights Act [5].

The Supreme Court has not adopted a specific method of analysis for age discrimination claims, but uses the same "burden-shifting" framework used in most Title VII discrimination claims. This approach is known as the "McDonnell Douglas analysis" and comes from *McDonnell Douglas v. Green*, a case that involved a claim of racial discrimination [6]. Under this approach, in the employment context, the plaintiff must first prove the elements of a prima facie case of discrimination: i) that the plaintiff belongs to a class protected by the law; ii) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants; iii) that, despite his/her qualifications, the plaintiff suffered an adverse employment decision; and iv) that after that rejection, the position remained open or that the plaintiff was treated less favorably than similarly situated employees (i.e., suffered from disparate treatment because of membership in the protected class) [7, 8]. Once a plaintiff establishes these elements, under the McDonnell Douglas analysis, the burden of proof shifts to the employer to show a legitimate, nondiscriminatory reason for the adverse employment action. If the employer can produce such a reason, the burden shifts again back to the plaintiff, who must now prove that the employer's stated reason was not the true reason, but was part of a pretext discriminatory action.

Because employers rarely provide direct evidence that they have taken actions based on a preference for younger workers, age discrimination cases, including

claims based on discrimination with regard to benefits, are difficult to prove. The employee must show that adverse action was taken because of age, and in most cases the employee must rely on circumstantial evidence. Replacing an older employee with a younger person does not necessarily violate the ADEA; in some circumstances it is not illegal to replace a high-salaried older employee with a younger person earning a lower salary. The older employee must prove that there was intentional action because of age. But if that intention can be shown, the successful plaintiff in an ADEA lawsuit is entitled to damages, including compensation for loss of income, emotional distress, and attorney's fees. When it comes to employee benefits, the general policy of the ADEA continues to apply but additional laws and regulations come into play.

THE OLDER WORKERS BENEFIT PROTECTION ACT

The past decade has seen significant changes in the law that governs employment benefits; these changes have come about through legislative and administrative action and by way of several controversial decisions from the Supreme Court. Congress passed the Older Workers Benefit Protection Act (OWBPA) [9], in 1990, amending the ADEA. The OWBPA provides specific protection with regard to benefits and has strict requirements concerning the methods by which ADEA protections can be waived. OWBPA addresses situations where employees give up their rights with regard to the ADEA [9]. If an employee wishes to waive his/her right to pursue any age discrimination claim (this is usually done in exchange for severance pay or early retirement benefits), the OWBPA requires that a carefully worded agreement be signed. Employees may also be asked to sign waivers in connection with layoffs or early retirement incentive programs. The OWBPA and its implementing regulations set out procedural and substantive requirements for "knowing and voluntary" waiver of rights by an employee. The waiver must

- be written in a manner calculated to be understood by the average individual eligible to participate in the program being offered by the employer;
- affect only those claims or rights that have arisen prior to the date of the waiver;
- be offered in exchange for some consideration in addition to which the individual is already entitled;
- specifically refer to ADEA rights;
- provide the worker with additional consideration beyond that to which s/he is already entitled, in exchange for the agreement to waive ADEA rights;
- advise the worker to consult an attorney;
- give the worker at least twenty-one days to consider the waiver before signing it;
- provide a seven-day revocation period, during which the employee may reconsider his/her decision to waive rights under the ADEA [10].

The OWBPA also applies to programs where groups of employees are invited to leave or retire, and the requirements of the law can be triggered by an exit program affecting as few as two employees [11]. Such a program may be either voluntary, such as an exit incentive program, or involuntary, such as employment termination programs and reduction-in-force programs.

In the latter, involuntary context, the starting point for compliance with the OWBPA is the "decisional unit." This is the portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered this consideration [12]. To comply with the OWBPA, the employer must create and make available to affected employees a listing of all the job titles and ages of all individuals in the decisional unit who are eligible or selected for the program and the job titles and ages of all individuals in the decisional unit who are not eligible and were not selected. Then, the "class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program" must also be disclosed [13]. Thus, an employer making an OWBPA disclosure should describe the decisional unit, describe the factors that make particular employees in the decisional unit eligible, and the applicable time limits for the program.

Employers should also be aware that the requirements of the OWBPA may necessitate ongoing compliance. The regulations contemplate that exit programs may take place "in successive increments over a period of time" [14]. In such a situation, the regulations require that the information supplied "be cumulative, so that later terminees are provided ages and job titles . . . for all persons in the decisional unit at the beginning of the program and all persons terminated to date" [14]. If the decision-making process applicable to multiple reductions in force occurring over time does not suggest separate and distinct employment actions, the risk is that the program and the duty to provide cumulative information to affected employees may continue indefinitely.

RECENT LEGAL DEVELOPMENTS

The Supreme Court has decided several crucial cases in recent years that define the law on employee benefits. the first of these cases grew out of the practice by some employers of requiring employees to sign "covenants" not to sue in order for the employees to receive severance pay. In these covenants, employees agree that if they ever sue their former employer they would be liable for attorney's fees, court costs, and other penalties. In 2001, the EEOC issued regulations establishing that covenants not to sue under the OWBPA should be treated in the same manner as releases and waivers. Therefore, no matter how the release of claims or covenant not to sue is worded, it must comply with all of the procedural requirements of the OWBPA. It is in this regard that the 1998 case of *Oubre v. Entergy Operations, Inc.* takes on great importance [15].

Oubre

Oubre worked in a power plant operated by Entergy Operations, Inc. in Louisiana. After receiving a poor performance rating, she was given the option of either improving her performance or accepting a voluntary arrangement for her severance. She was given fourteen days to consider the severance agreement, during which time she consulted with attorneys. She eventually decided to accept the agreement and signed a release waiving any claims she had against Entergy in return for a monetary settlement. But the release prepared by Entergy failed to comply with the requirements of the OWBPA in several respects: It did not give Oubre the required amount of time to consider the offer; it did not provide that Oubre had seven days after signing the release to change her mind; and the release did not make specific reference to Oubre's potential claims under the OWBPA [15].

After she had accepted the severance agreement, Oubre brought suit against Entergy, alleging that she was discharged on the basis of her age in violation of the ADEA. Entergy asked the trial court for summary judgment in the case based on a general principle of contract law, i.e., that before such a suit could be brought Oubre was required to tender back to the company the benefit (the money) that she had received under the agreement. The trial court granted summary judgment against Oubre and the case went to the Supreme Court on the issue of whether a release of claims is enforceable in court if it fails to strictly comply with the requirements of the OWBPA. The Supreme Court answered in the negative and held that even if the employer was correct under general principles of contract law, the OWBPA created new, separate duties on employers who seek release of claims under the ADEA. According to the Court, the OWBPA "sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications" [15, at 839].

In *Oubre*, the Court held employers to a strict standard of compliance with the requirements of the OWBPA. While Entergy asserted that general principles of contract ratification should operate in the matter, barring Oubre's suit, the Court relied on the clear language of the OWBPA. Under this law, Congress had placed clear, unqualified requirements on waivers of this kind, and those that do not exactly comply with each and every requirement cannot be enforced.

EEOC regulations ratify the principle set out in *Oubre*, making it clear that the OWBPA governs ADEA waivers, and that the law takes precedence over traditional principles of contract law. Therefore, older workers may retain severance or other benefits even if they decide to challenge the validity of a waiver agreement under the ADEA [16]. Employers may not avoid the "no tender back" rule by using other means to limit an older worker's right to challenge a waiver agreement,

or by penalizing an older worker for challenging a waiver agreement. Thus, an employer may not require older workers to agree to pay damages to the employer or pay the employer's attorneys' fees simply for filing suit [17]. An employer may recover money it paid for a waiver if the older worker successfully challenges the waiver, proves age discrimination, and obtains a monetary award. However, the employer's recovery may not exceed the amount it paid for the waiver, or the amount of the award [18]. An employer may not avoid the duties to which it agreed, even if the waiver is challenged, and employers remain obligated to make any payments promised to the older workers [19]. EEOC regulations further provide that workers may retain severance or other benefits paid in exchange for the release or covenant not to sue, even if they challenge the validity of that agreement in an ADEA lawsuit. Thus, employers may not require workers to agree to pay damages to the employer or pay the employer's attorneys' fees if, after signing the release, the employee then sues for age discrimination.

Gilmer

Another Supreme Court case of importance does not specifically concern employment benefits, but regulates the forum in which such claims may be pursued. *Gilmer v. Interstate/Johnson Lane Corp*. involves mandatory arbitration agreements [20]. These agreements generally require that disputes over employment benefits be resolved by an arbitrator rather than a judge. Because the Federal Arbitration Act of 1925 established that arbitration agreements stand upon the same footing as other contracts, the Supreme Court has embraced a "liberal federal policy favoring arbitration agreements [21]. As analyzed by Summers, employers more often succeed when disputes are resolved by arbitration rather than in the courts, and it is no surprise that contractual provisions requiring arbitration have become commonplace in many contracts governing employment rights [22, p. 685].

In *Gilmer*, the plaintiff was employed as a financial manager for Interstate/Johnson Lane Corporation. As part of his employment, Gilmer was required to register as a securities representative with the New York Stock Exchange, and that registration contained an agreement to arbitrate all disputes under the Stock Exchange rules. Interstate terminated Gilmer's employment when he reached age sixty-two. Gilmer brought suit under the ADEA after filing a charge with the EEOC, but Interstate asked the court to require Gilmer to resolve his claim by way of binding arbitration. Gilmer opposed that position and argued that compelling arbitration would undermine the EEOC's role in ADEA enforcement. The lower court refused to require arbitration, based on a 1974 Supreme Court case that held that an employee's suit under Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of his claim to arbitration under the terms of a collective bargaining agreement. The lower court concluded that Congress intended to protect ADEA claimants from waiving the opportunity to try their cases in court.

The Supreme Court disagreed and ruled against Gilmer. The Court said that an ADEA claim *can* be subjected to compulsory arbitration since neither the text nor the legislative history of the ADEA explicitly precludes arbitration. Gilmer was bound by his agreement to arbitrate unless he could show an inherent conflict between arbitration and the ADEA's underlying purposes. The Court went on to say that there was no inconsistency between the social policies furthered by the ADEA and enforcing agreements to arbitrate age discrimination claims; simply requiring arbitration would not undermine the EEOC's role in ADEA enforcement, since an ADEA claimant remains free to file an EEOC charge even if s/he is unable to bring a lawsuit in court. In taking this position, the Supreme Court relied on the ADEA's flexible approach to claims resolution, which permits the EEOC to pursue informal resolution methods, and said that out-of-court dispute resolution remains consistent with the ADEA's statutory scheme. In other words, the Court rejected Gilmer's claim that compelling arbitration would undermine the EEOC's role in ADEA enforcement [20].

Nonetheless, the EEOC seized upon certain language in the decision and now takes the position that *Gilmer* is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. The EEOC takes the position that the arbitration agreement in the *Gilmer* case was not directly with the employers, but in a separate agreement with the Stock Exchange. And even if the agreement to arbitrate had been in Gilmer's employment contract, the EEOC's position is that all civil rights claimants, including those under the ADEA, should have the choice of resolving their disputes in the courts. So the EEOC continues to process claims of discrimination under the ADEA even where the claimant has agreed to binding arbitration. The EEOC will scrutinize each charge involving an arbitration agreement to determine whether the agreement was obtained under coercive circumstances (e.g., as a condition of employment) and will process claims and bring suit in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

Wright

In 1998, the Supreme Court clarified this area of the law to some extent when it decided *Wright v. Universal Maritime Service Corp*. [23]. In this case, the plaintiff, a longshoreman, was subject to a collective bargaining agreement containing an arbitration clause. When Maritime Service refused to employ him after he had settled a claim for disability benefits, Wright sued, alleging discrimination in violation of the Americans with Disabilities Act of 1990 [24]. In deciding the case, the Supreme Court acknowledged that there was uncertainty in the law, but held that Wright did not lose his right to a federal judicial forum because the union agreement calling for arbitration was not "clear and unmistakable." This holding conflicts with the language in *Gilmer* [20] suggesting that the right to a federal judicial forum for an ADEA claim could be waived by way of a

collective bargaining agreement. While acknowledging that "some tension" did exist in these cases, the Supreme Court declined to rule on whether a pre-dispute agreement in a collective bargaining agreement to arbitrate employment discrimination claims is enforceable.

Cline

The Supreme Court's most recent decision affecting older workers' benefits involves a 1997 collective bargaining agreement between General Dynamics and the United Auto Workers that eliminated the company's obligation to provide health benefits to subsequently retired employees [25]. In *Cline v. General Dynamics Land Systems Inc.*, General Dynamics agreed to grandfather in the then-current workers who were at least fifty years old, meaning they would continue to receive benefits, while workers between the ages of forty and fifty would not [25]. Cline, and the class of plaintiffs he represented, were over the age of forty and thus protected by the ADEA, but under the age of fifty and therefore excluded from the benefits under the new agreement. The plaintiffs objected to the agreement, and the Equal Employment Opportunity Commission (EEOC) found that the agreement violated the ADEA, because it discriminated against them with respect to the benefits of their employment because of their age. In keeping with its long-standing policy, the EEOC ruled that *any* age discrimination violated the ADEA, and invited General Dynamics and the union to settle informally with the plaintiffs.

When negotiations between the plaintiff class and the company did not bring about an agreement, Cline brought a federal lawsuit against General Dynamics. The district court called the ADEA claim one of "reverse age discrimination," because the plaintiffs objected to discrimination not in favor of younger workers, but in favor of workers older than themselves. The argument before the trial court was based primarily on a simple reading of the text of the act. The ADEA prohibits discrimination because of age. It does not say how any age relationship between older and younger workers who are covered by the act is to figure in to the discrimination. The trial court dismissed the plaintiffs' case, ruling that the ADEA does not protect younger workers against older workers.

The case was appealed to the Sixth Circuit Court of Appeals, where a divided panel of judges reversed the judgment of the district court [26]. The majority reasoned that the ADEA's prohibition of discrimination against "any individual . . . because of such individual's age," is so clear on its face that if Congress had meant to limit its coverage to protect only the older worker against the younger, it would have said so [26, at 472]. The court acknowledged that its ruling conflicted with those of other courts of appeals, but it criticized those for paying too much attention to the "horatory, generalized language" of the congressional findings incorporated in the ADEA [26, at 470]. The Sixth Circuit also drew support for its decision from the EEOC regulations supporting the position of the *Cline* plaintiffs [26, at 471].

The question in the case became whether the ADEA prohibits an employer from favoring older over younger workers when both are more than forty years of age and therefore both are protected by the act. The case contrasted the plain wording of the ADEA against the logic that the purpose was to protect older workers from unfair advantages that might be given to younger workers. The *Cline* plaintiffs argued simply that they suffered discrimination because of their age, their *younger* age; they said they were discriminated against because they had not reached the age of fifty, like their older counterparts in the company.

The Supreme Court was also divided on the issue. A six-member majority examined the language of the act, as well as the social injustice that the statute was meant to correct and found that the ADEA does not forbid discriminatory preference for older workers over relatively younger workers, even if those younger workers are over age forty and therefore covered by the act [25].

Interpreting the intent of Congress when it passed the law, the majority opinion concluded that the lawmakers did not intend to protect older workers from discrimination in favor of other older workers. Instead, the inquiry into the social history of the ADEA led them to believe that the underlying concern of the ADEA was to protect the relatively older worker from age discrimination that gives unfair advantage to the relatively young worker [25].

In a strong dissenting opinion, Justice Clarence Thomas argued that the plain language of the ADEA should allow the *Cline* plaintiffs to recover for the obvious discrimination they suffered in favor of older workers. According to Thomas, the language of the ADEA simply prohibits discrimination based on an individual's age. The plain meaning of the statute does not allow discrimination against covered employees in favor of anyone, older or younger. Justice Thomas further pointed out that his plain reading of the statute was supported by an EEOC regulation that specifically prohibited discrimination of the type the majority allows in *Cline* [25]. A number of cases in administrative law hold that the courts should defer to the reasonable interpretations of administrative agencies that are charged with statutory enforcement [27]. While acknowledging that there are legal questions as to the weight the Supreme Court must give to existing administrative regulations, Thomas found the EEOC's position was reasonable and entitled to deference [25].

Both the majority opinion and the dissenters in *Cline* make strong arguments. Justice Thomas is correct in asserting that the language of the ADEA is clear on its face. The law prohibits discrimination based on age, and at least one of the ADEA's original sponsors was unequivocal in stating that the legislation was intended to prohibit *all* discrimination against older employees. The EEOC regulation confirming this point, which stood for approximately twenty years, can hardly be called unreasonable. And yet the majority opinion makes the undeniable point that the ADEA was clearly aimed at the specific evil of stereotyping older workers as less competent, less reliable, and less desirable than younger workers. The preponderance of the testimony before the 1967 congressional hearing that

considered the proposed ADEA, as well as common sense, suggests that the fundamental unfairness being addressed by the legislation was favoring a younger employee over an older employee but not vice versa. Ultimately, the Supreme Court majority determined that the ADEA never intended to stop an employer from favoring an older employee over a younger one. This precedent has implications for all aspects of employment law, including employee benefits.

CONCLUSION

Employment litigation has become one of the fastest growing types of litigation in America, and with the "graying" of the American workforce it can be expected that claims under the ADEA will continue to increase. Although in *Cline* the Supreme Court allowed an employer to renegotiate the health benefits it had promised its employees through a collective bargaining agreement [25], employers should not doubt the enduring potency of the ADEA. The case clearly endorses the primary principle of the ADEA, i.e., the protection of older workers from discrimination in favor of younger workers. And, there is no reason to believe that the standard of strict compliance with the OWBPA requirements demanded in the *Oubre* case has diminished in the years since that case was decided. There is every indication that, especially with respect to employee benefits, the Supreme Court stands ready to protect older workers from the superior bargaining power of their employers. Employers would therefore be well-advised to carefully draft all agreements by which employees waive their rights to pursue any age discrimination claim, including waivers in connection with layoffs or early retirement incentive programs. Congress passed the OWBPA to create precise requirements for waivers of rights to ensure that the bargaining process is as fair as possible, and it seems clear that the Supreme Court intends to see that this objective is realized.

Despite the confusion that remains regarding the *Gilmer* decision, employers should ensure that any requirement by which employees submit to binding arbitration, rather than filing a lawsuit, is knowing, voluntary, clear, and unambiguous. Employees must be given a copy of the dispute resolution policy and should acknowledge, in writing, their understanding that they are waiving their right to proceed through the courts. The waiver must be easy to understand, and employees should be told how to take advantage of the opportunity to arbitrate disputes. The policy must be procedurally fair to the employees, and they should specifically be provided with the right to legal representation.

The practical importance of the *Cline* decision is in its policy implications. Under *Cline*, employers may now treat some groups of workers who are covered by the ADEA differently, as long as those who receive the favorable treatment are more than forty years of age. This could open the door to arbitrary treatment with respect to benefits. *Cline* could engender a "divide and conquer" strategy when it comes to the renegotiation of benefit plans upon which older workers rely.

By marginalizing the very old, or as in *Cline*, the “not-so-old,” and offering renegotiated plans to those workers in the middle of the age range, employers may be able to win concessions that would not have been possible prior to this decision. The fact is, however, that employers usually have incentives and the ability to renegotiate benefits. Economic conditions and the threat of bankruptcy have made it possible for some large employers to simply eliminate health plans or other benefits altogether. But the *Cline* decision may also be seen as an invitation for employers to consider the elimination of some employee benefits while preserving benefits for other, older workers.

As it did with the passage of the OWBPA, Congress might consider again amending the ADEA to enforce the act’s fundamental purpose of prohibiting arbitrary discrimination in employment. This would not be the first time Congress has passed legislation in response to specific Supreme Court decisions. For example, Congress passed the Pregnancy Act of 1978, which amended Title VII, in order to reverse the 1976 Supreme Court decision in *General Electric v. Gilbert* allowing company health insurance plans to exclude pregnant women [28]. More recently, in 1994, Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA), in part to overturn several Supreme Court decisions in which the Court had refused to impose time limits on the length of military service through which employees are entitled to reemployment protection [29, 30, 31].

It would be incorrect to characterize the current Supreme Court as “pro-employer” or “pro-employee” when the interests of the two groups diverge, but it is clear that each decision it renders in this area of law will have increasing impact. Fortunately, a number of recent publications trace the development of the law on discrimination in employment benefits and provide the starting point for inquiry into how changes in benefits can legally be accomplished [32]. While inseparable from the larger context of employment discrimination, the law on age discrimination in employment benefits is emerging as a specialized field. This field of the law requires specific recognition from employers and employee groups, and expert advice should be obtained whenever changes in employee benefits are contemplated.

ENDNOTES

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28. *General Electric v. Gilbert*, 429 U.S. 125 (1976).
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