As our country faces economically turbulent times, we have already begun hearing about layoffs and companies downsizing. Unfortunately, older workers often bear the brunt of these cutbacks because employers use the opportunity to get rid of older workers who sometimes command the highest salaries or prevent the business from projecting a “younger” image.

If you are an older worker, federal law provides certain legal protections for you in the workplace. The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, et seq., protects most workers who are 40 years old or older from employment discrimination based on their age. Additionally, the Older Workers Benefit Protection Act (“OWBPA”), 29 U.S.C. §§ 623, 626 & 630, requires that employers follow certain rules when seeking a waiver of claims and when offering severance packages or early retirement options to older workers. This article will outline the basic protections provided to older workers under the ADEA and the OWBPA.
I. Age Discrimination in Employment Act

A. Who is Protected Under the ADEA?

Most workers who are 40 years or older and employed in the United States are protected against age discrimination by the ADEA if they work for employers with 20 or more employees. 29 U.S.C. § 631(a). This protection extends to job applicants, current employees, and retired employees in some circumstances. There are some exceptions to this coverage, however.

Working Abroad: If you are a U.S. citizen employed overseas you may still be covered by the ADEA, as long as your employer is a U.S. corporation or a subsidiary of one. If instead you are a U.S. citizen who has applied for employment or are employed abroad with a foreign corporation that is not controlled by an American affiliate, you are not protected against age discrimination under the ADEA. If you are not a U.S. citizen, the ADEA only protects you if you are employed inside the United States.

Military Personnel: If you are an uniformed personnel member in active or reserve armed forces the ADEA does not protect you. See Spain v. Ball, 928 F.2d 61, 63 (2d Cir. 1991). If, however, you are civilian personnel working within the military departments, which include the Department of the Army, Navy, and Air Force, you are protected against age discrimination under the ADEA. 29 U.S.C. § 2000e-16(a).

Independent Contractors: Independent contractors are not employees under the ADEA, and as such, are not protected against age discrimination. See 29 U.S.C. § 630(f). You should be aware, however, that just because you employer labels you an independent contractor does not necessarily mean that legally you are an independent contractor. To determine if a person is an independent contractor, courts look at whether the worker is in business for himself or herself and whether the employer has the right to control the means and manner of the worker’s performance. See Frankel v. Bally, 987 F.2d 86, 89 (2d Cir. 1993). If you exercise little or no control over what duties you perform and how you perform them and instead your employer dictates to you what tasks to do and when to do them, you may be an employee not an independent contractor under the ADEA regardless of the title your employer gave you.

Partners: Since the ADEA only covers employees, partners in a partnership are not protected against age discrimination by the ADEA. Similar to the case of independent contractors, however, courts look beyond the label of partner to determine if a worker is actually a bona fide partner. The test used to determine if a worker is a partner is whether the worker had ample opportunity to share in the management and control of the employer’s operations. See Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003). In Clackamas, the Supreme Court rightly pointed out that some partnerships today include hundreds of members who are labeled partners, but who likely qualify as employees, because only a small number of managing partners control the organization. Id. at 446. Thus, if you are a partner in a partnership, but exercise no control over the management of the partnership, you may be protected against age discrimination by the ADEA.
**Elected Officials and Their Appointees:** If you are an elected official of any state or political subdivision of any state, the ADEA does not protect you against age discrimination. 29 U.S.C. § 630(f). Thus, for example, the Supreme Court held that the ADEA did not protect Missouri state judges from a mandatory retirement requirement because they were subject to periodic retention elections. *Gregory v. Ashcroft*, 501 U.S. 452, 464-65 (1991). Likewise, if you are on the personal staff, are an appointee on the policymaking level, or are an immediate adviser with respect to the exercise of constitutional or legal powers of the office of a state elected official, you are not protected by the ADEA. 29 U.S.C. § 630(f).

**Executives and High Policymakers:** Private employers may impose mandatory retirement ages of 65 or higher for certain executives (called bona fide executives) or high policymaking employees. If you are an executive whose spends 80 percent of your time: (1) managing the enterprise, department, or subdivision; (2) routinely supervising the work of two or more other employees; (3) participating in the hiring and firing, advancement, and promotion of other employees; and (4) exercising considerable control over a large number of employees and a large volume of business, your employer may be able to require you to retire at age 65 or may demote you when you turn 65. 29 U.S.C. § 631(c). Even if you have little or no authority over other employees, if your responsibilities are such that they play a significant role in the development of corporate policy and implementation, you also may be subject to mandatory retirement or demotion at age 65. The ADEA, however, only allows employers to impose mandatory retirement or demotion at age 65 if the employee has been a bona fide executive or high policymaker for the two-year period immediately before retirement. When requiring an executive or high policymaker to retire, the employer must also provide an immediate nonforfeitable annual retirement benefit of at least $44,000. *Id.*

**Public Safety Officers:** State and local governments have the option of setting mandatory retirement ages for public safety officers, including police and firefighters. 29 U.S.C § 623(j).

If you are a bona fide executive, high policymaker, or public safety officer, it is important that you remember that while the ADEA does allow your employer to impose a mandatory retirement requirement, you are still protected against other forms of age discrimination, such as unequal pay, harassment, and retaliation.

**B. Who is a Covered Employer Under the ADEA?**

The ADEA applies to private employers, state and local government employers, labor organizations, employment agencies, and the federal government.

**Private Employers:** If your employer is a private organization or company and it employs 20 or more employees, it must comply with the ADEA. 29 U.S.C. § 630(b). Whether an employer meets that requirement is determined by looking at whether it has had 20 or more employees working for each workday in each of the 20 or more calendar weeks in the current or preceding calendar year. *Id.*

Even if your employer has fewer than 20 employees, it still may be considered a covered employer under the ADEA if (1) it has acted jointly with either a parent or a
subsidiary corporation and (2) the total number of employees at both companies is 20 or more. If the two corporations have acted in a manner that shows that they are interrelated to the point that they are really joint enterprise, they may be considered one for the purposes of the ADEA. The central question in determining if your employer has acted jointly with the parent or subsidiary corporation is how interrelated the two operations are. See _Darden v. DaimlerChrysler N. Am. Holding Corp._, 191 F. Supp. 2d 382, 395 (S.D.N.Y. 2002).

**State and Local Governments:** State and local governments are covered employers under the ADEA; however, if you work for a state government and you have been discriminated against because of your age, you cannot sue your employer for monetary damages. _Kimel v. Florida Board of Regents_, 528 U.S. 62 (2000). To seek monetary damages against a state employer, the Equal Employment Opportunity Commission (“EEOC”) would have to choose to sue on your behalf. See _State Police for Automatic Ret. Ass’n v. Difava_, 138 F. Supp. 2d 142, 146-47 (D. Mass. 2001).

**Labor Organizations:** If you are a member of a union, your union can be held liable for both its own discriminatory acts under the ADEA and for discriminatory contract provisions of a collective bargaining agreement that violate the ADEA. See _EEOC v. Air Line Pilots Ass’n_, 489 F. Supp. 1003, 1009 (D. Minn. 1980).

**Employment Agencies:** If an employment agency regularly procures employees for at least one employer covered by the ADEA, it is also subject to the ADEA. 29 C.F.R. § 1625.3(a).

**Federal Government:** While the ADEA protects workers from age discrimination at the hands of the federal government, there are certain procedural and substantive differences that apply, which will be discussed in the section addressing how to vindicate your rights under the ADEA.

### C. What Practices Are Prohibited Under the ADEA?

i. **Specific Discriminatory Acts**

Covered employers are prohibited from discriminating against employees with respect to their compensation, terms, privileges, or conditions of employment because of their age. Examples of discriminatory actions that would qualify are hiring, firing, demoting, or denying promotion. If you have been subject to an employment action that does not quite rise to the level of adverse action, such as reassignment, it may still qualify as a prohibited practice under the ADEA. See _e.g._, _Tadlock v. Powell_, 291 F.3d 541 (8th Cir. 2002).

ii. **Harassment**

The ADEA also protects older workers against age-based harassment at work, if the harassment creates a hostile work environment. See _Rivera-Rodriguez v. Frito Lay Snacks Caribbean_, 265 F.3d 15, 25 (1st Cir. 2001). For harassment to rise to the level of a hostile work environment, the offensive conduct must be severe or pervasive enough that an objective observer would find the work environment hostile or abusive. The worker who is subject to the harassment must also personally find
the work environment hostile or abusive. Examples of behavior that can contribute to a hostile work environment are ageist remarks, insults, ostracism, and unwarranted discipline.

It is important to understand, however, that harassment is only prohibited under the ADEA if it is based on a person’s age. The ADEA does not protect an older worker from hostile work environments where younger employees are also subject to harassment or where there is no evidence that the harassment is age based. See Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1363 (7th Cir. 1988).

iii. Retaliation

The ADEA also prohibits a covered employer from retaliating against any employee who opposes a prohibited practice, files a charge, or participates or testifies in an investigation, proceeding, or litigation under the ADEA. 29 U.S.C. § 623(d). Employees who are otherwise not covered by the ADEA are still protected against retaliation. Retaliatory actions include: termination, demotion, denial of promotion, unwarranted discipline, an unwarranted negative performance review, suspension or other forced leave, reduction in pay or hours, denial of benefits, reassignment that negatively impacts promotion, or alteration of job duties.

iv. Advertising and Referrals

The ADEA prohibits the printing or publishing of any notice or advertisement indicating any preference, limitation, specification, or discrimination against older workers. 29 U.S.C. § 623(e). Additionally, employment agencies may not refuse to refer an applicant for employment because her or she is an older worker. Id. Nor can an employment agency classify any person on the basis of age. Id.

v. Reverse Discrimination

The ADEA does not protect relatively young workers, who are 40 or over, from discrimination based on an employer’s preference of older workers. General Dynamic Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).

D. Can a Covered Employer Legally Discriminate Based on Age?

i. Bona Fide Occupational Qualification

An employer may overtly base employment decisions on age if it can show that age is a bona fide occupational qualification (“BFOQ”) that is reasonably necessary to the normal operation of the particular business. 29 U.S.C. § 623(j). For example, the Federal Aviation Agency is allowed to require commercial pilots to retire when they reach 60 for public safety reasons. Only a very limited number of occupations will be able to show that age is a BFOQ.

When determining if an employer’s age-based policy is a valid BFOQ, courts first look at whether the policy is reasonably necessary to the essence of the employer’s business. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985). For example, a mandatory retirement age for firefighters may be deemed reasonably necessary to the essence of fighting fires because having physically able firefighters is essential
for protecting the public safety.

The employer must also show, however, that it is compelled to rely on age its employment policy or practice. The employer can do so by either showing that (1) it has a substantial basis for believing that all or nearly all employees above a certain age lack the qualifications required for the position. Id. Courts, however, typically require detailed medical evidence, validation studies, and expert analysis to show that the employer has a substantial basis for its belief. An employer can also try to show that it is highly impractical for it to individually test employees to determine whether each has the necessary qualifications. Id.

Employers most often raise the BFOQ defense to defend a hiring requirement that requires a person be under a certain age or a mandatory retirement-ages requirement for jobs involving the public’s safety.

ii. Bona Fide Seniority System

If a bona fide seniority system would otherwise violate the ADEA, it is valid as long as it was not intended to evade the purposes of the ADEA. 29 U.S.C. § 623(f)(2)(A). Since seniority systems tend to favor rather than disfavor older workers, employers rarely need to raise this defense. However, a seniority system cannot require or permit involuntary retirement of any employee on the basis of age. Id.

iii. Bona Fide Benefit Plan

An employer may offer different terms for an older employee benefit plan where the payments made or costs incurred on behalf of an older worker are at least as large as those incurred on behalf of a younger worker. 29 U.S.C. § 623(f)(2)(B)(ii).

E. How Do I Vindicate My Rights?

i. Non-federal Employees

You must first file a charge with the EEOC in order to seek a legal remedy for age discrimination or retaliation that violated the ADEA. A charge must be filed with the EEOC within 180 days from the date of the alleged violation, in order to protect your ability to vindicate your rights under the ADEA. 29 U.S.C. § 626(d)(1). If you live in a state that has a state law that prohibits age discrimination, however, this 180-day filing deadline is extended to 300 days or 30 days after you have received notice of termination of state proceedings if that date is earlier. 29 U.S.C. § 626(d)(2). The reason if you live in one of these states you are given a longer timeline is because you are required to file a charge with the appropriate agency in your state.

The EEOC (or your state agency if applicable) will investigate your charge of discrimination or retaliation, and if it determines there is merit to your charge, it will attempt to foster conciliation between you and the employer. Unfortunately, the EEOC field offices are under-resourced and cannot act on most complaints in a timely manner. Regardless of the EEOC’s determination, after 60 days have passed, you may bring a civil action in court. 29 U.S.C. §§ 633(b), 626(d).

ii. Federal Employees
If you are a federal employee, you have two options for pursuing your ADEA claim. You may follow the EEOC’s administrative process or you may proceed directly to court.

If you choose to file an administrative charge, the first step is to contact an EEO Counselor at your agency within 45 days of the discriminatory action. 29 C.F.R. § 1614.105(a)(1). The agency will conduct an investigation of the complaint, either party may request a hearing, and after the hearing a final order is issued. 29 C.F.R. §§ 1614.108, 1614.109, 1614.110. If either party is dissatisfied with the final order, they appeal the decision to an EEOC administrative judge. 29 C.F.R. § 1614.401.

If you choose to go directly to court, you must file a notice of intent to file suit with the EEOC within 180 days after the alleged violation occurred. 29 U.S.C. § 633a(d). Additionally, you must wait at least 30 days after the notice is filed before filing suit. Id.

F. What Are the Available Remedies?

If a court finds that you have been discriminated or retaliated against in violation of the ADEA, you may be entitled to remedies that include:

- Reinstatement, compelled employment, or compelled promotion;
- Back pay;
- Front pay;
- Liquidated damages (not available for federal employees); and
- Attorneys’ fees

II. The Older Worker Benefit Protection Act

If your employer offers you an early retirement incentive plan or a severance package, such a plan must be voluntary, which means that (1) you had sufficient time to consider your options, (2) your employer must provide you with complete and accurate information concerning what benefits are available under the plan or package, and (3) your employer did not threaten or intimidate you into accepting the package. 29 U.S.C. § 623(f)(2)(B).

If your employer is requiring you to waive your ADEA rights as a condition of such a package, or if are settling an ADEA claim, the OWBPA requires that the waiver must be knowing and voluntary. 29 U.S.C. § 626(f). To meet this standard, the following eight conditions must be met or else your waiver is invalid:

If you signed a waiver that did not comply with all eight of these requirements, then the waiver does not bar your ADEA claim and you may pursue your ADEA claim without returning any money you received for signing the waiver. See Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998). However, an invalid waiver in and of itself does not provide you with separate grounds for monetary damages under the ADEA. See Krane v. Capital One servs., Inc., 314 F. Supp. 2d 589, 609 (E.D. Va.)
1. The waiver is part of an agreement between you and your employer that is written in clear and unambiguous language.

2. The waiver specifically refers to rights or claims arising under the ADEA i.e., age-discrimination or retaliation.

3. You did not waive rights or claims which may arise after the date the waiver is executed.

4. You are being given something more than the benefits you are already entitled to by right in return for signing the waiver. This means that if your employer provides a severance package to all employees as a matter of right, then as an older employee you must be given something of value in excess of the severance pay in exchange for your waiver of your ADEA rights.

5. You are advised in writing to consult with a lawyer before signing the agreement.

6. Your employer provides you with sufficient time to consider the waiver. Specifically, you are given at least 21 days to consider the matter before signing the agreement. If you are part of a group of employees being offered an early retirement incentive program or other employment termination program, you were provided with at least 45 days to consider the matter before signing the agreement.

7. You are given seven days after signing the agreement in which you may revoke the waiver. The agreement is not valid until the end of the seven days.

8. If you are signing a waiver in connection with an incentive or other employee retirement termination program offered to a group of employees, your employer must inform you in writing about the class, unit, or group covered by the program, any eligibility factors for the program, and any applicable time limits. Your employer must also make clear to you the job title and ages of all individuals eligible for the program, and the ages of all individuals in the same job classification, or organizational unit who are not eligible or selected for the program.

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Source URL: https://www.natlawreview.com/article/legal-protections-older-workers-know-your-rights