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# AGE DISCRIMINATION IN EMPLOYMENT: A COMPARISON OF THE FEDERAL AND STATE LAWS AND REMEDIES IN NEW MEXICO

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Age discrimination in employment has been prohibited by federal law since 1967 under the "Age Discrimination in Employment Act of 1967."<sup>1</sup> In 1969 the New Mexico Legislature made such age discrimination an "unlawful discriminatory practice" under the "New Mexico Human Rights Act."<sup>2</sup> While the federal and state acts provide extensive coverage as well as a broad panoply of remedies, they also present a maze of procedural requirements and pitfalls to aggrieved employee in his attempts to seek redress under the acts. Several recent federal court decisions interpreting the procedural requirements of the federal act in the context of applicable state laws and remedies have further complicated this procedural morass. This article provides a comparative overview of the federal and state acts and an explanation of their substantive and procedural relationship.

## THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

### A. Substantive Provisions

The federal "Age Discrimination in Employment Act of 1967"<sup>3</sup> (hereafter the ADEA) outlaws discrimination in employment because of age in almost every form.<sup>4</sup> Under Section 623 of the ADEA, employers,<sup>5</sup> employment agencies and labor organizations are

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1. 29 U.S.C. § § 621-634 (1970), *as amended* (Supp. V, 1975).

2. N.M. Stat. Ann. § § 4-33-1 to -12 (1953), *as amended* (Supp. 1975).

3. 29 U.S.C. § 621-634 (1970), *as amended* (Supp. V, 1975).

4. *Id.* § 623. Section 621(b) states that the Congressional purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; 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." Although the basic thrust of the ADEA is to prohibit certain employment practices which discriminate against the older worker the ADEA also requires the Secretary of Labor under Section 622(a) to "undertake studies and provide information to labor unions, management and the general public concerning the needs and abilities of older workers and their potentials for continued employment and contribution to the economy."

5. *Id.* § 630(b) (Supp. V, 1975), *amending* 29 U.S.C. § 630(b) (1970), includes, under the term "employer," states, political subdivisions of a state or their agencies, interstate agencies but not the United States. Section 633a(a) prohibits age discrimination in federal government employment.

prohibited from discriminating against older employees on the basis of age in hiring, discharge, compensation, terms and conditions of employment, classification or referral for employment and advertisements for employment indicating or implying a preference based on age.<sup>6</sup> The federal ADEA, however, only protects those individuals "who are at least 40 years of age but less than 65 years of age."<sup>7</sup> Furthermore, it only applies to industries affecting commerce who have 20 or more employees, to employment agencies, labor unions and by recent amendment to states, political subdivisions and agencies thereof and to the federal government.<sup>8</sup>

The ADEA creates two important exceptions where discrimination is permitted. Section 623(f)(1) provides that it is not unlawful for an employer, employment agency or labor organization to take any action otherwise prohibited:

... where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.<sup>9</sup>

Thus, if the employer can demonstrate that the very nature of the job requires a young worker (e.g., actors required for youthful roles or for promotion of products designed to appeal exclusively to the young) or that the requirements for the job necessarily exclude older workers (e.g., occupations which are particularly hazardous and require rapid reflexes, endurance or strength such as an underwater demolition man or iron worker) the discrimination does not violate the ADEA.<sup>10</sup>

Although the "bona fide occupational qualification" exception was interpreted by the Secretary of Labor as having limited scope and application with the burden of proof clearly on the shoulders of the discriminator seeking to rely upon it,<sup>11</sup> the courts have mitigated the burden of proof where the nature of the job poses some risk of bodily harm to the public. In *Hodgson v. Greyhound Lines, Inc.*,<sup>12</sup> the Secretary of Labor challenged the Greyhound Bus Line's policy

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6. *Id.* § 623 (1970). Section 623(d) of the ADEA also protects the employee from any retaliatory measures taken by an employer because of the employee's opposition to unlawful practices or his participation in investigation, proceedings, or litigation under the ADEA.

7. *Id.* § 631 (Supp. V, 1975), formerly 29 U.S.C. § 631 (1970).

8. *Id.* § 623 (1970) and §§ 630, 633a(a) (Supp. V, 1975), amending 29 U.S.C. §§ 630, 633 (1970).

9. *Id.* § 623(f)(1) (1970).

10. 29 CFR § 860.102(e), § 860.103(f)(1)(ii) (1975).

11. *Id.* § 860.102(b).

12. 499 F.2d 859 (7th Cir. 1974), rev'g 354 F. Supp. 230 (N.D. Ill. 1973).

of hiring persons for driving inter-city buses who were under 35 years of age. In reversing the lower court's decision against Greyhound which had found an absence of a scientific factual basis for Greyhound's employment policy, the court of appeals concluded that:

Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice.<sup>13</sup>

The second major exception of "differentiation based on reasonable factors other than age" has found judicial interpretation in *Stringfellow v. Monsanto*,<sup>14</sup> where an employer was forced to reduce his work force for economic reasons and the evidence showed that the average age of the employees had been lowered by a reduction of the work force. The court held that the employer had not violated the ADEA because the reduction in employees had been accomplished under a comprehensive evaluation criteria in which age was an entirely neutral factor. Additionally, it is also not unlawful under the ADEA to "discharge or otherwise discipline an individual for good cause."<sup>15</sup> In *Brennan v. Reynolds & Company*,<sup>16</sup> an elderly receptionist alleged that she had been unlawfully fired because of her advanced age. The defendant-employer contended that the plaintiff was fired for "good cause" and in support introduced time sheets and affidavits proving habitual tardiness. In granting the employer's motion for summary judgment the court interpreted the congressional intent of Section 621 of the ADEA and the "good cause" defense provided for in Section 623(f)(3) in the following manner:

Section 621 does not cast upon the court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge. It serves only to prevent discharge because of age alone. However, even when age is but one of a number of causes for discharge, the finding must be that the discharge was not "for good cause," within the meaning of 621. . . . On the other hand, where the discharge is that of a person whose "age" by tradition and custom was excessive; where it actually was not the employer's

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13. 499 F.2d 859, 863 (7th Cir. 1974); see also *Usery v. Tamiami Trails Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) where policy of refusing initial employment of intercity bus drivers over 40 was upheld, and *McIlvanie v. Pennsylvania State Police*, 6 Pa. Cmwlth. 505, 296 A.2d 630 (1972) where mandatory retirement of state policemen at age 60 was held not to violate the ADEA because of bona fide occupational qualifications.

14. 320 F. Supp. 1175 (W.D. Ark. 1970); see also *Gill v. Union Carbide Corp.*, 368 F. Supp. 364 (E.D. Tenn. 1973).

15. 29 U.S.C. § 623(f)(3) (1970).

16. 367 F. Supp. 440 (N.D. Ill. 1973).

consideration, discharge for other reasons would under the statute be a "good cause" discharge.<sup>17</sup>

In litigating claims under the ADEA the employee-plaintiff has the burden of going forward with the evidence and has the ultimate burden of proof in establishing discrimination under the ADEA.<sup>18</sup> However, once the employee has made a *prima facie* showing of age discrimination the burden of justification then shifts to the defendant-employer.<sup>19</sup> As in cases brought under Title VII of the "Civil Rights Act," courts have held that a *prima facie* case of discrimination under the ADEA can be made by proof of a pattern and practice from which age discrimination can be inferred.<sup>20</sup> Without evidence of such a pattern and practice of age discrimination in employment policies the employee faces a more difficult time in sustaining his burden of proof.<sup>21</sup>

Certain provisions of the ADEA have also been interpreted by the Secretary of Labor to authorize involuntary retirement irrespective of age so long as the "retirement" is pursuant to the terms of a *bona fide* "retirement or pension plan" meeting the requirements of Section 623(f)(2).<sup>22</sup> Although such mandatory retirement laws and policies are permitted under the ADEA, they have been challenged on constitutional grounds in the area of public employment.<sup>23</sup>

17. *Id.* at 444.

18. *Bittar v. Air Canada*, 512 F.2d 582 (5th Cir. 1975); *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Gill v. Union Carbide Corp.*, 368 F. Supp. 364 (E.D. Tenn. 1973); *deLoraine v. MEBA Pension Trust*, 499 F.2d 49 (2d Cir. 1974).

19. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974); *Schulz v. Hickok Mfg. Co.*, 358 F. Supp. 1208 (N.D. Ga. 1973).

20. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972).

21. *See Surrisi v. Conwed Corp.*, 510 F.2d 1088 (8th Cir. 1975).

22. 29 U.S.C. § 623(f)(2) (1970); 29 C.F.R. § 860.110 (1975). Section 623(f)(2) of the ADEA provides: "[I]t shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual." For a critical discussion of whether the Secretary's interpretation is supported by the legislative history of the ADEA see Gilan, *The Federal Age Discrimination in Employment Act Revisited*, 9 Clearinghouse Rev. 766, 767 (March 1976).

23. The constitutional attacks have been in the area of public employment where the employer has been sufficiently clothed in state action to be subject to the 5th and 14th amendment constraints. These challenges have centered on the deprivation of the employee's due process and equal protection rights. All have thus far proved unsuccessful. In *Murgia v. Massachusetts Bd. of Retirement*, 376 F. Supp. 753 (D. Mass. 1974), *rev'd per curiam*, \_\_\_\_ U.S. \_\_\_\_ (1976), 44 U.S.L.W. 5077 (June 27, 1976), the U.S. Supreme Court held constitutional Massachusetts's mandatory retirement law for uniformed state police officers at age 50, utilizing the "relatively relaxed" rational basis standard after finding that government employment was not a "fundamental right" and that state officers over age 50 were not a "suspect class" requiring "strict scrutiny." *See Weisbrod v. Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 940 (1975) involving mandatory retirement for federal employees at age 70 where such policy was argued to impose an irrebuttable

Finally, in the area of advertising for employment where both the language of the ADEA and the interpretive regulations of the Secretary of Labor clearly forbid "any indication of preference, specification or discrimination based on age,"<sup>24</sup> enforcement of the provisions has been greeted with judicial resistance. In *Brennan v. Paragon Employment Agency, Inc.*,<sup>25</sup> the Secretary of Labor brought suit against an employment agency which advertised for "college students," "girls," "boys," and "June graduates" and in spite of the fact that the Secretary's own interpretive regulations had designated these precise terms as discriminating against older persons in advertising for employment,<sup>26</sup> the court granted the defendant's motion to dismiss, refusing to accept the Secretary's interpretation and the clear mandate of Section 623(e). The court reasoned that:

The purpose of the Act was to prevent persons aged 40 to 65 from having their careers cut off by unreasonable prejudice. It was not intended to prevent their children and grand-children from ever getting started. There is nothing in the Act that authorizes the Secretary of Labor to prohibit employers from encouraging young persons—whether or not in college—to turn from idleness to useful endeavors.<sup>27</sup>

The holding in *Paragon* is somewhat symptomatic of the general reluctance the courts have demonstrated in giving force and effect to the substantive provisions of the ADEA.

### B. Procedural Requirements

The administration and enforcement of the ADEA have been delegated to the Department of Labor except where federal government employees are involved.<sup>28</sup> The Civil Service Commission has the responsibility of enforcement of the ADEA where age discrimination arises in federal employment.<sup>29</sup> Both agencies are authorized to promulgate rules and regulations interpreting the provisions of the ADEA.<sup>30</sup> Timely and proper notice of alleged discriminatory prac-

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presumption of non-productivity and thus depriving the employee of due process; see also *Cannon v. Guste*, 423 U.S. 918 (1975); *McIlvanie v. Pennsylvania State Police*, 454 Pa. 129, 309 A.2d 801 (1973), *dismissing appeal*, 415 U.S. 986 (1974); *Weiss v. Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd*, 461 F.2d 846 (2d Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973).

24. 29 U.S.C. § 623(e) (1970); 29 C.F.R. § 860.92(b) (1975).

25. 356 F. Supp., 286 (S.D.N.Y. 1973), *aff'd mem.*, 489 F.2d 752 (2d Cir. 1974).

26. *Id.* at 288.

27. *Id.* at 288, 289.

28. 29 U.S.C. §§ 622, 624, 625 and 626 (1970).

29. *Id.* § 633a(b) (Supp. V, 1975).

30. *Id.* § 628 (1970) and § 633a(b) (Supp. V, 1975).

tices must be given by aggrieved individuals to these federal agencies. Recent court pronouncements have made scrupulous adherence to these requirements essential. The ADEA requires that aggrieved individuals must give written notice to the Department of Labor of the alleged discrimination and their intent to file a lawsuit within 180 days of the discriminatory act.<sup>31</sup> However, if a state agency has become involved, the Department of Labor may be so notified within 300 days of the alleged unlawful practice or within 30 days after receipt of notice of termination proceedings under state law, whichever occurs first.<sup>32</sup> The existence of a state agency, empowered under a state law to grant or seek relief from such age discrimination, further complicates the procedural requirements.<sup>33</sup> Section 633 of the ADEA provides that no suit either by an individual or the Secretary of Labor may be filed "before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated."<sup>34</sup> If such a state agency exists the aggrieved individual must notify the state agency by a written and signed statement, by registered mail, of the discriminatory practice within the appropriate time limit set by state law (90 days under the "New Mexico Human Rights Act").<sup>35</sup> The aggrieved party must also wait 60 days after notifying the Secretary of Labor before commencing his own law suit.<sup>36</sup> Finally, all law suits brought under the ADEA must be filed within 2 years after the cause of action occurs or within 3 years if the action is willful.<sup>37</sup> The

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31. *Id.* § 626(d)(1) (1970). Written notice should be addressed to the local Wage and Hour Division of the Department of Labor.

32. *Id.* § 626(d)(2).

33. *Id.* § 633(b).

34. *Id.*

35. *Id.* § 633(b); N.M. Stat. Ann. § 4-33-9A (1953). Although such notice to state authorities is nowhere made a prerequisite to federal litigation under the ADEA, three federal courts (discussed *infra*) have made it a condition precedent to subject matter jurisdiction. *See* *Curry v. Continental Airlines*, 513 F.2d 691 (9th Cir. 1975); *Goger v. H. K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974); *McGarvey v. Merck & Co.*, 359 F. Supp. 525 (D.N.J. 1973), *vacated*, 493 F.2d 1401 (3d Cir. 1974), *cert. denied*, 419 U.S. 836 (1974). *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich., 1974); *but see* *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975), *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976); *Bertsch v. Ford Motor Co.*, 415 F. Supp. 619 (E.D. Mich. 1976).

36. 29 U.S.C. § 626(d) (1970). Where federal employees are involved the individual must wait 30 days after giving the Civil Service Commission notice of intent to file before commencing his own civil action. Notice of age discrimination and intent to file a civil action must be filed with the Civil Service Commission within 180 days of the occurrence of the alleged unlawful practice. *Id.* § 633a(d) (Supp. IV, 1974). While non-federal employees may file "in any court of competent jurisdiction" for relief under the ADEA, *id.* § 626(c) (1970), federal employees must file in the federal district court. *Id.* § 633a(c) (Supp. IV, 1974).

37. 29 U.S.C. § 626(e) (1970) *incorporating* § 255(a) (1970).

courts have construed all of these notice and time requirements to be jurisdictional prerequisites.<sup>38</sup>

The required notice to the Secretary of Labor need not conform to any rigid specifications. However, the court in *Burgett v. Cudahy Company*,<sup>39</sup> interpreting an opinion letter of the Department of Labor, required that it must contain the basic facts which would enable the Secretary to perform his functions.

It should be provided in writing in a letter properly addressed to the Secretary; it should contain an identification of the parties involved; and it should include a general description of the alleged discriminatory action.<sup>40</sup>

The purpose of requiring an individual to notify the Secretary of Labor of a violation before he can file a law suit in court is clearly to encourage private settlements and voluntary compliance through the direct involvement of the Department of Labor with its investigative and conciliatory powers.<sup>41</sup> The courts have rigidly construed this 180 day notice requirement as a mandatory, jurisdictional condition precedent to private litigation, and have literally required that the notice specifically express the individual's intent to file his own law suit. In *Powell v. Southwestern Bell Telephone Company*,<sup>42</sup> the court of appeals affirmed a lower court decision dismissing a private individual's suit for lack of jurisdiction where the Department of Labor was only notified of "a desire that an agency of the federal government commence litigation"<sup>43</sup> on the claimant's behalf and not that the claimant intended to file an independent action. The claimant in *Powell* twice notified the Secretary in writing within the 180 day time limit. However, because neither the first notification, which set out the alleged violation, nor the second, which requested that the Secretary file a law suit on her behalf, specifically mentioned the claimant's intention to file her own suit, the court found the notice to be fatally defective.

In a subsequent case the 5th Circuit Court of Appeals again considered the same notice requirement in the context of whether failure of the employer to post required notices of the ADEA waived or tolled the 180 day time limit. The employer in *Edwards v. Kaiser*

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38. *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kan. 1973); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.D.C. 1973); *Cochran v. Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Edwards v. Kaiser Aluminum & Chem. Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975).

39. 361 F. Supp. 617 (D. Kan. 1973).

40. *Id.* at 621.

41. *Id.*

42. 494 F.2d 485 (5th Cir. 1974).

43. *Id.* at 489.



*Aluminum and Chemical Sales, Inc.*,<sup>44</sup> had failed to comply with Section 627 and 29 C.F.R. § 850.10 which require the posting of notices of the applicability of the ADEA in conspicuous places.<sup>45</sup> The plaintiff, a former employee, had filed suit for damages alleging wrongful discharge because of age under the ADEA. The plaintiff did not give the Secretary of Labor notice of his intent to sue until more than a year and a half had elapsed from the wrongful discharge and more than 180 days after he gained actual knowledge of the ADEA through consultation with his attorneys. The district court granted the employer's motion to dismiss and the court of appeals affirmed. Both courts rejected the employee's argument that the employer's failure to post notices totally relieved the employee of his obligation to give the Secretary notice of his intent to file suit within 180 days. While the district court held that the 180 day notice requirement is tolled by the employer's failure to post notices until such time as the employee gains actual knowledge, the court of appeals refused to consider the issue as the employee had also failed to comply within 180 days of securing counsel and obtaining actual knowledge. The court did state by way of *dicta* that "[T]olling rather than waiver would also supply a remedy commensurate with the wrong."<sup>46</sup> Again, as in *Powell*, the failure of the employee to give timely notice to the Secretary was deemed to be a failure to meet a jurisdictional prerequisite for maintaining an action under the ADEA.<sup>47</sup> The equitable doctrine of tolling was adopted in *Skoglund v. Singer Co.*,<sup>48</sup> where the employer's failure to post the required ADEA notices under Section 627 allegedly prevented the employee from notifying the Department of Labor of the ADEA claim within the prescribed time limit. The court found that the 180 day notification requirement of Section 626(d) was analogous to a statute of limitation and thus subject to equitable modifications. Concluding that the employer's failure to post the appropriate ADEA notices would serve to toll the Section 627 notice requirement the court reasoned:

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44. 515 F.2d 1195 (5th Cir. 1975).

45. 29 U.S.C. § 627 (1970) provides that "[E]very employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Chapter." 29 C.F.R. § 850.10 (1975) provides that "[E]very employer . . . which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Secretary of Labor or his authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees. . . ." However, the ADEA is silent on specific penalties for violations of this section.

46. 515 F.2d 1195, 1199 (5th Cir. 1975).

47. *Id.*

48. 403 F. Supp. 797 (D.N.H. 1975).

... ADEA is remedial legislation. It is therefore, entitled to a broad reading. It creates rights in a class of employees, the elderly employed, and it places a burden on employers to inform that class of their rights. If that burden is not met, this remedial legislation will benefit few. Congress has specifically placed this burden upon employers, and, although it did not provide for a tolling of the one hundred eighty day notification requirement, to toll the requirement would not be inconsistent with the general remedial and humanitarian purposes of ADEA.<sup>49</sup>

Upon receipt of the notice of intent to sue the ADEA directs that "the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."<sup>50</sup> The ADEA charges the Secretary with the responsibility of affirmatively seeking voluntary compliance through conciliation with the employer before any judicial action can be taken by the Department of Labor.<sup>51</sup> The efforts of the designated compliance officer in reaching such voluntary compliance must be substantial, given the recent court holding in *Brennan v. Ace Hardware Corporation*.<sup>52</sup> The compliance officer in that case engaged in two conferences with the employer, as well as a telephone conversation, all of which proved fruitless. In spite of a finding that the employer had indeed violated the ADEA, the lower court dismissed the Secretary's suit because such attempts at conciliation were inadequate. In affirming the lower court's decision the 8th Circuit Court of Appeals held that although the compliance officer need not rigidly follow "positions announced in handbooks,"<sup>53</sup> the efforts at conciliation must be "exhaustive, affirmative action."<sup>54</sup> Section 626(b) specifically bars only suits brought by the Secretary and the adequacy of the conciliation efforts of the Secretary should not affect the commencement of a private, civil action under Section 626(c).

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49. *Id.* at 804. See also *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), where similar reasoning adopted allowing commencement of action after statutory period had run.

50. 29 U.S.C. § 626(d) (1970).

51. *Id.* § 626(b) provides: "[B]efore instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

52. 362 F. Supp. 1156 (D. Neb. 1973), *aff'd*, 495 F.2d 368 (8th Cir. 1974).

53. 495 F.2d 368, 376 (8th Cir. 1974). The lower court had implied in its decision that the compliance officer's departure from a field operation handbook setting out procedures for seeking voluntary compliance would make the conciliation efforts inadequate per se. 362 F. Supp. 1156, 1159-1160 (D. Neb. 1973).

54. 495 F.2d at 374 (8th Cir. 1974).

Class actions brought under the ADEA are governed by Section 216(b) of the "Fair Labor Standards Act"<sup>55</sup> and not by Rule 23 of the Federal Rules of Civil Procedure.<sup>56</sup> For an employee to become a member of the class he must file a written consent to be made a party to the suit with the court in which the action is brought. All members of the class action need not individually comply with the jurisdictional notice requirements to the Secretary if the representative plaintiff has properly done so.<sup>57</sup>

Finally, the ADEA grants to the courts broad remedial powers including judicially imposed employment, reinstatement, promotion, and awards of back wages or unpaid overtime compensation in cases brought either by the Secretary or an individual employee.<sup>58</sup>

### THE NEW MEXICO HUMAN RIGHTS ACT

#### A. Substantive Provisions

The State of New Mexico outlaws age discrimination in certain employment practices under the "New Mexico Human Rights Act" (hereafter the NMHRA).<sup>59</sup> This act also creates a seven member "Human Rights Commission" to administer and enforce the statutory prohibitions against discrimination.<sup>60</sup> The NMHRA prohibits a broad spectrum of discriminatory practices based on race, religion, color, national origin, ancestry, physical or mental handicap as well as age.

Section 4-33-7A of the NMHRA makes it an unlawful discriminatory practice for "an employer, unless based on a bona fide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, or physical or mental handicap." Although the NMHRA goes on to prohibit discriminatory practices in such other employment related areas as union membership, training programs, job advertisement, employment agencies and in the areas of housing and credit on the basis of race, religion, color, national origin, ancestry, sex, and physical or mental handicap,<sup>61</sup>

55. 29 U.S.C. § 626(b) (1970), *incorporating* 29 U.S.C. § 216(b) (1970).

56. *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

57. *Burgett v. Cudahy Co.*, 361 F. Supp. 617, 624 (D. Kan. 1973).

58. 29 U.S.C. § 626(b) (1970). Liquidated damages may only be awarded for willful violations of the ADEA at the discretion of the court. *Chilton v. National Cash Register Company*, 370 F. Supp. 660 (S.D. Ohio 1974). The plaintiff may also recover attorney's fees and costs. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

59. *Supra* at note 2.

60. N.M. Stat. Ann. § 4-33-3 (Supp. 1975).

61. *Id.* § 4-33-7 B, C, D, E, F, G, and H.

"age" as a prohibited basis of discrimination is not further included. The NMHRA is thus more limited in its coverage of employment discrimination than the ADEA which not only prohibits discriminatory practices based on age in the hiring, firing, promotion and compensation of employees as covered by the state act, but also prohibits discriminatory practices in the terms and conditions of employment, classification or referral for employment, and advertisements for employment indicating a preference based on age. Furthermore, the ADEA extends its coverage beyond employers to also include labor organizations and employment agencies. On the other hand, the NMHRA applies to employers with 4 or more employees<sup>62</sup> which is significantly broader than the federal ADEA which covers only employers with 20 or more employees whose businesses affect interstate commerce. Another feature of the NMHRA which may extend its umbrella of coverage beyond that of the federal act is the fact that the term "age" is not defined to include or exclude numerical age groups. Whereas the ADEA offers protection only to persons between 40 and 65 years of age, the NMHRA protects all age groups where age is used as a basis for discrimination.\*

The NMHRA allows two exceptions to its age discrimination prohibition. Discrimination is allowed where it is based on a "bona fide occupational qualification,"<sup>63</sup> and, by recent amendment, mandatory retirement of an employee at 65 is permitted if the employer has a retirement plan in accordance with the "Employee Retirement Income Security Act of 1974," 26 U.S.C. § 410 *et seq.* (Supp. 1976).<sup>64</sup> The language defining the two exceptions parrots the federal ADEA and would suggest similar judicial interpretations by the New Mexico courts. In *Keller v. City of Albuquerque*,<sup>65</sup> discussed *infra*, the age discrimination provision in Section 4-33-7A was attacked as being unconstitutionally vague by not providing reasonable guidelines as to age. The New Mexico Supreme Court considered the broad generic term "age" in the context of the included "bona fide occupational qualification" exception and found that it did define with sufficient particularity the unlawful discriminatory practices intended to be prohibited by the legislature although

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62. *Id.* § 4-33-2B (1953).

[\*The courts have stated that the ADEA sets only minimum standards and does not preempt stricter state statutes with broader coverage. See *Simpson v. Alaska State Comm'n for Human Rights*, 423 F. Supp. 552 (D. Alaska 1976).]

63. *Id.* § 4-33-7A (Supp. 1975).

64. *Id.* § 4-33-8E.

65. 85 N.M. 134, 509 P.2d 1329 (1973).

the guidelines were admittedly not as "precise as the federal act dealing with the same problems of age. . . ." <sup>66</sup>

The adequacy of the remedies provided for under the NMHRA depends on the particular circumstances of the aggrieved individual. For individuals between 40 and 65 years of age who may be subjected to discrimination based upon their age by persons employing 20 or more people, the ADEA offers a much broader scope of rights and remedies. Also persons seeking relief against labor organizations or employment agencies for age discrimination in membership, training programs or job advertisement, as well as persons seeking relief from discrimination in housing or credit, have no adequate state remedy under the NMHRA and must proceed solely under the ADEA <sup>67</sup> or other federal legislation. <sup>68</sup> Both the "Human Rights Act" and the ADEA offer full injunctive relief to persons protected by those respective acts. However, the NMHRA limits the award of monetary damages to \$1000, <sup>69</sup> whereas recovery of actual and punitive damages available under the ADEA are not subject to statutory maximums.

### *B. Procedural Requirements*

Administration and enforcement of the NMHRA have been delegated to the Human Rights Commission as created by the statute. The Commission has the power to promulgate rules and regulations to eliminate discrimination in employment. The Commission also has the authority to conduct hearings and fully adjudicate any complaint alleging an unlawful discriminatory practice. It is empowered to investigate, attempt reconciliation, hold adjudicative hearings, issue cease and desist orders, award damages up to \$1,000 and apply to the district court for specific performance of any conciliation agreement or for enforcement of any order it may issue. <sup>70</sup>

Timely and proper notice of alleged discriminatory practices must be given under the state act. All complaints must be filed with the Commission within ninety (90) days after the alleged act was committed. <sup>71</sup> Failure to file within this ninety day period would

66. *Id.* at 139, 509 P.2d at 1334.

67. Where no state remedy exists or where no "adequate" state agency exists an aggrieved individual need not defer to the state agency otherwise required by the ADEA, see *Curry v. Continental Airlines*, 513 F.2d 691 (9th Cir. 1975).

68. Certain discriminatory practices based on age in the extending of credit are prohibited by the "Equal Credit Opportunity Act Amendments of 1976" Pub. L. No. 94-239, *amending*, 15 U.S.C. § 1691 *et seq.* (Supp. V, 1975).

69. N.M. Stat. Ann. § 4-33-10E (Supp. 1975).

70. *Id.* § 4-33-4A, B, C, D, and E (1953) and § 4-33-10E (Supp. 1975).

71. *Id.* § 4-33-9A (1953).

preclude the complainant from his state remedy and may also bar later attempts to obtain federal relief under the ADEA as well (discussed *infra*). The complaint must contain the name and address of the person alleged to have committed the unlawful discriminatory practice, the date of the alleged discrimination, a statement of facts, and a statement of the relief requested.<sup>72</sup> The complaint is deemed filed when it is received by the Commission<sup>73</sup> and must be served on the respondent by the Commission within thirty days "by mail or in person."<sup>74</sup>

After filing of the complaint, the Commission staff conducts an investigation into the alleged discriminatory practice. Upon completion of the investigation, the Commission issues a list of findings of facts.<sup>75</sup> Either party may file exceptions to these findings,<sup>76</sup> after which the Commission makes a determination whether there exists "probable cause" for the Commission to file its own complaint concerning the alleged discriminatory practice.<sup>77</sup> If there is a finding of "probable cause," the Commission must endeavor to attempt conciliation between the parties.<sup>78</sup> Failing to reach conciliation, the Commission must then file its own complaint against the respondent<sup>79</sup> and an adjudicative hearing on the complaint must be held within 15 days.<sup>80</sup> When there is a finding of "no probable cause" by the Commission or when the complaining party objects to the conciliation agreement reached between the Commission and respondent, the complainant must request a review hearing before the Commission.<sup>81</sup> At this hearing the complainant has the burden of showing that the dismissal or the conciliation agreement was arbitrary, capricious or not in accordance with law.<sup>82</sup>

The Commission's actions at the review hearing or at the adjudicative hearing on the merits represents final administrative action for purposes of appeal. Within 30 days after the review hearing or entrance of the Commission's order in the adjudicative

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72. "Rules and Regulations, New Mexico Human Rights Commission," Rule II(C) (1974).

73. *Id.* Rule II (D) (2).

74. *Id.* Rule II (E) (1).

75. *Id.* Rule III (A) (1).

76. *Id.* Rule III (A) (2).

77. *Id.* Rule IV(A).

78. N.M. Stat. Ann. § 4-33-9C (1953); "Rules and Regulations New Mexico Human Rights Commission," Rule VII(A) (1974).

79. *Id.* § 4-33-9D; Rule IX(A)(1).

80. *Id.* Rule IX(A)(3).

81. *Id.* § 4-33-9B; Rule VI(A)(1) and VII(B)(1).

82. "Rules and Regulations, New Mexico Human Rights Commission," Rule VI(B)(2) (1974).

hearing, either party may file a notice of appeal with the district court. The party aggrieved by an order of the Commission may obtain a trial de novo in the district court<sup>83</sup> where the scope of the district court's review goes beyond the review ordinarily allowed of administrative proceedings. The district court makes an independent determination of facts from the record, transcript,<sup>84</sup> and such other relevant evidence as the parties may choose to introduce. Either party may request a trial by jury.<sup>85</sup> This expanded scope of judicial review by the district court was affirmed in *Keller v. City of Albuquerque*, *supra*. In that case the Commission found in favor of a city policeman who complained that he had been terminated from employment solely on the basis of age. The district court on review set aside the order of the Commission. The complainant appealed to the New Mexico Supreme Court on the basis of traditional administrative law principles that limit the court's review to questions of law, fraudulent, arbitrary, or capricious actions, or whether the Commission's order is supported by substantial evidence. The court examined the standard of review of the NMHRA in comparison with review standards of other state administrative agencies and found that because the act provided for both a trial de novo and a trial by jury the general rules of administrative review were not applicable. The court concluded that the district court judge or jury "... has the right to make an independent determination of the facts from the record in the case and such additional relevant evidence as may be presented. . . ."<sup>86</sup>

#### PRIOR RESORT TO STATE REMEDIES—A PROCEDURAL PITFALL

Section 633(b) of the ADEA provides that:

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminating practice, *no suit may be brought under Section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law*, unless such proceedings have been earlier terminated. . . . (emphasis added).<sup>87</sup>

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83. N.M. Stat. Ann. § 4-33-12A (Supp. 1975).

84. N.M. Stat. Ann. § 4-33-12B (Supp. 1975), "Rules and Regulations, New Mexico Human Rights Commission," Rule XII (1974).

85. N.M. Stat. Ann. § 4-33-12C (Supp. 1975).

86. 85 N.M. 134, 138, 509 P.2d 1329, 1334 (1973).

87. 29 U.S.C. § 633(b) (1970).

Several recent decisions have interpreted this section as creating yet another condition precedent to jurisdiction in the federal courts; namely, a prior resort to state remedies. While conceding that Section 633(b) does not require a full exhaustion of state administrative remedies,<sup>88</sup> the courts in *Curry v. Continental Airlines*,<sup>89</sup> *Goger v. H. K. Porter Company, Inc.*,<sup>90</sup> *Vaughn v. Chrysler Corporation*,<sup>91</sup> and *McGarvey v. Merck & Co., Inc.*,<sup>92</sup> have held that Section 633(b) does require that the aggrieved individual must first seek relief from the appropriate state agency before filing an ADEA claim in federal court. The Secretary of Labor's interpretation that the limitation contained in Section 633(b) applies only if the proceedings have already begun under state law and that the complainant has the option of pursuing either state or federal remedies was rejected in *Goger*. The court instead adopted the following interpretation:

We agree with the district court, however, that although the Act does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance.<sup>93</sup>

In concluding that Section 633(b) mandates a prior resort to state administrative remedies in all instances where such remedies are available, all of the above courts relied upon the similarity between the provisions of Title VII of the "Civil Rights Act of 1964"<sup>94</sup> and Section 633(b) of the ADEA, reasoning that since analogous provisions of the "Civil Rights Act"<sup>95</sup> have been construed to require a

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88. Exhaustion of the state remedy is clearly not at issue as 29 U.S.C. § 633(a) (1970) provides that "upon commencement of action under this chapter such action shall supercede any State action."

89. 513 F.2d 691 (9th Cir. 1975). In *Curry*, the court found that there existed no adequate state agency authorized to grant relief for the discriminated employee within the meaning of 633(b) and therefore concluded that deferral in that case was not required.

90. 492 F.2d 13 (3d Cir. 1974).

91. 382 F. Supp. 143 (E. D. Mich. 1974).

92. 359 F. Supp. 525 (D.N.J. 1973), *vacated*, 493 F.2d 1401 (3d Cir. 1974), *cert. denied*, 419 U.S. 836 (1974). Because of the newness of the ADEA and the fact that the plaintiff in *Goger* had been misadvised by the Department of Labor, the circuit court vacated the lower court's dismissal and remanded the case for a hearing on the merits granting "equitable relief." *McGarvey* was thereafter vacated by the third circuit so that the district court could reconsider their decision in light of the "equitable relief" afforded in *Goger*.

93. 492 F.2d 13, 15 (3d Cir. 1974).

94. 42 U.S.C. § 2000e *et seq.* (1970), *as amended* (Supp. V, 1975).

95. *Id.* § 2000e-5(c) (Supp. V, 1975), *amending* 42 U.S.C. § 2000e-5(b) (1970).



prior resort to state remedies as a jurisdictional prerequisite,<sup>96</sup> such construction compels the same result under the ADEA.<sup>97</sup>

The crucial ramification of this judicial construction, currently subscribed to by the 3rd and 9th Circuits and the Eastern District of Michigan, is to impose a second statute of limitations on federal court suits brought under the ADEA. The prospective ADEA litigant must commence<sup>98</sup> his state proceeding within the applicable state statute of limitations or be forever barred from having his ADEA action heard in federal court.<sup>99</sup> The state statute of limitation is not tolled by the federal action. The claimant cannot, once the time has expired, cure the federal jurisdictional defect after his error is discovered.

A more liberal construction of Section 633(b), however, was reached in *Skoglund v. Singer Company*,<sup>100</sup> where although 633(b) was interpreted as requiring a "timely resort to state remedies"<sup>101</sup> before a complaint could be filed in federal court, the provision itself was not found to be a jurisdictional absolute which would preclude the federal court from ever taking jurisdiction of a case regardless of the circumstances or equitable considerations. In *Skoglund*, the employee notified the state agency of the age discrimination one month after the state statute of limitations had run. The employee's failure to timely file with the state agency was allegedly due to employer's failure to post the required notices of the ADEA and employee's own lack of knowledge of the state and federal age discrimination laws. The employer moved to dismiss the employee's ADEA complaint for lack of jurisdiction. The court found the ADEA to be "remedial legislation" which should not "be so narrowly read as to preclude achievement of its purpose."<sup>102</sup> While noting that the

96. *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Crosslin v. Mountain States Telephone and Telegraph Company*, 422 F.2d 1028 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004 (1971).

97. Though Section 633(b) of the ADEA and Section 2000e-5(c) of Title VII of the "Civil Rights Act of 1964" are similar in language, the procedures of the ADEA are substantially dissimilar to those of Title VII. There is also no legislative history to support the conclusion that Section 633(b) of the ADEA is a jurisdictional prerequisite as there is for Section 2000e-5(c). See the concurring opinion of Judge Garth in *Goger*.

98. 29 U.S.C. § 633(b) (1970) provides that both the 60 day period and the state proceeding are "deemed to have been commenced" upon the filing of a written and signed statement of facts sent by registered mail to the state authority regardless of more stringent state law requirements.

99. The "equitable relief" afforded the litigants in *Goger* and *McGarvey* because of the newness of the statute and the reliance on erroneous official advice may no longer apply. See *Vaughn v. Chrysler Corp.*, *supra* note 91, at 146.

100. 403 F. Supp. 797 (D.N.H. (1975); see also *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976).

101. 403 F. Supp. at 802.

102. *Id.* at 801.

congressional purpose of Section 633(b) was to further federal and state relations and to encourage deferral to states and their remedial efforts, the court reasoned that to construe the section as a jurisdictional prerequisite would not serve to further this purpose but only to "deny plaintiff any remedy at all."<sup>103</sup> The court concluded that:

I do not believe that plaintiff's failure to comply with Section 633(b) deprives this court of the power to hear this case. There is no indication in either the history or the wording of ADEA that the Section 633(b) requirement is jurisdictional.<sup>104</sup>

The construction eventually afforded Section 633(b) in other circuits is difficult to predict. Nevertheless, the newness of the ADEA and the judicial inhospitality which has greeted it make it advisable for prospective New Mexico litigants and their attorneys to be mindful of the 90 day New Mexico statute of limitation by timely initiating their claim before the New Mexico Human Rights Commission and thus avoiding any unnecessary risk of having their ADEA action later barred in federal court by a strict reading of Section 633(b). The lesson to be learned from the judicial interpretations given the ADEA procedural requirements is that once the age discrimination has been discovered and before 90 days have elapsed, two signed and written statements setting forth the complaint should be sent by registered mail. The first should be addressed to the New Mexico Human Rights Commission and the second to the Department of Labor, Wage and Hour Division.<sup>105</sup> The letter to the Department of Labor should also contain a clear statement of the individual's intent to file his own suit. Upon expiration of 60 days the aggrieved individual may then file his own ADEA action in federal court.

### CONCLUSION

The "Age Discrimination in Employment Act of 1967" and the "New Mexico Human Rights Act" supply a comprehensive statutory

103. *Id.* at 802.

104. *Id.* The court in *Skoglund* adopted the reasoning of *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975) and *Equal Employment Opportunity Comm'n v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir. 1974) which found the Title VII filing requirements not to be jurisdictional in the strict sense but analagous to a statute of limitations and thus subject to equitable modifications such as tolling and estoppel. This reasoning was again adopted in *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976).

105. In *Vaughn v. Chrysler Corp.*, *supra* note 91, at 145, the court was of the opinion that the notice to the Secretary of Labor could not be sent until after the expiration of the 60 day state deferment period. There is no statutory basis for this interpretation in the ADEA.

framework of protection for the elderly employee in New Mexico. The effectiveness of these laws in shielding the senior worker from age discrimination in employment ultimately rests with the courts. Thus far, as evidenced by the cases discussed in this article, the federal courts have generally displayed an attitude of ambivalence toward the ADEA by judicially erecting one procedural hurdle after another before prospective claimants. This article has attempted to clarify these state and federal acts as they have been judicially construed and to hopefully provide a guide for the private litigant through the procedural pitfalls as they presently exist. Age discrimination is both subtle and pervasive in the "youth culture" society we live in. These laws are relatively new with limited or no judicial interpretation. As society and jurists become more cognizant of age discrimination and its devastating effect on our elderly, the laws may take on more meaning in a practical sense and succeed in affording the effective protection originally envisioned by Congress and the New Mexico Legislature.