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State Legislation Prohibiting Discrimination in Employment Because of Age

By James T. Brennan

To date 26 jurisdictions\(^1\) have passed legislation prohibiting discrimination in employment because of age.\(^2\) Among them are the important industrial states of California, Michigan, New York, Pennsylvania, and Ohio. While the purpose of these statutes is to outlaw discrimination in employment because of age, the statutes often do not contain the word “Discrimination.”\(^3\) However, the concept of discrimination seems inherent in the statutory language. Many read something like:

> It shall be an unfair employment practice (a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment.\(^4\)

Hence, it would appear from the wording of such statutes that every consideration of age in the context of the employment relationship is unlawful, unless, of course, the statute is inapplicable in the specific case between the particular employer and employee because of exemptions or exclusions contained within the act.\(^5\) Even in the absence


\(^{\text{\footnotesize 2}}\) The best single source for locating material on legislation prohibiting discrimination in employment because of age is the new CCH Employment Practices Guide.


\(^{\text{\footnotesize 4}}\) CONN. GEN. STAT. REV. § 31-128 (1962). The corresponding California statutory section prohibiting discrimination in employment because of age is CAL. UNEMP. INS. CODE § 2072 which provides: “It is unlawful for an employer to refuse to hire or employ; or to discharge, dismiss, reduce, suspend, or demote any individual between the ages of 40 and 64 solely on the ground of age, except in cases where the law compels or provides for such action.”

\(^{\text{\footnotesize 5}}\) CAL. UNEMP. INS. CODE § 2072 continues: “This section shall not be construed to
of an applicable statutory exemption, a court may construe the statute
as not barring all consideration of age, but rather as merely prohibi-
ting discrimination against an individual because of his age, there
being no violation of such a statute where a bona fide occupational
need exists for using age as a criteria in the employment relationship. 6

Since 1934, Louisiana has prohibited discrimination in employment
because of age. 7 There is no specific exclusion for a bona fide occupa-
tional qualification or need; but in interpreting the statute, the at-
torney general issued the opinion that the practice of the Public
Service in New Orleans of requiring bus drivers to be between the
ages of 21 and 45 years did not violate the statute because the drivers
of the motor vehicles are engaged in a hazardous occupation. 8 This
opinion appears to factually create an exemption for a bona fide occu-
pational qualification or need under the statute. Today, a court
might or might not similarly write an exclusion for bona fide occupa-
tional qualifications or needs into a Fair Employment Practice Act; and
even if it did, it might reach a different conclusion as to whether the
the facts in the particular case constituted a bona fide occupational
need or qualification. 9

make unlawful the rejection or termination of employment where the individual appli-
cant or employee failed to meet bona fide requirements for the job or position sought
or held, or to affect bona fide retirement or pension programs; nor shall this section
preclude such physical and medical examinations of applicants and employees as an
employer may make or have made to determine fitness for the job or position sought
or held.

"Promotions within the existing staff, hiring or promotion on the basis of experience
and training, rehiring on the basis of seniority and prior service with the employer, or
hiring under an established recruiting program from high schools, colleges, universities
and trade schools shall not, in and of themselves, constitute a violation of this chapter.

"This section shall not limit the right of an employer, employment agency, or labor
union to select or refer the better qualified person from among all applicants for a job.
The burden of proving a violation of this section shall be upon the person or persons
claiming that the violation occurred."

6 See text accompanying note 54 supra.
7 LA. REV. STAT. § 23:892 (1950) provides: "The elements for employment shall
not be determined by age, but shall be governed by the mental and physical fitness,
and by the experience and trustworthiness of the employee or applicant; except in
hazardous occupations or occupations requiring unusual skill and endurance."
8 1944-1946 OfS. LA. ATT'Y GEN. 319.
9 For an example of the interesting problems which laws banning discrimination in
employment because of age may present, the reader might consult a policy statement of
the Washington State Board Against Discrimination issued on November 18, 1965, and
reported in CCH 1966 EMPLOYMENT PRACTICES GUIDE ¶ 8034: "This Board responds
'no' to the question raised by counsel for the complainants in Smith and Strzeleck v.
New Viceroy Restaurant, No. EA-963 and -964:—Is an employer requirement that a
cocktail waitress be 'sexy' and exciting violative of the law against discrimination in
employment because of age?"
It should be pointed out that in almost all states it is not discrimination because of age which is outlawed but rather discrimination because of middle age. Persons between the ages of 40 and 65 are generally singled out exclusively for special protection under the FEP Acts. Although there are numerous variations in the several FEP Acts, the state statutes which prohibit discrimination in employment because of age may quite usefully be segregated into two distinct groups according to the scope of the statute. In the first group of statutes the prohibition against discrimination in employment because of age is included in a general civil rights statute prohibiting discrimination in employment because of race, color, religious creed, national origin or ancestry. The second group of statutes deals exclusively with discrimination in employment because of age.

With a few exceptions, the legislation prohibiting discrimination in employment because of age is new. Many statutes which forbid

The Board said in part: "None of the foregoing job specifications are perfectly correlated with age, nor is a requirement of sexiness. Some older women are 'sexy' and some younger women are not. Thus a condition of employment that cocktail waitresses be 'sexy' is not strictly an age condition, although it is a condition that older women, as a class, may find more difficult to meet.

"In any event employees of this Board for the foreseeable future will not question the employer's judgment as to whether a particular girl has the right quantum of sex; that is not a function of this Board. Any limit on cocktail waitresses in terms of chronological age will be considered evidence that the cocktail lounge is discriminating because of age.

"This statement concerns cocktail waitresses only. It does not relate to waitresses in dining rooms."

See text at notes 45, 46, 47, 48 infra. California for example provides: "It is unlawful for an employer to refuse to hire any individual between the ages of 40 and 64 solely on the ground of age." Cal. Unemp. Ins. Code § 2072.


Colorado (1903), Louisiana (1934) and Massachusetts (1937 and 1950).

Alaska Stat. § 18.80.200 (Supp. 1966) (amended to include age in 1965);
discrimination in employment because of race, color, religious creed, national origin or ancestry have recently been amended to prohibit discrimination because of middle age as well. Likewise, those statutory enactments which only prohibit discrimination in employment because of age are of recent origin. Three states, Louisiana, North Dakota and Texas, prohibit discrimination in employment because of age but do not prohibit discrimination in employment because of race, color, religious creed, national origin or ancestry.

The statutes may also be divided into those which provide for criminal penalties and those which provide for specific orders to hire, promote or re-employ an individual who has been discriminated against. Some statutes create a special administrative agency charged with effectuating the purposes of the FEP Act, and these statutes usually create a special hearing tribunal to decide cases of alleged


See amended statutes in note 14 supra.

For example the Texas statute was passed in the legislative session of 1962-1963, and the North Dakota statute was enacted in 1965.

However, both North Dakota and Texas have equal pay laws, though the Texas equal pay law is limited to public employment.

See, e.g., N.D. CENT. CODE § 34-01-17 (Supp. 1965) which provides: "Any person or corporation who violates any of the provisions of this section shall be guilty of a misdemeanor, and shall be punished by a fine of not to exceed twenty-five dollars or by imprisonment in the county jail for not to exceed one day or by both such fine and imprisonment."

See, e.g., ALASKA STAT. § 18.80.130(a) 1 (Supp. 1966) which provides: "The Commission may order the hiring, reinstatement or upgrading of an employee with or without back pay, restoration to membership in a labor organization, or his admission to or participation in an apprenticeship training program, on-the-job training program or other retraining program."

See, e.g., ALASKA STAT. § 18.80.010 (Supp. 1966) which provides for the creation of a State Commission for Human Rights.
discrimination in employment. Other statutes do not provide any sanction for discrimination because of age.

As a rule the statutes which prohibit discrimination in employment only because of age and which are not modeled after a general civil rights statute provide either criminal sanctions or no sanctions whatever. The statutes which include age in a general civil rights act normally provide for: (1) specific orders to hire, promote, or re-employ; (2) an administrative agency to enforce the act; and (3) a special hearing tribunal to determine cases of alleged discrimination under the act.

What Constitutes a Violation of the FEP Acts

Types of Discrimination Because of Age

Most acts provide in substance that it is an unfair employment practice for an employer to refuse to hire a person, discriminate against an individual in the employment relationship, or discharge an employee because of his age. Thus there are three distinct types of cases in which the employer may be guilty of violating the FEP Acts. The employer may discriminate against an individual in the hiring process. After he has hired the individual, the employer may discriminate against the worker while he is an employee. And finally, the employer may discriminate against an individual by discharging him.

Discrimination in Hiring

It is obvious that the FEP Acts prohibit discrimination against an individual at the hiring stage. The statute usually will provide:

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21 See, e.g., CONN. GEN. STAT. REV. §§ 31-124, 31-127 (1962) which provide for the appointment of hearing examiners and set forth the procedure under which a complaint is brought before a hearing tribunal.

22 For example, California provides no penalty for violating CAL. UNEMP. INS. CODE § 2072. Also, there is no penalty provided in TEX. REV. CIV. STAT. ANN. art. 6252-14 (Supp. 1966).

23 See, e.g., LA. REV. STAT. § 23:893 (1950) which provides: "Whoever violates the provision of this Section shall be fined no more than five hundred dollars or imprisoned for not more than ninety days, or both."

24 E.g., CONN. GEN. STAT. REV. § 31-127 (1962).

25 For example it is unlawful in California to refuse to hire any individual between the ages of 40 and 64 solely on the ground of age. CAL. UNEMP. INS. CODE § 2072.

26 For example California makes it unlawful to reduce or suspend any individual between the ages of 40 and 64 solely on the ground of age. CAL. UNEMP. INS. CODE § 2072. ALASKA STAT. § 18.80.130 (Supp. 1966) provides that the Commissioner shall order a person to refrain from engaging in discriminatory conduct. The order may prescribe conditions on the accused's future conduct. The Commissioner may order upgrading of an employee with or without back pay or his admission to or participation in apprenticeship, on-the-job, or retraining programs.

27 E.g., CAL. UNEMP. INS. CODE § 2072.
It shall be an unfair employment practice (a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment...

The administrative agencies charged with the enforcement of the acts consistently interpret this statutory language to prohibit any act which may lead to an ultimate discriminatory refusal to hire. Thus an employer may not advertise a position by a description which excludes middle-aged applicants, recruit in such a manner as to discriminate against a middle-aged individual, or discriminate against a middle-aged person by offering to pay him a lower salary because of his age.

**Discrimination During the Employment Relationship**

After an individual has been hired, the FEP Acts prohibit discrimination in the employment relationship. It is unlawful to pay a middle-aged employee less because of his age, but it is not unlawful to treat the middle-aged employee unequally as to pension plans and similar fringe benefits. Likewise, the failure to promote, or give special training opportunities to a middle-aged employee because of his age, and discrimination against a middle-aged employee in the type of work to which he is assigned are prohibited under the FEP Acts.

28 CONN. GEN. STAT. REV. § 31-126 (1962).
29 For example Regulation § 371-2a of the Connecticut Commission on Civil Rights provides: "It shall be an unfair employment practice, except in the case of a bona fide occupational qualification or need, for employers or newspapers to use in employment advertising the word 'young' in describing an applicant or to use an age specification or limitation which bars applicants over a maximum age e.g. 'Help Wanted 25 to 35' 'Help Wanted Under 40'" Found in CCH 1966 EMPLOYMENT PRACTICE GUIDE § 21276.
30 E.g., PENN. STAT. ANN. tit. 43, § 955(b) 4 (1964).
31 E.g., CONN. GEN. STAT. REV. § 31-126(a) (1962).
32 E.g., ALASKA STAT. § 18.80.220 (Supp. 1966).
33 E.g., CONN. GEN. STAT. REV. § 31-126(a) (1962).
34 E.g., CONN. GEN. STAT. REV. § 31-128 (Supp. 1965) provides: "[T]he provisions of this section as to age shall not apply to (1) termination of employment where the employee is thereupon entitled to benefits under the terms or conditions of any bona fide retirement or pension plan or collective bargaining agreement between the employer and a bona fide labor organization, (2) operation of the terms or conditions of any bona fide retirement or pension plan, (3) operation of the terms or conditions of any bona fide group or employee insurance plan"
35 E.g., ALASKA STAT. §§ 18.80.130, 18.80.220 (Supp. 1966).
The Discriminatory Discharge

The FEP Acts make it unlawful to discharge an employee because of his age. However, if the discharge is the result of a bona fide pension or retirement plan, it will not violate the acts, which specifically provide an exemption for such plans. And since age is generally defined in the FEP Acts as being between 40 and 65, it would not violate the acts to discharge an employee over 65 because of his age.

Discrimination by Agents of the Employer

Once it is determined that consideration of age violates the FEP Act, a related question is who must have unlawfully considered the individual's age to hold the employer liable for violating the statute? The answer is simple when only one man does the hiring, but it is more difficult to answer the question with fairness both to the applicant and the employer when the views of several screening personnel are submitted to a person with final hiring authority. Will unlawful consideration of age in the part of one of the screening personnel, with or without submission of the candidate's age to the person authorized to do the hiring, constitute an unlawful employment practice on the part of the employer? In a recent Connecticut case, where a whole board had the final hiring authority, the court held that the unlawful consideration of age by one member of the board did not constitute a violation of the statute.

36 See report of J. Edward Conway on the practices of the airlines in setting an age ceiling for continued employment as a stewardess reported in CCH 1966 EMPLOYMENT PRACTICES GUIDE ¶ 8051. He found that such a ceiling was not a bona fide occupational qualification under the New York state law against discrimination.
38 E.g., CONN. GEN. STAT. REV. § 31-122(k) (1962) defines age as meaning "any age between forty and sixty five, inclusive." California's statute covers individuals between the ages of 40 and 64. CAL. UNEMP. INS. CODE § 2072.
39 To date these questions appear to be unanswered. The author submits that any unlawful consideration of age by any agent of an employer which adversely affected an applicant would probably constitute a violation of the FEP Act by the employer.
40 Board of Educ. v. Commission on Civil Rights, 153 Conn. 652, 220 A.2d 278 (1966). At a meeting of the West Haven Board of Education one of the members, Mr. Dest, remarked that Steeves [the complainant] was fifty years of age and that he wanted a young man to be trained as a potential administrator in this position. After a forty-five minute discussion, the motion to appoint the complainant to the position was put to a vote and defeated four to two. The Connecticut Supreme Court of Errors said "The reference to Steeves' age by Dest appears to have been taken out of context by the majority of the hearing tribunal and to have been given undue weight in arriving at their decision. Had age been a factor in motivating Dest's vote, the record fails to support, let alone prove, that the other three members who voted against Steeves were similarly motivated. The isolated observation of one member cannot be imputed to his
**Discrimination by Nonemployers**

Although the employer is the party who is most likely to violate the FEP Acts, the acts may be violated by other individuals or organizations as well. It is quite possible for a union to violate the FEP Acts both within its own organization and in conjunction with an employer. Third parties such as employment agencies and others may also violate the FEP Acts by their activities.

**Exemptions and Exclusions**

**Minimum and Maximum Age**

As previously pointed out, the statutes of most states do not prohibit discrimination in employment because of age against persons under 40 or over 65. Probably it was believed by legislators that young workers were not being discriminated against because of their age and, hence, needed no such protection. But surely, if a younger worker is discriminated against because of his age, he should be entitled to the same protection as his middle-aged brother. And indeed, it is believed that certain organizations, particularly industries such as banking, do discriminate against younger employees.

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41 E.g., ALASKA STAT. § 18.80.220(2) (Supp. 1966) provides: “It is unlawful for a labor organization, because of a person’s age, race, religion, color or national origin, to exclude or to expel him from its membership, or to discriminate in any way against one of its members or an employer or an employee.”

42 E.g., ALASKA STAT. § 18.80.260 (Supp. 1966) provides: “It is unlawful for a person to aid, abet, incite, compel or coerce the doing of an act forbidden under this chapter or to attempt to do so.”

43 See, e.g., ALASKA STAT. § 18.80.220(3) (Supp. 1966). “It is unlawful for an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication, or to use a form of application for employment or to make an inquiry in connection with prospective employment, which expresses, directly or indirectly, a limitation, specification or discrimination as to age, race, creed, color or national origin, or an intent to make the limitation, unless based upon a bona fide occupational qualification.”

44 See statute quoted in note 42 supra. It would appear that newspapers may violate the FEP Acts by printing advertisements which by their content constitute a violation of the acts.

45 See, e.g., IND. ANN. STAT. § 40-2318 (1965). However, several states cover slightly different age spans in their acts.

The reason for excluding workers over 65 from the protection of the acts is the practical necessity of some cut off age, and 65 is the traditional retirement age in America. While many persons over 65 are capable of performing in accordance with what may be termed as the minimum economic standard required by industry, many are not; and almost all persons over 85 are not. If a cut off age were not contained in the statutes, the burden of proving that a 68-year-old employee was not satisfactorily fulfilling the requirements of his position would be extremely difficult. The absence of a cut off age is a disadvantage to employers because in each individual case all the emotional factors are in favor of the employee and against the employer.

**Bona Fide Occupational Qualification or Need**

Generally, the FEP Acts prohibit discrimination in employment because of age, unless based upon a *bona fide occupational qualification or need.* The difficulty is determining what is a bona fide occupational qualification or need in the circumstances which give rise to a dispute. Though the exemption is necessarily broad, it could be defined either by examples or general rules. To date, however, no administrative agency charged with drafting regulations to supplement the FEP Acts has attempted to define “bona fide occupational qualification” by example or otherwise. Likewise, no court of record has yet passed on what constitutes a “bona fide occupational qualification or need.” It is not clear whether the courts will interpret the words “qualification or need” as being synonymous or as having different meanings.

**Occupational Qualification**

This exemption should permit the employer to set minimum standards of educational and professional experience without violating the FEP Acts. However, if a middle-aged individual meets these minimum occupational qualifications, the employer might violate the acts if

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47 New Jersey apparently has no cut-off age. See note 46 supra.
48 See text at note 85 infra concerning the burden of proof under the FEP Acts.
49 The italicized phrase is taken from Conn. Gen. Stat. Rev. § 31-126(a) and appears in many of the FEP Acts. The idea but not the language is found in Cal. Unemp. Ins. Code § 2072.
50 In Board of Educ. v. Commission on Civil Rights, 153 Conn. 652, 220 A.2d 278 (1966) this issue was briefed, but the case was decided on other grounds. See note 40 supra.
51 In refusing to grant a railroad company and a tree trimming firm a blanket exemption from the Age Discrimination Act, the Michigan Civil Rights Commission said:
he were to select a younger man for a specific job, raise or promotion because the man was younger, because the man was younger, regardless of what additional advantages might accrue to the employer by giving the younger man the job, raise or promotion.

**Occupational Need**

If the acts were read to exclude discrimination based upon a *bona fide occupational need* of the employer, it does not appear that such an interpretation would permit any additional consideration of age which would not be permitted under the concept of a *bona fide occupational qualification*. This is because of the meaning of the adjective "occupational." Occupation relates to generally recognized classifications of skills. Hence, *bona fide occupational qualification* and *bona fide occupational need* would for practical purposes be synonymous. Neither phrase would permit the employer to discriminate against a middle-aged worker because the employer desired or needed a younger individual in the position.

**Bona Fide Need**

If the courts should read the phrase "bona fide occupational qualification or need" so that only "bona fide" modifies "need," then an additional and important exemption to the acts would exist. Such an interpretation would permit an employer to deliberately select a younger man over an older man for a position or promotion whenever it might legitimately be in the best interests of the employer to have a younger man in the position. Such an interpretation would certainly permit management training programs. (In the absence of an exemption for the *bona fide needs* of an employer, management training programs quite likely violate the FEP Acts of many states.) The requirement that there be a *bona fide need* for a younger man on the part of the employer would prohibit general policies by employers such as only hiring young men as salesmen, but it would permit an employer with an almost exclusively middle-aged sales staff to deliberately hire a few younger salesmen in order to secure the future continuity of the business upon the gradual retirement of the older salesmen.

"The ability of a yard man to hop onto a freight or a trimmer to climb trees is not necessarily governed by his age." CCH 1966 Employment Practices Guide § 80599.

52 See, e.g., CAL. UNEMP. INS. CODE § 2072; WIS. STAT. § 111.32(5)(1) (1965).

53 This is a debatable point which only litigation will resolve. See note 36 supra.

54 This point is arguable. One meaning of occupation is one's habitual employment, trade or calling. Hence any skill required for any job could also be regarded as a *bona fide occupational qualification or need*.
Apprenticeship Programs

Generally, the FEP Acts provide an exemption in favor of apprenticeship programs. This exemption should apply to all commonly recognized classifications of skilled worker apprenticeship programs, and probably it should apply to newly instituted apprenticeship-like programs which are required for the newly developed skilled jobs of American industry. In light of the types of jobs available in our Twentieth Century society, it would be possible for the courts to give the word "apprenticeship" a new meaning so as to include all training programs, such as training programs for salesmen, clerical personnel, junior executives, etc. Similarly, the courts might exempt management training programs from the FEP Acts by classifying these programs as executive apprenticeships. Such expansion of the concept of apprenticeship, while arguably desirable on broad grounds of social policy, seems unlikely because too great an expansion of this exemption would for practical purposes abrogate the statutory prohibition of discrimination against the middle-aged. That is, it would defeat the intent of the state legislatures in passing this legislation.

Religious, Fraternal and Charitable Organizations

The states which include prohibition of discrimination because of age in a general civil rights statute generally exempt religious, fraternal and charitable organizations from the statute. This exclusion of religions, fraternal and charitable organizations is probably too broad even in the context of discrimination because of race, color, national origin or ancestry. What legitimate social interest is protected by permitting hospitals or like institutions to discriminate in employment because of race? Such an exemption serves no apparent socially useful purpose when the basis for this discrimination is not race but merely age. It unjustifiably exempts an important group of employers from the requirement to treat middle-aged workers equally with younger workers.

55 E.g., Conn. Gen. Stat. Rev. § 31-126 (Supp. 1965) provides: "The provisions of this section as to age shall not apply to operation of any bona fide apprenticeship system or plan."

Domestic Employees

The states which prohibit discrimination because of age in the same statute which prohibits discrimination because of race or religion usually provide an exclusion for domestic servants. This exclusion may be justified when the race and possibly when religion is the basis for the discrimination since society’s interest in permitting every individual to associate with whom he pleases outweighs the social evil of discrimination, but there is no apparent social justification for excluding domestic employees from protection against discrimination in employment because of their age. Indeed, domestic employment is one type of work which middle-aged and older persons are quite qualified to do. Age can make little legitimate difference to the employer of a domestic servant so long as the employee is capable of performing his job satisfactorily. This unfortunate exclusion is a result of the statutory scheme of many states which unjustifiably includes age along with race or religion in a general civil rights statute.

Fringe Benefits

Today employees are compensated not only in cash wages but also by employer contributions to pension plans, life insurance, health insurance and the like. Even under group plans, the cost of the contributions by the employer to these plans may increase with the age of the employee. Thus in real hard cash terms it may be more expensive for an employer to hire an older worker than a younger man. While this should not be a reason for permitting an employer not to hire a job applicant because of his age, it should be permissible for an employer to adjust the salary offered to older job applicants so that his total economic cost for a worker to fill the position will not be increased by the hirng of an older man for the position.

57 ALASKA STAT. § 18.80.300(2) (Supp. 1966); CAL. UNEMP. INS. CODE § 2071(3); CONN. GEN. STAT. REV. § 31-123(g) (1962); IND. ANN. STAT. § 40-2327 (1965); MASS. GEN. LAWS ANN. chs. 149, § 241, 151B, § 1 (1965); MICH. STAT. ANN. § 17.458(2) c (1960); N.J. STAT. ANN. § 18:25-5(f) (West 1964); N.Y. EXEC. LAW § 292(6) (McKinney 1951); ORE. REV. STAT. § 659.010(5) (Supp. 1965); PENN. STAT. ANN. tit. 43, § 954(c).

58 See IND. ANN. STAT. § 40-2328 (1965) which provides: “Nothing herein shall be deemed to limit, restrict or affect the freedom of any employer in regard to (a) fixing compulsory retirement requirements for any class of employees at an age or ages less than sixty-five [65] years; (b) fixing eligibility requirements for participation in, or enjoyment by employees of, benefits under any annuity plan or pension or retirement plan on the basis that any employee may be excluded from eligibility therefor who, at the time he would otherwise become eligible for such benefits, is older than the age fixed in such eligibility requirements or (c) keeping age records for any such purposes.”
Likewise many employers have compulsory retirement ages combined with pension benefits. While it may well be that compulsory retirement programs should be regarded as against sound public policy, it is clear that any legislation prohibiting compulsory retirement programs would face violent political opposition both from organized labor and management. Hence many of the FEP Acts clearly exclude such compulsory retirement plans from the coverage of the act. As indicated previously, the age span protected by the acts will also frequently exclude from the coverage of the acts persons who would otherwise be required to retire.

Employers of X Number of Persons

The states which include prohibition of discrimination because of age in their general civil rights statutes usually provide an exemption for employers of a very limited number of persons. Frequently this exemption is created by defining an employer as a person employing more than X number of employees. The exact number varies from state to state but is always small. The purpose of this exemption in terms of discrimination because of race or religion is to preserve the freedom of the employer to indulge in his personal prejudices in selecting employees with whom he will be in intimate contact. While it may be socially desirable not to force an employer into personal

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59 See CAL. UNEMP. INS. CODE § 2070 which proclaims: "It is the public policy of the State of California that manpower should be used to its fullest extent. This statement of policy compels the further conclusion that human beings seeking employment, or retention thereof, should be judged fairly and without resort to rigid and unsound rules that operate to disqualify significant portions of the population from gainful and useful employment. Accordingly, use by employers, employment agencies, and labor organizations of arbitrary and unreasonable rules which bar or terminate employment on the ground of age offend the public policy of this State." However, CAL. UNEMP. INS. CODE § 2072 provides: "This section shall not be construed to make unlawful the rejection or termination of employment where the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held, or to affect bona fide retirement or pension programs."

60 E.g., IND. ANN. STAT. §§ 40-2327-28 (1965). Section 40-2328 is quoted note 58 supra. Section 40-2327 reads: "These provisions shall not apply to a person employed in private domestic service or service as a farm laborer nor to a person who is qualified for benefits under the terms or conditions of an employer retirement or pension plan or system."

61 See text at notes 47, 48 supra.

62 E.g., CONN. GEN. STAT. REV. § 31-122(f) (1962) provides an exemption for employers of four or fewer employees.

63 E.g., MICH. STAT. ANN. § 17.458(2)b (1960) provides: "The term 'employer' includes the state or any political or civil subdivision thereof, any person employing 8 or more persons within the state and any person acting in the interest of an employer, directly or indirectly."
contacts with races or religions which he finds obnoxious, certainly no one would suggest that socially unacceptable hostility is likely to develop between an employer and an employee simply because the employee is old or young. The different bases of the two reasons for discrimination indicate why FEP restrictions barring discrimination based upon age should not be lumped with those which deal with discrimination based upon religion or race.

States which have separate legislation banning discrimination because of age are not likely to have such an exemption for employers of a limited number of individuals.  

**Procedure Under the FEP Acts**

As previously noted, the statutes prohibiting discrimination in employment because of age fall into two groups. The first group merely makes such discrimination unlawful, but it neither establishes an administrative agency to see that the act is complied with nor does it establish special tribunals to determine whether or not an alleged act of discrimination occurred. These activities are left to appropriate existing state officials and the regular courts. Since these statutes are generally criminal in nature, there are few major procedural or substantive difficulties encountered, and the normal court procedure is followed.

The second group of statutes not only makes discrimination in employment unlawful, but it charges an administrative agency with power to enforce the statute. The administrative agency is authorized to investigate and initiate the prosecution of alleged violations. The agency may also be authorized to issue regulations to supplement the act. Special hearing tribunals are established for an administrative

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64 E.g., IDAHO CODE ANN. §§ 44-1601-06 (Supp. 1965).
65 E.g., LA. REV. STAT. § 23:893 (1950); N.D. CENT. CODE § 34-01-17 (Supp. 1965).
66 E.g., MICH. STAT. ANN. § 17.458(6) (1960). The Michigan Civil Rights Commission was established by a constitutional amendment and has replaced the state's Fair Employment Practices Commission as guardian against discrimination. MICH. STAT. ANN. § 3.548(6) (Supp. 1965).
67 E.g., IND. ANN. STAT. § 40-2312(e) (1965); CONN. GEN. STAT. REV. § 31-125(e) (1962).
68 E.g., CONN. GEN. STAT. REV. § 31-127 (Supp. 1965) provides in part: "In case of failure to eliminate such practice, the investigator or investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission and to the attorney general. The chairman of the commission shall thereupon appoint a hearing tribunal of three members of the commission or a panel of hearing examiners to hear such complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or
determination of whether or not an employer has discriminated against an individual in the particular circumstances giving rise to the dispute.\textsuperscript{70}

**Prehearing Procedure**

In the states where a special procedure exists for handling complaints of alleged discrimination, the following procedure is typical. First a complaint must be filed by the aggrieved individual with the appropriate administrative agency \textsuperscript{71} It is then the agency's task to investigate and determine whether or not probable cause exists to believe that discrimination because of age has occurred. Until the employer is contacted, the only information the agency has is the charge by the aggrieved individual. Hence, unless the complainant is not within the age group protected by the statute, a prima facie case of discrimination exists against the employer. It is doubtful whether in most cases a mere denial by the employer will be accepted by the agency as sufficient to dispose of the complaint, and so even at this early stage in the proceedings, the burden is on the employer to prove to the satisfaction of the agency that he did not discriminate against the complainant. If the agency is not satisfied, then in most states it has the authority to seek and obtain voluntary compliance by the employer with the FEP Act.\textsuperscript{72} This means that the agency attempts to

See note 68 supra.


persuade the employer to voluntarily employ the complainant in the position which the complainant claims by right he would have received if he had not been discriminated against because of his age. If the agency is unable to obtain voluntary compliance from the employer, the complaint is then referred to the attorney general who prosecutes the charge before an administrative hearing board established under the FEP Act.

The Administrative Hearing

Parties

The FEP Acts provide generally that the complaint against the employer will be prosecuted before the hearing tribunal by the attorney general. Obviously the employer and attorney general are necessary parties. If the statute were exclusively criminal in nature, no question would arise as to whether or not other interested persons and organizations should be permitted to appear as parties. Regardless of how the FEP Acts which provide for administrative hearings may be characterized, if the employer is found to have discriminated against the complainant because of his age, the remedy which is likely to be imposed is a specific order to employ, promote or rehire the complainant as may be appropriate in the individual case.

Since important financial interests of the complainant are at stake, justice would seem to dictate that he have the right to appear as a party at the administrative hearing. The FEP Acts, however, are usually silent on whether he may appear as a party or not. In Board of Educ. v. Commission on Civil Rights, the hearing tribunal per...
mitted the complainant to appear by counsel at the hearing and take a very active part in conducting the proceedings. On appeal the Connecticut Supreme Court of Errors permitted the attorney for the complainant to file an Amicus Curiae brief but refused to treat the complainant as a party or allow him to participate in the oral argument.

In theory the attorney general in seeking to enforce the statute adequately represents the interests of the complainant when he prosecutes the employer. However, many complainants may suspect the attorney general of a lack of vigor in investigating and prosecuting their complaint. Psychologically there is no substitute for being permitted to hire your own attorney and present any evidence you may have. Aside from the fact that the FEP Acts generally fail to so provide, there does not appear to be any substantial reason why the complainant should not be permitted to be a party if he so desires.

Bearing in mind that the administrative hearing tribunal upon a finding of discrimination is likely to order the employer to give a certain position to the complainant, it is obvious that there may well be one or more third parties with personal and financial interests in the outcome of the hearing at least equal to the interests of the complainant. In Board of Educ. v. Commission on Civil Rights, the hearing tribunal found that the board of education had discriminated against the complainant because of his age when he was not selected for the position of Supervisor of Adult Education. The Connecticut Civil Rights Commission then ordered that the complainant be employed in that position with back pay. If the case had not been appealed, the practical effect of this order would have been to require the City of West Haven to take the position of Supervisor of Adult Education away from the incumbent holder of the position and give it to the complainant without the incumbent holder ever having been heard or afforded the opportunity to present evidence. The statutes prohibiting discrimination because of age are generally silent as to the rights of affected third parties to be heard or made parties.

It might be argued that neither the finding of the hearing tribunal

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78 But see MICH. STAT. ANN. § 17.458(7) (Supp. 1965), quoted in part in note 74 supra. ALASKA STAT. § 18.80.135(a) (Supp. 1966) provides: "A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order."
nor the prior voluntary compliance by the employer with the demands of the administrative agency could affect the contract rights of a third party holding the position in dispute, but this does not seem correct. Any contract action instituted by the adversely affected third party against the employer would be defeated by the defense of impossibility of performance caused by governmental action.\textsuperscript{79}

If a hearing tribunal has the power to order, in practical effect, that a position be taken away from a third party, there appears no substantial reason why the potentially affected third party should not have the right to appear by counsel and give evidence at the administrative hearing which vitally concerns his rights and future.\textsuperscript{80}

**Procedure**

Procedurally the FEP Acts create no particular difficulties. The procedure is normally set forth in rather great detail in the acts,\textsuperscript{81} and the administrative regulations generally restate in even greater detail the procedure to be followed.\textsuperscript{82} Any remaining questions should be resolved by either the state administrative procedure act or the administrative procedure currently practiced in the state.

**Evidence of Discrimination**

The purpose of the hearing is to determine whether or not the complainant was discriminated against because of his age. By statute

\textsuperscript{79}That is, the performance by the employer has become impracticable because of the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made; or expressed in another way, the performance of the employer was frustrated by compliance in good faith with a governmental regulation of order. See Uniform Commercial Code § 2-615 (defenses in sales contracts); 17 Am. Jur. 2d Contracts § 419 (1964).

\textsuperscript{80}See Neal v. System Bd. of Adjustment (Mo. Pac. R.R.), 348 F.2d 722 (8th Cir. 1965); Nix v. Spector Freight Sys., Inc., 264 F.2d 875 (3d Cir. 1959); Order of R.R. Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir. 1956). In the Neal case the court held that employees who might be adversely affected by the action were indispensable parties. Neal v. System Bd. of Adjustment (Mo. Pac. R.R.), supra at 728.


\textsuperscript{82}See, for example, Regulations 371-3 through 371-57 of the Connecticut Commission on Civil Rights. These regulations are reproduced in CCH 1966 Employment Practices Guide §§ 21277-88. Generally, the regulations established by the commissions charged with the enforcement of the FEP Acts are concerned with the procedure to be followed in processing complaints. They also frequently provide guidelines concerning what questions may be asked a job applicant before and after he is hired and what may be contained in an advertisement for a position. The CCH Employment Practices Guide reproduces these guidelines. For a rather extensive collection of guidelines the reader might consult the rulings of the New York State Commission for Human Rights found in CCH 1966 Employment Practices Guides §§ 26000-150.
this question is to be resolved after a consideration of all the evidence. What then is evidence of discrimination because of age?

If the tribunal decides that any consideration of age whatever constitutes a violation of the statute, then the questions of sufficiency of evidence and burden of proof necessary to sustain a determination of discrimination will probably be avoided since there will be not only the complainant’s testimony but quite likely some limited admissions by the employer. However, if the tribunal decides that the statute is not violated merely because age was considered along with other factors, then the hearing tribunal is presented with very difficult mixed questions of fact and law as to what constitutes discrimination because of age.

At a hearing on the complaint of an individual alleging that he was discriminated against because of his age and that therefore the position was given to a younger man, what evidence is likely to be presented? The attorney general’s case will be composed of objective facts. He will show the respective ages of the candidates, the results of any tests administered by the employer, any interview sheets which may be in existence and the professional qualifications and experience of the two men. In meeting the accusation of discrimination, the employer’s case will usually be weak because it will be subjective. He can only say: “We didn’t consider age, or we liked the young man’s personality better, or we thought the job required a more aggressive personality than the complainant’s.” If by chance the job was given to a younger man because of political considerations, family connections or friends, the firm can hardly admit this fact in a public hearing.

The difference between objective and subjective factors of decision in a courtroom type atmosphere and the stigma which accompanies the accusation of discrimination make it very difficult for an employer to win at an administrative hearing, regardless of whether he did in fact discriminate in the particular case. While the hearing tribunal members may wish to be fair, they are, nevertheless, the Twentieth Century American Inquisition charged with and dedicated

83 E.g., Conn. Gen. Stat. Rev. § 31-127 (1962) provides in part: “If, upon all the evidence, the tribunal finds that a respondent has engaged in any unfair employment practice, it shall

84 In Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93 (Super. Ct. 1950), a case involving racial discrimination, the court said: “Since the proceeding is one in which the commission prosecutes the complaint before itself as arbiter, it is essentially inquisitorial. It lacks the elements of a judicial or quasi-judicial proceeding in which parties litigate adverse interests before an impartial tribunal.” Id. at 98.
to stamping out the great social evil of inequality. Whatever the rule of law may be, when a charge of discrimination reaches the hearing stage, the burden of proof is, in effect, on the employer\(^6\) regardless of the traditions of jurisprudence.

In arriving at its decision, the hearing tribunal is generally required to find discrimination upon a consideration of all the evidence.\(^6\) Practically, this means that, barring admissions against interest, the members of the hearing tribunal must determine on the basis of the evidence presented at the hearing which of the two candidates they would have hired. If they, as reasonable men of good judgment, would have hired the complainant who did not get the position, then the employer must have discriminated against the complainant because of his age, unless they decide that the selection was so close that they should not upset the employer's judgment.

**Sanctions Under the FEP Acts**

Once it has been established that an employer has discriminated against a job applicant because of his age, the question of remedy or punishment arises. There is great diversity among the statutes of the several states as to the legal consequences of prohibited discrimination. Some statutes provide no sanctions,\(^7\) and others provide only criminal penalties.\(^8\) Most states, however, charge an administrative

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\(^6\) Contra, Motorola, Inc. v. Illinois Fair Employment Practices Comm'n, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). In this case the court held that failure of the employer to provide the Commission with a copy of the applicant's test paper combined with the applicant's ability to pass the same test when subsequently administered might create a suspicion of discrimination, but such suspicion was not sufficient grounds on which to base a remedial order. See also Kovarsky, *The Harlequinesque Motorola Decision and Its Implications*, 7 Boston College Industrial & Commercial L. Rev. 535 (1966).


agency with enforcement of the act, and a hearing tribunal is generally empowered to order the employer to take such affirmative action as necessary and appropriate to discontinue the violation of the statute, which may include the hiring of the complainant. Some administrative agencies must petition the regular courts for a court order enforcing the commission order. If the order of the commission is affirmed by a regular court in the manner required by local procedure then it appears that the employer may be held in contempt of court for failure to obey what is now the order of a regular court. A fair reading of the FEP Acts leads to the conclusion that this is the legislative intent. However, since the acts usually contain a separate section making willful disobedience of an order of the commission a misdemeanor punishable by fine and/or imprisonment, it may be argued that this should be the exclusive remedy since it is criminal in nature. Such an interpretation of the legislative intent seems unsound and unlikely as it would often make it possible for an employer to pay a small fee for the privilege of engaging in unlawful discrimination and would thereby frustrate the legislative intent of securing employ-


91 Penn. Stat. Ann. tit. 43, § 960 (1964) specifically provides for a contempt order; however, this would appear to be an inherent power of all courts of general jurisdiction.


93 Neb. Rev. Stat. § 48-1005 (Supp. 1965) (provides maximum fine of $10.00); N.D. Cent. Code § 34-01-17 (Supp. 1965) (provides maximum penalty of $25.00 fine and one day's imprisonment in county jail).
ment for qualified middle-aged workers. It would seem that upon default of an employer to comply with an order granting the complainant specific relief, the FEP Acts should be construed as permitting the order to be specifically enforced by contempt proceedings as an alternative to or in addition to any further remedy provided for in the act. As previously noted, many statutes do not provide for specific orders to hire.  

**Appeals**

The right to appeal a decision of the administrative hearing tribunal is specifically provided in most FEP Acts which have created such special proceedings. Otherwise the normal routes of appeal are open. After a finding of discrimination by the hearing tribunal, the right of appeal to an employer would be of little value. A properly drafted finding by the hearing tribunal, whether or not based upon any evidence, should almost guarantee that the decision of the hearing tribunal will be upheld on appeal. State lower and supreme courts rarely upset the findings of administrative tribunals; they tend to reverse only when presented with the crassest examples of abuse of power or poor judgment by the administrative agencies.

**Jurisdiction**

There are two possible jurisdictional conflicts. One is between state and federal tribunals and the other is between different state tribunals.

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96 Attorneys in active practice occasionally find themselves confronted by findings of fact by a trial judge which they believe are loaded and hardly, if at all, supported by evidence in the record. They are apt to suspect certain judges of occasionally acting as advocates for their own decision when drafting their findings. Since the author was co-counsel for the Board of Education, he must leave it to other unbiased persons to determine whether or not the findings of fact of the hearing tribunal in Board of Educ. v. Commission on Civil Rights, 153 Conn. 162, 220 A.2d 278 (1966) were supported by the evidence presented at the hearing.


98 The complexity of the question of jurisdiction in many of our industries is well
The State-Federal Conflict

The National Labor Relations Act preempts the field of labor law at least as to matters falling arguably within the provisions of the act. However, it is clear that state labor boards and state courts have not been ousted by the NLRA from all areas of merely peripheral concern to federal labor law.

Neither the National Labor Relations Act nor the Railway Labor Act prohibit discrimination in employment because of age. However, under the rationale of the *Miranda Fuel Co.* and *Hughes Tool Co.* cases it is possible that the NLRB will find that union discrimination because of age constitutes a violation of the union's duty of fair representation so as to constitute an unfair labor practice. While in isolated individual cases, concurrent jurisdiction may exist between the NLRB and state agencies charged with the enforcement of FEP Acts, in general unfair employment practices will be readily distinguishable from unfair labor practices. It would seem that in the occasional case involving concurrent jurisdiction, the NLRB might well cede jurisdiction to a state civil rights commission when it appears that the main thrust of the complaint is discrimination because of age.

illustrated by Allegheny Airlines v. Fowler, CCH 1966 EMPLOYMENT PRACTICES GUIDE ¶ 9031 (S.D.N.Y. Dec. 15, 1966). The plaintiff airlines brought a declaratory judgment action in the federal court to declare that the New York State Commission for Human Rights was without jurisdiction to apply the age provisions of the New York law against discrimination to the plaintiffs' stewardesses. The federal court dismissed the action because the plaintiff's had failed to exhaust their administrative remedies, but the jurisdictional difficulty is illustrated by the following facts: most of the airlines are foreign corporations, and all of the airlines are engaged in interstate commerce; the airlines are required to employ flight attendants or stewardesses, and each airline has determined that youth is an occupational qualification for flight stewardesses; each airline employs stewardesses who perform services within the state, but all stewardesses are hired to perform services in interstate or foreign air transportation; most of the airlines have stewardess bases in New York and other bases outside the state, but most stewardesses are initially hired outside of New York and the majority of those assigned to New York bases perform most of their services outside New York; there are laws against discrimination in employment in twenty states (including New York) serviced by the airlines, with a range of different protected ages.


102 147 N.L.R.B. 1573 (1964).

However, it also would seem that whenever the NLRB may reasonably
be thought to have jurisdiction, an affirmative decision by the NLRB to
cede jurisdiction is necessary. In this regard the holding in Walker Mfg. Co. v. Industrial Comm’n that there was no federal preemp-
tion in a case involving discrimination in employment because of age
may be justified since it did not appear in that case that it was rea-
sionably arguable that the NLRA was applicable. When an employer
discriminates against an individual because of union activity but
alleges that the reason for its conduct was the age of the individual,
the NLRB should have jurisdiction.

**The Intrastate Tribunal Conflict**

There are two possible jurisdictional conflicts within the state. The first is between the state labor board and the regular courts, and the second is between the state labor board and the civil rights com-
mission in those states which have established separate commissions
to enforce the FEP Acts.

In those states which do not have a separate civil rights com-
mission, it will be a question of statutory interpretation as to whether
the state labor board may assert jurisdiction over discrimination in employment because of age. If the board is found to have jurisdic-
tion, it would seem that such jurisdiction should be exclusive.

In those states which have established separate civil rights com-
missions to enforce the FEP Acts, there should be no question as to the
authority of the commission to enforce the acts. Whether their juris-
diction is exclusive might depend upon the type of dispute involved.
To date the greatest number of disputes and the greatest number of
administrative regulations under the acts concern discrimination dur-
ing the hiring process. If the refusal to hire is based solely upon

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104 Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Amalgamated Meat
105 27 Wis. 2d 669, 135 N.W.2d 307 (1965).
Bhd. of Teamsters Union v. Oliver, 358 U.S. 283 (1959); Klotz v. Watham, 31 Wis. 2d
19, 142 N.W.2d 197 (1966). See generally Smith & Clark, Reappraisal of the Role of the
States in Shaping Labor Relations Law, 1965 Wis. L. Rev. 411. See also Purdy, Title VII: Relationship and Effect on State Action, 7 Boston College Industrial & Com-
mercial L. Rev. 525 (1968) where the author discusses section 706 of Title VII of the
Civil Rights Act of 1964, which provides for the invocation of state or local law pro-
hibiting an unlawful employment practice where such laws exist.
107 See Sardis Luggage Co. v. NLRB, 234 F.2d 190, 195 (5th Cir. 1956); Tide-
108 For example see the New York State Commission Against Discrimination regu-
lations reproduced in CCH 1986 Employment Practices Guide ¶ 26050 (Rulings on
age, there may be a jurisdictional conflict between the civil rights commission and the state labor board, but as a matter of statutory interpretation, it would seem that the civil rights commission should have jurisdiction to the exclusion of the state labor board. When an alleged act of discrimination occurs during the employment of an individual or when an alleged discriminatory discharge occurs, the conduct of the employer is likely to be a violation of a provision in the employer's contract with a union as well as a violation of the FEP Act. The regulation of the employer-employee relationship is generally in the hands of an executive-administrative agency (i.e. state labor board), whereas the FEP Act is generally administered by the state's civil rights commission. Thus there are potential jurisdictional conflicts in cases dealing with the employment relationship as well as in those dealing with the hiring process.

It seems unfortunate that the FEP Acts which prohibit discrimination in employment set up a separate administrative agency to accomplish this task. The consequence is that the state law governing the legal relations of employers, unions, and employees is regulated by two state administrative agencies, one with a general subject matter jurisdiction over labor matters and one with a specific subject matter jurisdiction.

Pre-Employment), 26051 (Pre-Employment Inquiries), 26052 (Rulings Interpreting 'Age' Provisions).

109 See CCH 1966 EMPLOYMENT PRACTICES GUIDE §§ 8066, 8081.


112 This dual regulation raises a number of questions. Do the FEP Acts preempt the field of labor law from the jurisdiction of state labor boards? Should they? If the FEP Act concurrently regulates a labor dispute, may the complainant elect between pursuing his remedies under the FEP Act or under general labor law? Or must one route toward a remedy be exhausted before the other may be pursued? If so, which one? In Neal v. System Bd. of Adjustment (Mo. Pac. R.R.), 348 F.2d 722 (8th Cir. 1965) the court held that internal union remedies must be exhausted as a pre-requisite to relief in the federal courts.
jurisdiction over civil rights questions in the employment relationship. Needless conflicts, confusion, and expense to the state and all citizens can be the only result of this unfortunate division of administrative competence. When positive relief rather than a criminal penalty is the available remedy, the enforcement of a statute prohibiting discrimination in employment should be left to the agency charged with the administration of the state's substantive labor law rather than a separate administrative agency (i.e. a civil rights commission).

**Technical Evaluation of Existing FEP Acts**

In this section it will be assumed that it is a wise and desirable social policy to prohibit discrimination in employment because of middle age. As discussed above two distinct approaches have been taken by the statutes: some statutes merely impose criminal sanctions; other statutes create administrative agencies charged with the task of investigating alleged acts of discrimination and compelling the employer not to discriminate in a particular case by an order granting the complainant affirmative relief.

It is understandable that a separate administrative agency charged with the special tasks of eliminating discrimination and with the necessity of justifying its own existence and budget may display more vigor and energy in enforcing an FEP Act than a state attorney. However, the machinery of the law only comes into operation under either system when an individual files a complaint with the appropriate public official. Hence one should not assume that an administrative agency will automatically be much more efficient in eliminating discrimination than the state attorney.

**Criminal Sanction vs. Specific Order**

Criminal sanctions may be as severe or light as the legislature deems appropriate. There is no reason why a criminal statute which imposes a heavy penalty and which is vigorously enforced cannot be just as effective in eliminating discrimination in employment as specific

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112 E.g., ALASKA STAT. § 18.80.100 (Supp. 1966).
113 E.g., LA. REV. STAT. § 23:893 (1950) provides: "Whoever violates the provisions of this section shall be fined no more than five hundred dollars or imprisoned for not more than ninety days, or both."
114 E.g., N.D. CENT. CODE § 34-01-17 (Supp. 1965) provides: "Any person or corporation who violates any of the provisions of this preceding section shall be guilty of a misdemeanor, and shall be punished by a fine of not to exceed twenty-five dollars or by imprisonment in the county jail for not to exceed one day or by both such fine and imprisonment."
orders to cease and desist from discrimination under the statutes which authorize such orders. However, while criminal sanctions against an employer may eliminate prospective discrimination, they will not obtain a position for the person discriminated against in the case in question. This can be accomplished only under statutes which permit orders to eliminate the discriminatory practices against an individual.

We live in an age which believes in positive government, and in a society where the personal relationship between the employer and employee has largely disappeared. Nevertheless, whether an employer should be compelled to hire, promote, or rehire an individual when the employer has previously decided to do the contrary is a difficult social judgment.

Under those statutes which permit positive relief to the complainant, there is a shifting of the ultimate power to hire, fire, or promote from private individuals to a governmental administrative agency. In order to determine whether the alleged discrimination actually occurred, the administrative agency must decide *de novo* whether an individual should have been hired, fired, or promoted. This decision has most serious implications for freedom in our society, particularly in those firms where ownership has not yet been divorced from management. The social desirability of such strong arm procedures should be considered. For centuries it has been basic law that an employment contract will not be specifically enforced. The courts have regarded it as against public policy to require an employer to keep an employee whom the employer does not want. Freedom of association has been recognized as a value to be protected in society. However, the traditional policy arguments against the specific enforcement of employment contracts have lost much of their force in recent years. Under today's labor law it is not infrequent to find that an employer loses his right to discharge an employee without cause, and in many cases the employer has been forced to re-employ discharged employees.

The employer has an interest in those who work for him, and that is why the employer will usually screen applicants by some hiring
procedure. When an employer is forced to hire an individual after the employer refused to hire that individual even when threatened with an administrative hearing and was willing to spend the money in attorneys’ fees necessary to fight hiring the particular individual, it is hard to believe that there will be no smoldering bitterness on either side and that a relationship of mutual trust and confidence, which is so necessary to the employee’s proper performance of his job, will spring up between the employer and the employee. On the contrary, such a compelled relationship between the employer and the new employee is bound to be strained. It may even infect the atmosphere of the entire firm and cause a deterioration in the morale of other employees.

At first glance it would appear to be advantageous to the middle-aged worker to require the employer guilty of discrimination to hire him. But is it really to the advantage of the middle-aged worker to be hired with the sheriff behind him? Not likely, unless the sheriff were to remain there constantly. Not only does the new employee face the prospect of unpleasant tasks, but his chances for future advancement with that employer are virtually nil, and raises are highly unlikely. Of course, such acts by the employer might well constitute further violations of the Fair Employment Practice Act, but proof of discrimination is likely to be more difficult. Furthermore, the worker who constantly complains either to the state administrative agency charged with the enforcement of the FEP Act or to his union grievance committee is unlikely to obtain either sympathy or relief.

It would seem that in the long run orders to hire, promote or rehire a given worker against the wishes of the employer are probably against the public interest. Our courts have traditionally recognized this in refusing to grant specific enforcement of personal service contracts. While large corporations are frequently impersonal in many matters of personnel policy, even in large corporations the relationship between an employee and his supervisor is highly personal and subject to all the vagaries of human emotion. Even here a forced relationship is likely to be contrary to the best long-term interest of an aggrieved middle-aged worker. It seems quite probable that FEP Acts which provide for specific orders to hire, promote, or rehire are ill-advised and contrary to enlightened public policy.

**Scope of Statute**

After it is determined whether a statute prohibiting discrimination in employment because of age is criminal in nature or permits positive
relief against discrimination, the breadth of coverage of the statute must be determined. Most of the statutes which permit positive relief are the result of placing age along with race, religion, color, etc., in a general civil rights statute prohibiting discrimination in employment.\textsuperscript{120} However, the states which have enacted this type of statute have failed to recognize that there are vast social, economic, political, psychological and qualitative differences between discrimination in employment because of middle age and discrimination in employment because of race, religion, etc. The social results of discrimination based upon race differ from the social results of discrimination based upon age. There are rarely any rational reasons for discrimination because of race whereas there are situations in which discrimination based upon age is both economically and socially justifiable.\textsuperscript{121} Hence it is structurally preferable to make discrimination in employment because of age unlawful under a separate statutory section\textsuperscript{122} rather than to merely add age to the types of discrimination banned by the general civil rights' statute. This is so because different exemptions and exclusions are appropriate in statutes banning discrimination in employment because of age than are appropriate in statutes banning discrimination in employment because of race, color, religious creed, national origin or ancestry\textsuperscript{123} When the same statute covers both age and race, religion, etc., illogical and unjustifiable exclusions may result. For instance, the exclusion for domestic servants and religious, fraternal and charitable organizations, as previously discussed, may be appropriate when the reason for the discrimination is race or religion but not when it is age.

## Conclusion

Only a bare majority of the states have passed legislation prohibiting discrimination in employment because of age; and so far the federal government has declined to pass such legislation. Hence the question of whether or not it is enlightened public policy to prohibit discrimination in employment because of age remains open.

Why do people discriminate against workers of middle or advanced age? There are two basic reasons: one resulting from physical age, and one resulting from the by-product of present day employment contracts and social legislation.

\textsuperscript{120} Note 24 supra and accompanying text.
\textsuperscript{121} See text at note 57 supra.
\textsuperscript{122} See statutes listed in note 12 supra.
\textsuperscript{123} See text at notes 62, 63 supra.
While there is no direct mathematical relationship between age and the physical and mental attributes of a man, there is enough of a relationship between these two factors to make age a reliable basis for predicting the qualities of an individual. Youth is the time of physical strength, energy, idealism, and flexibility. Advancing age brings with it a decline in physical strength and energy and often a disappearance of idealism and flexibility; but it also brings with it experience, mature judgment and a wider circle of acquaintanceships. Thus, there are quality differences between the older, middle-aged worker and the young worker. For one job an employer might want the qualities of a young man, and for another job the same employer might want the qualities of an older man. It should be obvious that most employers would want a younger man for a body guard and an older man for a chief auditor.

Another reason why an employer might prefer a younger worker is to create or preserve an age balance and spread among his employees. Today employers are largely corporate entities of indeterminate life. Any organization which becomes overloaded with middle-aged or older employees will find itself in trouble. There will be no youthful energy to balance the caution and conservatism of the older employees. This can lead to serious loss of business to younger more aggressive competitors. Then too, the day of nature's reckoning is just around the corner. If there is an insufficient age spread in a firm, within a brief period of time most of the firm's key personnel will retire; and there will be an insufficient number of younger and middle-aged men of sufficient experience to carry on the same quality of operation. This is why most large firms and many smaller ones have executive training programs. These firms deliberately recruit younger men and train and advance them over the years in order to have good experienced replacements familiar with the firm's business ready to step into the shoes of older employees as they retire.

There is a catch in the logic behind the well-intentioned FEP Acts, particularly as they concern discrimination in employment because of age. A full utilization of workers in our society depends upon a full employment economy, an economy which we have generally not enjoyed except in times of war. In any economy, other than a full employment economy, some workers must be out of work; the question, then, is which workers. Further complicating the situation is the fact that the number of persons seeking employment expands and contracts considerably depending upon social, economic and other factors.

In our present society everyone has a right to a minimum standard
of living. Those who are out of work are supported by those who are working. This is true whether the unemployed are over or under 40 years of age. Laws banning discrimination against middle-aged and older workers do not create more jobs. They merely reallocate among the various age groups the jobs available in society. This fundamental fact was apparently not given the consideration it deserved when state legislatures passed statutes prohibiting discrimination in employment because of age.

The real solution to the social evils which accompany unemployment lies not so much in legislation prohibiting discrimination in employment as in positive legislation creating new, productive jobs for the unemployed regardless of their age, race, color, creed or national origin. Recognizing the social problems which accompany unemployment and likewise all the useful work there remains to be done in our society, it would seem that our government should recognize that it has a duty to supply employment for its citizens. We might begin with the river control projects, the subway construction and the many other useful projects which are needed in our country. Such projects would largely eliminate the necessity of fair employment practice acts. A full employment economy would turn the labor market from a buyer's into a seller's market.

In our present society, with its high rate of unemployment until quite recently, serious consideration should be given to whether it is in the public interest to prohibit discrimination because of age. Such prohibition merely increases the employment of older persons and limits the number of jobs available to the younger members of our society. Since most FEP Acts only make discrimination against workers between 40 and 65 unlawful, this must necessarily increase unem-

124 The Russian Constitution guarantees every citizen of the Soviet Union the right to work. It is the duty of the government to find or create a job for every individual. U.S.S.R. Const. art. 12 (Foreign Languages Publishing House 1982) provides: "Work in the U.S.S.R. is a duty and a matter of honor for every able-bodied citizen, in accordance with the principle: 'He who does not work, neither shall he eat.' The principle applied in the U.S.S.R. is that of socialism: 'From each according to his ability, to each according to his work.' U.S.S.R. Const. art. 118 provides: "Citizens of the U.S.S.R. have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quantity and quality. The right to work is ensured by the socialist organization of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment."

ployment among those under 40, and these are the members of our society who are raising young families and who are without any appreciable accumulation of savings.

The author is not certain whether in the long run legislation prohibiting discrimination in employment because of age is in the best interest of society. He inclines toward the belief that it is not. It is a question upon which reasonable men may certainly differ after considerable thought. However, he believes that in many instances insufficient consideration has been given to the long term social and economic effects of this legislation. If legislation there must be, he is inclined to believe that it should be purely criminal in nature. If an administrative agency is to be charged with the enforcement of the statute, it should preferably be the state administrative agency with general supervisory power over all labor matters and not a specialized civil rights commission.