



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Forsgren
Carr
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F/c

January 25, 1995

MEMORANDUM FOR THE DIRECTOR

THROUGH: Christopher Edley, Jr. *CEJ*

FROM: Susan Carr/Anna Briatico

SUBJECT: Amendment to the Age Discrimination in Employment Act (ADEA) of 1967 for State and Local Firefighters and Law Enforcement Officers

Issue

What should be the Administration's position on HR 344, a bill to exempt State and local firefighters and law enforcement officers from the ADEA?

Background

The Amendments of 1986 to the ADEA established an exemption for the hiring and retirement of State and local law enforcement officers and firefighters. This exemption expired on December 31, 1993.

Yesterday, the House Employer-Employee Relations subcommittee (Harris Fawell, Chairman) held a hearing on HR 344 (Pickett (D) VA) to reinstate the exemption of State and local firefighters and law enforcement officials from the hiring and retirement provisions of the ADEA.

Witnesses at the hearing represented the AFL-CIO, AARP, the City of Alexandria, Virginia, and law enforcement and firefighters organizations. There were no Administration witnesses.

The AARP has contacted EEOC, strongly opposing the bill. EEOC also strongly opposes this bill and would like to send a letter to Congress expressing its views.

Related Efforts to Pass Similar Legislation During the Last Congress

This bill is very similar to HR 2722, which passed the House during the last Congress. EEOC sent an OMB-cleared letter to the Hill opposing the bill in September 1993. The White House later withdrew support for the letter.

A lot of the debate over HR 2722 occurred in the context of the Crime Bill. At that time, the Administration was prepared to support a temporary, three-year extension of the exemption, thereby allowing further study of age restriction policies for public safety workers. Although HR 2722 was included in the House-passed version of the Crime Bill, it was excluded from the version that became law, largely because of Senator Metzenbaum's strong opposition.

Timing of Congressional Action this Year

During yesterday's hearing, Chairperson Fawell indicated that he plans to move on this issue quickly and may be introducing his own bill shortly.

Domestic Policy Council's Position

The DPC staff (Jose Cerda) supports a three-year extension of the exemption. According to Cerda, this expression of limited preference would support the coalition of police, firefighters, mayors and Federal law enforcement officials who are strong proponents of the exemption, while minimally upsetting the AARP and Civil Rights Community.

Options

1. Advise EEOC that the Administration will not be taking a position on HR 344 at this time.

Pros - Buys the Administration some time on a largely "no-win" political issue. The Administration conceivably could wait to express its views until legislation is scheduled for markup or House floor consideration.

Cons - Potentially limits the Administration's ability to influence the outcome of this legislation. It's unlikely that the issue will become less difficult later in the legislative process.

2. Advise EEOC to prepare a letter to the House Economic and Educational Committee opposing HR 344.

Pro - Supports EEOC efforts to end age-based discrimination.

Cons - Makes Administration look indecisive -- i.e., we were willing to accept a three-year exemption last year. Also makes Administration vulnerable to criticism of double standards. The Federal Government is exempted from the ADEA and maintains mandatory age restrictions for its law enforcement (and certain other) personnel.

3. Advise EEOC to prepare a letter to the House Economic and Educational Committee stating the Administration prefers no exemption, but could accept a three-year extension of the exemption.

Pro - Is consistent with the Administration's position on the issue during last year's Crime Bill debate.

Con - Will not fully satisfy the opponents or proponents of HR 344.

Recommendation

Because of the tie with the Crime Bill, we recommend that you discuss which option the Administration should pursue with the Chief of Staff, who was heavily involved in the discussions over the last year. Jack Lew and Chris Edley favor Option 3.

cc: Jack Lew
Jose Cerda

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

LRM NO: 564

FILE NO: 480

3/3/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): _____

TO: Legislative Liaison Officer - See Distribution below:
FROM: Janet FORSGREN (for) *Janet L. Forsgren*
Assistant Director for Legislative Reference
OMB CONTACT: Anna BRIATICO 395-7887
Legislative Assistant's line (for simple responses): 395-7362
SUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age Discrimination in Employment Amendments of 1995

DEADLINE: Noon Wednesday, March 08, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Submitted by EEOC in anticipation of House floor action in the next few weeks.

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**RESPONSE TO
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 554
FILE NO: 480**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

**TO: Anna BRIATICO 395-7887
Office of Management and Budget
Fax Number: 395-6148
Branch-Wide Line (to reach legislative assistant): 395-7362**

FROM: _____ (Date)

_____ (Name)
_____ (Agency)
_____ (Telephone)

SUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age Discrimination In Employment Amendments of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.2 (c) Initials: QMS Date: 8/22/05

DRAFT

~~CONFIDENTIAL~~

February 28, 1995

Dear Congressman Goodling:

This is in response to your request for my views on H.R. 849, a bill that would amend the Age Discrimination in Employment Act of 1967 (ADEA). This legislation incorporates several elements. First, it would restore an exemption to the ADEA, enacted in 1986 but now expired, to permit State and local governments to use age limitations for hiring and retiring police officers and firefighters. Second, it would require the Chairman of the EEOC to conduct a study of abilities tests available for public safety jobs and then, based on the study, to issue advisory guidelines for the administration of physical and mental fitness tests to measure the abilities of public safety officials. Third, it would also require the Chairman to propose advisory standards for wellness programs. The bill authorizes five million dollars to be appropriated to carry out these requirements.

For the reasons set forth below, it is my view that H.R. 849 should not be enacted into law.

At the outset, I am extremely concerned about the expenditure of five million dollars on a study which is very similar to the study on this subject that the Commission recently completed, at Congress' direction, at a cost of over one million dollars. That study, conducted in concert with the Department of Labor, carefully analyzed many, if not most, of the issues enumerated in H.R. 849.

In pertinent part, that study: (1) concluded that age is a poor predictor of performance; (2) identified critical performance criteria for public safety jobs; (3) listed several tests that could be used to measure these criteria; and (4) explained that these tests can be properly validated in accordance with current legal and professional standards.

The expenditure proposed by H.R. 849 raises particular concerns given the enormous challenges currently facing the Commission. We project that over 100,000 charges of employment discrimination will be filed with us in FY 95 and that our pending inventory will grow to over 100,000 charges during this same period. I know you are familiar with these ongoing operational problems and also are well aware that we simply do not currently have the resources to resolve these problems adequately. In this time of extremely tight budgets, five million dollars could make a significant difference in our ability to serve the people who come to our door every day for assistance. In my view this would be a far more appropriate expenditure of public funds than using scarce federal dollars to contract with consultants to examine matters already addressed at government expense. These concerns are underscored by practical considerations as well. Given the fact that the legislation would make the ADEA exemption permanent, there would presumably be only a limited demand -- at most -- for the contemplated guidelines. Covered entities would have little, if any, incentive to implement such tests if they can rely on a mandatory retirement age.

Aside from these critically important resources questions, I

find H.R. 049 particularly problematic because it would require the EEOC to undertake tasks which are legally and technically impractical, if not impossible. Insofar as the bill contemplates the creation or identification of a "safe harbor" test for public safety officials, or "safe harbor" elements for such tests to include, it is important to keep in mind these that tests must be measured against particular job functions. For us to create or identify such a test or to identify the elements of such a test, we would, consistent with governing legal principles, have to make assumptions regarding how local police and fire departments structure their workplaces. For the guidelines to be of any use to them, these departments would then have to structure their jobs in conformity with assumptions in the guidelines. In my view, setting job standards for state and local public safety departments is a wholly inappropriate function for the federal government, including the EEOC. State and local governmental entities should be able to assign job functions and structure their workforces in whatever ways they see fit to serve their particular needs.

Regarding wellness programs, the EEOC has no particular expertise or experience in this area. Quite frankly, in order to develop advisory standards for such programs, we would of necessity have to "reinvent the wheel" and would inevitably spend resources in an inefficient manner. Surely, other government agencies with demonstrated expertise in this area could do a far better and more efficient job for the public.

I also note with concern that the legislation's obligations flow to the Chairman of the EEOC rather than to the Commission as

a whole. While the Chairman exercises the administrative authority of the Commission and could certainly initiate the required process, the Commission alone possesses the policy making authority. A requirement that the Chairman issue guidelines is thus inconsistent with Title VII.

Finally, but also of substantial importance, it is my view that the legislation's exemption from the ADEA is inconsistent with the basic premise of the ADEA that age is an inappropriate proxy for ability. The ADEA -- along with the other anti-discrimination laws enforced by the EEOC -- stands for the proposition that people should be judged on the basis of their individual abilities and not on stereotypes or generalizations. Yet reliance on stereotypes and generalizations about the abilities of older Americans is exactly what this legislation would permit. I, therefore, find the legislation antithetical to the fundamental principles of equal employment opportunity law.

I appreciate this opportunity to share my views regarding this important legislation. Please feel free to call on me if I may be of further assistance.