## 11.10 Age Discrimination—Defenses—Bona Fide Employee Benefit Plan

The defendant contends that any age-related disparate treatment afforded to the plaintiff resulted from the plaintiff’s participation in a bona fide employee benefit plan. “Disparate” means “different.” The defendant has the burden of proving each of the following elements by a preponderance of the evidence:

1. [*describe the alleged discriminatory action*] occurred as part of the defendant’s policy of providing its workers with nonwage benefits under an employee benefit plan;

2. the benefit plan was bona fide, that is, it existed and provided for and paid benefits to employees;

3. the defendant was actually following the plan at the time it is alleged to [describe the alleged discriminatory action]; [and]

4. [the defendant’s employee benefit plan did not place the plaintiff in a position where a reasonable person in that position would believe that [he] [she] had no choice but to retire; and]

[4] [5] [describe the alleged discriminatory action] is justified by significant cost considerations.

Evaluating whether the disparate treatment is justified requires considering that some benefits cost more to provide to older workers than to younger ones. The law allows employers to provide less in benefits to older workers when (a) the employer spends approximately the same amount for benefits for older and younger workers, and (b) the extent of the difference in benefits is necessary to keep the cost approximately equivalent. Thus, a plan is justified by significant cost considerations when any age-related differential in employee benefits exists only to the extent necessary to achieve approximate equivalency in costs between older and younger workers.

If you find that the plaintiff has proved [his] [her] claim[s] in accordance with Instruction[s] [*insert cross reference to the pertinent instruction[s] on the plaintiff’s theory of liability*], your verdict should be for the plaintiff, unless you find that the defendant has proved all [four] [five] elements of this defense, in which event your verdict should be for the defendant.

**Comment**

The bracketed fourth element should only be used when involuntary retirement is at issue.

The ADEA exempts certain employer actions taken pursuant to a “bona fide employee benefit plan” from general liability under the statute. *See* 29 U.S.C. § 623(f)(2)(B).

Prior to 1989, the Ninth Circuit used a four-element test in applying this provision. *EEOC v. Orange County*, 837 F.2d 420, 421 (9th Cir. 1988) (“To qualify for exemption under section [623](f)(2), [a] plan must fulfill four criteria: 1) it must be the sort of ‘plan’ covered by the section, 2) it must be ‘bona fide,’ 3) the [employer]’s action must be in observance of the plan, and 4) the plan must not be a subterfuge to evade the purposes of the Act.”).

Subsequent to the establishment of the Ninth Circuit test, the Supreme Court substantially redefined the “subterfuge” element and placed the burden on the plaintiff to show that the plan “was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation.” *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 181 (1989). Then, in 1990, Congress amended the statute, effectively abrogating the holding of *Betts* in two respects. The amendment: (1) removed the word “subterfuge” from the text of the statute and replaced it with the definition that had been used by the EEOC prior to *Betts*; and (2) clarified that the employer claiming the defense bears “the burden of proving that such actions are lawful”—thus establishing that the provision is, contrary to the characterization in *Betts*, an affirmative defense. *See* Older Workers Benefit Protection Act (OWBPA), Pub.L. 101-433, Title I, § 103, Oct. 16, 1990, 104 Stat. 978; *see also Meacham v. Knolls Atomic Power Lab’y*, 554 U.S. 84, 94-95

(noting enactment of OWBPA and holding that the added phrase “otherwise prohibited” is an

affirmative defense). After the 1990 amendment, there is little Ninth Circuit law interpreting the bona fide employee benefit provision. However, Congress was clear that the amendment was meant to return the law to its pre-*Betts* state. *See* OWBPA § 101 (“Congress finds that, as a result of the decision of the Supreme Court in . . . *Betts*, . . . legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA].”). Thus, the general state of the law pre-*Betts* is persuasive, and some version of the four-element test should apply. *See Orange County*, 837 F.2d at 421; *EEOC v. Borden’s Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984), *disapproved by Betts*, 492 U.S. at 172.

As to the first element, it appears reasonable to retain the relatively broad definition of “employee benefit plan” as discussed in *Betts*. *Betts* relied on an EEOC regulation’s definition of these benefits as “fringe”—i.e., other than monetary compensation—and gave the examples (then in the statute) of retirement, pension, and insurance plans. 492 U.S. at 174. *See also Am. Assoc. Ret. Pers. v. Farmers Group, Inc.*, 943 F.2d 996, 1003 (9th Cir. 1991) (following *Betts*; distinguishing “wages” from “benefits”). The OWBPA did not alter the substance of that definition.

The second element is straightforward. “‘[B]ona fide’ . . . has been held to mean no more than that the plan exists and pays substantial benefits.” *Borden’s*, 724 F.2d at 1395.

The third element is a question of historical fact.

The text of the statute also provides that no affirmative defense is available (even if justified by cost) if a plan “require[s] or permit[s] the involuntary retirement of any individual.” 29 U.S.C. § 623(f)(2). This section has been construed to mean that discrimination that occurs pursuant to a benefits plan must not lead a reasonable person in the position of the plaintiff to believe that he has “no choice but to retire.” *Kalvinskas v. Cal. Inst. of Tech.*, 96 F.3d 1305, 1308 (9th Cir. 1996). As the statute requires the employer to prove the legality of its conduct, when relevant, the court should instruct the jury on this additional fourth element.

The final element was clearly altered by the OWBPA. Instead of using the word “subterfuge,” Congress used the definition of subterfuge applied by the EEOC prior to *Betts*. Thus, the fifth element now requires that the plan be “justified by significant cost considerations.” 29 C.F.R. § 1625.10 (incorporated by reference in 29 U.S.C. § 623(f)(2)(B)(i)). More specifically, an age-based differential in employee benefits is exempted under the ADEA only “to the extent necessary to achieve approximate equivalency in cost for older and younger workers.” *Id*.

Cost of benefits cannot excuse a failure to hire. 29 U.S.C. § 623(f)(2)(B).

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