The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

January 13, 1987

The Honorable Patrick B. Harris
Member, House of Representatives
515C Blatt Building
Columbia, South Carolina 29211

Dear Representative Harris:

You have asked the following question:

> Under existing federal or state law, must South Carolina judges retire at age 72?

It is our opinion that federal law now prohibits the State from enforcing its mandatory retirement laws with respect to South Carolina judges.

Pursuant to § 9-1-1530 of the Code, any employee or teacher in service

> who has attained the age of seventy years shall be retired forthwith, except that
>
> (1) With the approval of his employer he may remain in service until the end of the year following the date on which he attains the age of seventy years;
>
> (2) With the approval of his employer and the Board he may, upon his request therefor, be continued in service for a period of one year following each such request until such employee has reached the age of seventy-two years; and
>
> (3) With the approval of his employer, upon his request therefor, be continued in service for

> such period of time as may be necessary for such employee to qualify for coverage under the old age and survivors insurance provision of Title II of the Federal Social Security Act, as amended.
>
> It shall be mandatory for any employee or teacher whether or not appointed and regardless of whether or not a member of the South Carolina Retirement System to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.
>
> This section shall not apply to any person holding an elective office.
>
> This section shall take effect July 1, 1969. Provided, however, no person affected by the provisions of this section shall be required to retire prior to July 1, 1971.
>
> Provided, however, that excepting constitutional offices, this section shall not apply to appointive offices receiving per diem or travel allowances as total compensation or to employees of the State Court System when such court employees are employed on a part-time basis.

Section 9-1-10(4) defines an "employee" in pertinent part as "... to the extent he is compensated by the State, any employee, agent or officer of the State or any of its departments, bureaus and institutions, other than the public schools, whether such employee is elected, appointed or employed ...". The definition further notes that the word "employee" shall "not include Supreme and circuit court Judges ..." However, § 9-8-60, which is part of the chapter of the Code dealing with judicial retirement, provides that "[a]ny member of the System may retire upon written application... not later than his attaining age seventy-two ... ." Those judges within the scope of the judicial retirement system include "a justice of the Supreme Court or a judge of the court of appeals, circuit or family court of the State of South Carolina."

Based upon the foregoing provisions, all judges in South Carolina, except probate judges who are elected, have retired no later than age seventy-two. See, Op. Atty. Gen., April 5, 1962 (probate judge may "occupy the office ... as far as age is concerned, so long as the electors re-elect him to office."); Op. Atty. Gen., September 23, 1980 (magistrate must retire at age 72).

AGE DISCRIMINATION IN EMPLOYMENT ACT

Because Title VII of the Civil Rights Act of 1964 was deemed not to reach age discrimination, Congress in 1967 enacted the Age Discrimination in Employment Act (ADEA). The legislation was enacted to prohibit discrimination in employment because of age in such matters as hiring, job retention, compensation and other terms, conditions or privileges of employment. The congressional purpose is stated as intending "to promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. Prior to the 1986 amendments, the ADEA protected workers who were at least 40, but less than 70 years of age from discrimination on the basis of age by most employers of 20 or more persons, employment agencies and labor organizations that have 25 or more members. State and local governments were covered by amendments to the ADEA in 1974 [29 U.S.C. § 630 (b)] and such applicability has been recently upheld by the United States Supreme Court as not contravening the 10th Amendment. EEOC v. Wyoming, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). Most federal employees who are at least 40 years old are also covered, but without an upper age limit.

The ADEA contains certain exceptions. These include (1) where age is a bona fide occupational qualification reasonably necessary to normal operations of a particular business; (2) where differentiation is based on reasonable factors other than age; (3) to observe the terms of a bona fide seniority system or a bona fide employee benefit plan such as a retirement, pension or insurance plan, with the qualification that no seniority system or benefit plan may require or permit the involuntary retirement of any individual who is covered by the ADEA; and (4) where an employee is discharged or disciplined for good cause.

With respect to the State's mandatory retirement laws, it has been held that the ADEA does not preempt state statutes which are broader in coverage. Simpson v. Alaska State Comm. for Human Rights, 608 F.2d 1171 (9th Cir. 1979).

However, to the extent that state mandatory retirement provisions conflict with the ADEA, it has been held that the Supremacy Clause dictates that federal law will prevail. Orzel v. City of Wauwatosa, 697 F.2d 743 (7th Cir. 1983), cert. den., 104 S.Ct. 484 (1983). This office has previously concluded that the mandatory retirement provisions contained in § 9-1-1530 do not conflict with the ADEA as previously enacted because the ADEA provided that the Act prohibits age discrimination "against persons who are between 40 and 70 years of age." As we have noted, "our State statute actually allows two more years of employment than is required by the federal statute." Op. Atty. Gen., July 20, 1982.

However, on November 1, 1986, the President signed into law H.R. 4154 which significantly amends the ADEA. H.R. 4154 amends Section 12 of the Act by removing the upper limit of seventy years for coverage under the ADEA. In short, coverage under the ADEA now has a lower limit of forty years of age, but no upper limit. The amendments to the Act take effect January 1, 1987. Thus H.R. 4154 supersedes this State's mandatory retirement laws except where a previous exception to coverage under the Act remains applicable. A good summary of the effect of H.R. 4154 is as follows:

> The new law, which was unanimously approved by Congress last month ... is the first major coverage change in the Age Discrimination in Employment Act since 1978 and amends the Act by extending all the protections currently available to those covered to private sector and most state and local government workers age 70 and older. Covered employers also are required to continue the same group health insurance extended to employees and their spouses to all their older workers.
>
> The law exempts from the mandatory retirement ban for seven years state and local public safety officers - police, firefighters, and prison guards - and tenured college and university professors. During this time, the Department of Labor and EEOC will be required to conduct studies to determine whether the retention of a mandatory retirement age for these occupations is justified.

Current Developments (Daily Labor Report) No. 213, A-15, November 4, 1986.

It is therefore evident that Congress, by removing the upper age limitations, sought to greatly extend coverage under the ADEA. However, Congress does not appear to have altered previously existing exemptions from the Act. Thus, in reference to your specific question, it still must be determined whether exceptions to or exemptions from the Act's applicability would be relevant with respect to the state judiciary.

WHETHER A JUDGE IS AN "EMPLOYEE" UNDER THE ADEA

The ADEA defines an "employee" in pertinent part as

> an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

29 U.S.C. 630(f). Clearly, judges of this State (except for probate judges, who are elected and thus not subject to the State's mandatory retirement laws) are not officials elected by popular vote, but are instead elected by the General Assembly or appointed by the Governor or some other appointing authority. See, §§ 14-3-10 (Supreme Court, "elected" by General Assembly); 14-5-610 (circuit court, same); 14-8-20 (Court of Appeals, same); 20-7-1370(b) (family court, same); 14-11-20 (masters in equity, appointed by Governor); Article V, § 26 and § 22-1-10 (magistrates, appointed by Governor); § 14-25-15 (municipal judges, appointed by city council). Nor, of course, would a judge fall in the category of a person on the personal staff of an elected official. Moreover, he is not an "immediate adviser with respect to the constitutional or legal powers of the office" of an elected official who may have elected or appointed him. Since it cannot be said that a judge is an employee "subject to the civil service laws", it must thus be determined whether a judge is an "appointee on the policymaking

level" within the meaning of the exemption contained in § 630(f).

As noted above, the Age Discrimination in Employment Act of 1967 was amended in 1974 to include within its coverage federal, state and local employees. The stated purpose of the amendment was "to include ... Federal, State and local government employees (other than elected officials and certain aides not covered by civil service.)" (emphasis added). 1974 Congressional and Administrative News, p. 2849. Since a judge is by no means an "aide" of the elected officials who may have "elected" or appointed him, it is logical to conclude that he would be deemed an "employee" under the Act. However, the case law which has construed the exemption under the ADEA is virtually nonexistent and does not answer the question definitively. See, E.E.O.C. v. Reno, 758 F.2d 581, 584 (11th Cir. 1985); E.E.O.C. V. Bd. of Trustees of Wayne Cty. Comm. Coll., 723 F.2d 509 (6th Cir. 1983).

The language of the definition of "employee" as used in the ADEA is identical to the definition of "employee" used in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. Courts construing the ADEA have thus looked to court decisions interpreting the definition of "employee" under § 2000(e) as analogous. E.E.O.C. v. Bd. of Trustees of Wayne Cty. Comm. Coll., supra.

In Gearhart v. State of Oregon, 410 F.Supp. 597 (D. Or. 1976), the legislative intent of the exemption contained in § 2000(e) was scrutinized in detail. There, the Court in examining the Congressional history of the exemption concluded that a deputy legislative counsel was an "employee" under Title VII. The Court observed:

> Some light is shed on this matter by the conference report of the Congress. The exemption granted to public officials and certain of their staff members originated in the Senate as a result of Senator Ervin's efforts. The House acceded to this amendment in conference. The conference committee stated its intention to
>
> "... exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers or to policymaking positions at the highest levels of the departments

> or agencies of State or local governments, such as cabinet officers, and persons of comparable responsibilities at the local level. It is the conferees intent that this exemption shall be construed narrowly." (Emphasis supplied.) 2 U.S. Code Cong. & Adm.News p. 2180 (1972).

The congressional purpose is to be divined, if at all, largely from the debate in the Senate conducted mostly by Senators Ervin, Javits (New York) and Williams (New Jersey). The purpose apparently was to provide exemption from the Act for public officials and those staff members or assistants whose selection by the elected official involves subtle considerations of the mixture of legislative or executive duties with the political facts of life. Realistically, some staff persons must be chosen with an eye not only to those functions which are characterized as those of a statesman, but as well those which are characterized as those of a politician. In short, most--but not all--elected officials are aware that they must keep an eye not only on the next generation but on the next election as well. Congress did not want State and local elective officials to be subjected to the strictures of the Equal Employment Opportunity Act in the selection of staff persons in sensitive or intimate positions. Congress, in using the term "immediate adviser," was trying to avoid exempting large groups of faceless technicians and researchers without sweeping into the Act the close personal policy making advisers deemed to be vitally necessary for the conduct of executive and legislative business by officials who are necessarily politicians as well. During the debate, Senator Williams asked Senator Ervin to define the clear area of exempt employees from the ambiguous area. Senator Ervin responded that the exemption was for "... the person who would advise him [the

> elected official] in regard to his legal or constitutional duties. It would not just be a law clerk." 18 Cong.Rec. 4096-4097 (1972). The relatively high status required to exempt an employee was again emphasized the following day when Senator Williams asked for clarification of the amendment in these terms: "That is basically the purpose of the amendment, to exempt from coverage those who are chosen by the Governor, or by the mayor or the county supervisor, whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line advisers, is that basically the purpose of the Senator's amendment?" (Emphasis added.) 118 Cong. Rec. 4493 (1972). Senator Ervin responded, "That is the purpose of the amendment, yes." Id.

Other cases have construed the exemption similarly. For example, in Anderson v. City of Albuquerque, 690 F.2d 796 (10th Cir. 1982), the Court held that the position of staff director of the Albuquerque Human Rights Board was not exempt under § 2000(e). The Court concluded that the position was neither an appointment at the policymaking level nor an immediate advisor with respect to the constitutional or legal powers of the mayor who made the appointment. The Court emphasized that the purpose of the exclusion from coverage under § 2000(e) was "to exempt ... those who are chosen by the Governor or the mayor ... whatever the elected official is, and who are in a close personal relationship with him. Those who are his first line of advisors." 690 F.2d at 801. Concluded the Court:

> In sum, considering the facts of this case and construing the exemption narrowly, we conclude that the staff director does not formulate policy or advise the mayor so to create the immediate and personal relationship required by the exemption. (emphasis added).

Id.

And in Owens v. Rush, 654 F.2d 1370 (10th Cir. 1979), the Court, after examination of the Congressional history, concluded that the § 2000(e) exemption applied "only to those individuals who are in highly intimate and sensitive positions

of responsibility on the staff of the elected official." 654 F.2d at 1375. Moreover, the Court in Morgan v. Tangipahoa Parish, 23 EPD § 31063 (U.S.D.C. La., No. 77-3814, 1979) held that deputy sheriffs were not normally "'policymaking' personnel who would occupy a position similar to a cabinet officer." The Court found that the exemption contained in § 2000(e) was meant to exclude "only high level policymaking members of an official's personal staff." In Perry v. City of Country Club Hills, 607 F.Supp. 771, 774 (D. Mo. 1983), the Court held that the "appointee on the policymaking level" exemption contained in § 2000(e) must be construed narrowly.

A legislative budget analyst was deemed in Bostick v. Rappleyea, 629 F.Supp. 1328 (N.D.N.Y. 1985) to be not the type of position which was "sensitive and intimate" to the Legislative Committee which employed her, so as to fall within the "policymaking" or "immediate advisor" exceptions to § 2000(e). The Court in Howard v. Ward Co., 418 F.Supp. 494 (D.N.D. 1976) concluded that a deputy sheriff was neither a member of a Sheriff's personal staff nor an "appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the [Sheriff's] office." In elaborating, the Court found that

> Those exclusions are aimed at persons such as members of a governor's cabinet or a mayor's personal secretary (provided they are not protected by state civil service) rather than at deputy sheriffs.

418 F.Supp. at 502.

The foregoing authorities, although not addressing the precise question at hand, would certainly appear to suggest that the exemption contained in § 2000(e) (and 29 U.S.C. § 630(f)) is intended in its entirety to exclude "only [those] high level policymaking members of an [elected] official's personal staff." Thus, such exemption would not appear to be aimed at justices or judges who are "elected" by the General Assembly or appointed by some other authority. As members of a separate and independent branch of government, it would hardly seem appropriate to consider a judge as standing in the relationship of a high level member of the staff of an elected official.

It must be recognized, however, that there is authority which arguably construes the phrase "appointee at the policymaking level" exemption to the contrary, and thus the question is a close one. In Equal Employment Opportunity Commission v. North Carolina, 21 EPD § 30442 (W.D.N.C. 1979),

the Court, in construing a statute similar to 29 U.S.C. § 630(f) and 42 U.S.C. § 2000(e), concluded that magistrates appointed by the senior regular circuit judge were not "appointees on the policymaking level" and thus were employees pursuant to § 2000(e). The basis for the conclusion was that the magistrate "does not make 'policy,' but rather applies policies made by others to the specific fact situations before her." In dicta, the Court questioned whether

> [a] different case might be presented if this suit instead involved judges of the state appellate courts. It could at least be fairly argued that judges at that level are engaged in "policymaking" in their reported decisions expounding and developing the common law. Such is not the case here.

Moreover, there exists at least one E.E.O.C. interpretation which at first glance seems to interpret the "appointee on the policymaking level" exemption somewhat broadly. E.E.O.C. has ruled that the exemption for appointees on the policymaking level

> applies only where it is established that the individual is not covered by state or local civil service laws, is personally appointed by the elected official, and where the position is a policymaking one at the highest levels of a department or agency of a state or political subdivision of a state.

E.E.O.C. Dec. § 6725 (September 29, 1978). Thus, E.E.O.C. held that the chief executive officer of a commission who was appointed by the Governor was not an "employee". The decision also noted however, that the purpose of the exemption was to give

> elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official

> is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.

Applying this test from the E.E.O.C. ruling, it is somewhat difficult to determine whether a judge falls within the exemption. It could be argued that the General Assembly (or other appointing authority) chooses judges on the basis of "similar ideological outlooks" and thus to implement a particular political ideology. However, the better interpretation, we believe, is to read the E.E.O.C. interpretation as limited to appointments which have a more immediate impact upon the implementation of the policies of the elected official, i.e., cabinet members or agency or department heads in the same branch of government. We believe that is more the thrust of the E.E.O.C. ruling in stating that the purpose of the exemption is "to allow the appointee to work closely with elected officials ... in developing policies that will implement the overall goals of the elected officials." Accord: E.E.O.C. Dec. No. 79-08, Empl. Prac. E.E.O.C. Dec. (CCH) § 6739) (October 20, 1978).

A recent opinion of the Maryland Attorney General construes the ADEA in precisely this way. Op. Atty. Gen. (Md.), December 29, 1986. The opinion concludes that judges not elected by the people are "employees" within the definition of the ADEA. The Maryland Attorney General ruled that the legislative history of Title VII (and thus the ADEA) clearly demonstrates that, "Congress intended the 'policymaking level' exception to apply only to cabinet officers and similar political appointees in the Executive Branch." We find the reasoning of the Maryland Attorney General to be persuasive.

Thus, we do not believe a judge, who is part of a completely separate and independent branch of government, can be said to implement the day to day policies of the Legislature or other authority which appoints them. While such may be the hope or desire in making the appointment, the principles of separation of powers and judicial detachment generally militate otherwise. As the Court held in Goodwin v. Cir. Ct. of St. Louis Co., 729 F.2d 541 (8th Cir. 1984), the exemption should not be applicable where there is no "personal relationship" between the appointing authority and appointee and where the appointee such as a judicial officer must "assert ... independent judgment free from any direction from others." 729 F.2d at 548. Thus, we believe that the exemption should be narrowly construed so that a justice of the Court is not

subject to the exemption and is thus an "employee" under the ADEA. This reasoning is in accord with both the Congressional history and purpose of the ADEA 1/

BONA FIDE OCCUPATIONAL QUALIFICATION EXEMPTION

Moreover, it would appear that the "bona fide occupational qualification" exception contained in 29 U.S.C. § 623 (f) would not be applicable to this situation. As stressed above, any exception to the ADEA is to be narrowly construed. Smallwood v. United Air Lines, 661 F.2d 303 (4th Cir. 1981). And the "bona fide occupational qualification" exception is generally reserved for officers in law enforcement and public safety, the type of personnel specifically exempted by the new amendments. Indeed, the view that age constitutes a qualification for serving as a judge has been rejected; as stated in Grinnell v. State, 435 A.2d 523, 526 (N. H. 1981), a line drawn with respect to judges on the basis of age deprives

> the bench of able jurists who are forced to retire in the height of their intellectual creativity, when they are making an inestimable contribution to the people they serve.

Thus, as with the other recognized exemptions, we deem the "bona fide occupational qualification" exemption to be inapplicable.

1/ See, 118 Cong. Rec. at 4095 ["the only person excluded besides the elected official is the person who advises him."]; but see, Id. [a justice elected by popular vote would not be exempt from the ADEA coverage.]. See also, 65 Georgetown Law J. 809, 816 [Senate interpretation is applicable to conference committee report]. In addition, we are advised that there has been an "informal" ruling by a staff member of the E.E.O.C. which reaches this same conclusion; however, we are further advised that such ruling, because of its informality, does not have precedential value.

Moreover, federal case law indicates that the ADEA is applicable even where the individual concerned is considered an "officer" rather than an "employee". See, E.E.O.C. v. City of Linton, 623 F.Supp. 724 (S.D. Ind. 1985) [police officer]; E.E.O.C. v. Mo. State Hwy. Patrol, 555 F.Supp. 97 (W.D. Mo. C.D.) [highway patrol]; Kossman v. Kalumet Co., 600 F.Supp. 175 (E.D. Wis. 1985).

BONA FIDE EXECUTIVE OR HIGH POLICYMAKING POSITION EXEMPTION

One other exception to the Act's applicability should be noted. 29 U.S.C. § 631 (c) (1) provides:

> Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer of the employee which equals, in the aggregate, at least $44,000. (emphasis added).

The Equal Employment Opportunity Commission (EEOC) has promulgated regulations further clarifying this provision of the ADEA. Such regulations note:

> Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption should be narrowly construed.

29 C.F.R. § 1625.12.

The EEOC regulations further provide that, for an employee to be deemed a "bona fide executive" under 29 U.S.C. § 631 (c) (1) of the ADEA, the employer must initially show that the employee satisfies the same definition "set forth in § 541.1 of this chapter." In § 541.1, the Department of Labor has sought to define "bona fide executive" as that term is used in § 13 (a) (1) of the Fair Labor Standards Act; such provision of the FLSA exempts "bona fide executives" from coverage under that Act. According to the EEOC regulations, each of the elements (a) through (e) as specified in § 541.1 must be satisfied in order for there to be consideration for an exemption from the

ADEA, pursuant to the bona fide executive provision. 2/ The regulations recognize that application of the test is a factual question and must be resolved on a case by case basis.

Section 541.1 provides as follows:

> The term "employee employed in a bona fide executive capacity" in Section 13 (a) (1) of the Act (FLSA) shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and
>
> (b) Who customarily and regularly directs the work of two or more employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as for the hiring and firing and

---

2/ It is clear that simply fulfilling the requirements of § 541.1 in itself is not sufficient for an employer's entitlement to an exemption under 29 U.S.C. § 631 (c) (1) of the ADEA. The E.E.O.C. regulations, at 29 C.F.R. § 1625.12 (2), provide:

> Even if an employee qualifies as an executive under the definition in § 541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the Conference Committee Report in the form of examples (see HR Rept. No. 95-950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business.

> as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent, or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours of work in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section....

It is certainly true that judges, particularly the Chief Justice and those designated by him as administrative judges, (see Article V, § 4 of the State Constitution) possess important administrative duties within the unified judicial system. However, it remains doubtful whether a judge meets all the requirements of § 541.1 (a) through (e). Although judges probably fulfill the requirements of (b), (c) and (d), it is quite unlikely that their "primary" duty is in a managerial capacity. The Department of Labor regulations (§ 541.103) provide as a rule of thumb, that the employee must spend over 50 percent of his work time in performing the managerial duties specified in Subsections (a) through (e). Moreover, it is certainly likely that judges devote more than 20% of their time to nonexempt work, i.e. purely judicial duties, and thus do not meet the requirement contained in § 541.1 (e). 3/

Because the "bona fide executive" exemption is not applicable, it would likewise not appear that judges would fall within the phrase "high policymaking position" as used in

---

3/ Other considerations may be applicable. 29 U.S.C. § 631 (c) (1) provides that the employee must be entitled to "an immediate ... retirement benefit...." EEOC has interpreted this to mean receipt of benefits within two months or less. See, 29 C.F.R. § 1625.12. To our knowledge, there is no guarantee under state law that a judge would begin to receive benefits within the two month limitation period.

§ 631(c)(1). 29 CFR § 1625(e) states as follows:

> The phrase "high policymaking position" according to the Conference Report (H.R. Rept. No. 95-950, p. 10), is limited to ... certain top level employees who are not 'bona fide executives' ..." Specifically, these are:
>
> ... individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of a corporate policy and effectively recommend the implementation thereof.
>
> For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy directions to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to decisionmakers. Such an employee would meet the definition of "high policymaking" employee.

It would not appear that a judge neatly fits into the type of position contemplated here. This exemption was obviously intended to encompass those who recommend policy decisions to corporate executives. Since we cannot conclude that a judge meets the requirements of a "bona fide" executive, we also do not believe that he meets the criteria of the more subordinate "policymaking" position.

Our analysis is somewhat similar to that employed by the court in a private sector case, Whittlesey v. Union Carbide Corp., 567 F.2d 1320 (S.D.N.Y.), affd. 742 F.2d 724 (2d Cir. 1984). In Whittlesey, the Court held that the position of chief labor counsel of a corporation was not a "bona fide executive or high policymaking" position. The Court based its conclusion with respect to the "bona fide executive" exemption on the fact that the corporate counsel position was that

"primarily of an attorney doing legal work, giving legal advice, giving attention to the effect of statutes, regulations and administrative action upon company practices, and attending to litigation." 567 F.Supp. at 1323. While the legal counsel undeniably exercised certain administrative duties, the Court found that such duties were small by comparison to his legal duties. Likewise, the Court found that the corporate counsel's duties as an advisor on policy was quite modest and thus the position was not a "high policymaking" position.

Admittedly, a judge, particularly the Chief Justice of the Supreme Court, exercises important administrative duties and thus it might be argued that at least certain judges are "... the very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business". However, as in Whittlesey, in the case of an attorney, the fact remains that a judge's duties are primarily legal, rather than administrative in nature because our courts remain primarily legal institutions. Thus, we do not believe that our judges are analogous to a corporation or its top level executives. See also, Op. Atty. Gen. (Md.), December 29, 1986.

More fundamentally however, we question whether 29 U.S.C. § 631 (c) (1) of the ADEA was intended to apply to the type of situation presented here. This provision of the ADEA was enacted in 1978. As indicated above, Congress in enacting this provision, made it clear that it intended to use the same definition of "bona fide executive" as used under the Fair Labor Standards Act as a "guideline for determining those employees who meet the definition of 'executive' for purposes of this amendment." 1978 Congressional and Administrative News (Vol. 3) at 530. Since at the time of enactment of the amendment, the United States Supreme Court had held that Congress could not constitutionally apply the FLSA to State governments, National League of Cities v. Usery, 426 U.S. 833 (1976), it is, arguably, unlikely that Congress intended 29 U.S.C. § 631 (c) (1) to apply employees other than those "covered" by the Act at that time, i.e. private executives. See, 1978 Congressional and Administrative News, (Vol. 3) at 531; 29 C.F.R. § 1625.12.

Moreover, we have found no case holding that this provision of the ADEA is applicable to high ranking state or local officials, particularly judges who in our view, should hardly be deemed "executive" officers even though they may possess administrative duties. In addition, at least one labor law publication indicates that the "bona fide executive" exemption

was intended to be applied to "executive or high-policy making employees in private industry ...". (emphasis added) Current Developments (Daily Labor Report), A-16 (No. 213), November 4, 1986. Thus, for this reason also, we believe the exemption contained in 29 U.S.C. § 631 (c) (1) to be inapplicable. 4/

CONCLUSION

In conclusion, Congress has now removed the ADEA's upper age limit for those scheduled to retire after the effective date of the Act, January 1, 1987. While arguments can be made as to the possible applicability of the various exemptions contained in the ADEA, and only a court can ultimately decide the question, it is our opinion that, effective January 1, 1987, South Carolina judges who reach retirement age after that date are, as a matter of federal law, no longer required to retire at age 70 (or 72). This conclusion would be applicable to justices of the Supreme Court, including the Chief Justice, judges of the Court of Appeals, circuit court judges, family court judges, masters in equity, special referees, magistrates and municipal judges. Probate judges, who are elected officials, remain unaffected by the ADEA; however, since South Carolina's mandatory retirement law has long exempted probate judges as elected officials, they continue to be exempt from mandatory retirement requirements as before.

If we can be of further assistance, please let us know. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

RDC/an

4/ As to whether the $44,000 figure is met, such obviously would depend upon the individual factual situation. The $44,000 retirement figure referred to in 29 U.S.C. § 631 (c) (1) must be calculated pursuant to the formula provided in 29 C.F.R. 1627.17. That regulation requires that, where employees make contributions to the retirement plan, the $44,000 figure must be adjusted "so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no roll over contributions are made."