Kansas Administrative Regulations

Kansas Human Rights Commission

Article 80.—Age Discrimination in Employment

21-80-9. Exemption for bona fide executive or high policy making employees.

(a) The party seeking to invoke the exemption for bona fide executive or high policy-making employees shall have the burden of showing that every element of the exemption has been met clearly and unmistakably. This exemption shall be narrowly construed.

(b) Any employee within the exemption may lawfully be required to retire on account of age at age 65 or above. In the alternative, the employer may retain such an employee either in the same position or status or in a different position or status. Any employee who accepts such a new status or position shall not get treated any less favorably, on account of age, than any similarly situated younger employee.

(c) The bona fide executive exemption shall apply to top-level employees who exercise substantial executive authority over a significant number of employees and a large volume of business.

Any individual in the corporate organizational structure who possesses a comparable or greater level of responsibility and authority, as measured by established and recognized criteria, shall also qualify for this exemption.

(d) The phrase "high policymaking position" shall be limited to certain top-level employees:

(1) who are not bona fide executives;

(2) who are individuals who have little or no line authority; and

(3) whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend its implementation.

(e) Each employee qualifying for this exemption shall have been a bona fide executive or held a high policy-making position, as those terms are defined in this regulation, for the two-year period immediately before retirement.

(f) "Annual retirement benefit" means the aggregate sum payable during each one-year period of retirement. The initial one-year period shall commence from the date the benefits first became receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(g) The annual retirement benefit shall be immediately available to the employee retiring under this exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits, in a lump sum or the first of a series of periodic payments, shall occur not later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period shall not preclude retirement under the exemption, if the employee could have elected to receive benefits within that period.

(h) To determine whether the aggregate annual retirement benefit equals at least $44,000, only benefits authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan shall be included.

(i)(1) The annual retirement benefit shall be nonforfeitable. Accordingly, the exemption shall not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $44,000 in any one year. However, retirement benefits shall not be considered forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

(2) An annual retirement benefit shall not be considered forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with Treasury Regulation 1.401-4(c). However, there shall be at least a reasonable expectation that the plan will meet its obligations when the retirement in question becomes effective.

(Authorized by K.S.A. 1991 Supp. 44-1121; implementing K.S.A. 1991 Supp. 44-1113, 44-1118; effective Dec. 28, 1992.)