U.S. Coast Guard. 1999. Recreational Boating Accident Statistics 1995 and 1996. www.uscgboating.org/stats.html. Accessed Feb. 1999.

PWIA vs. Department of Commerce, 48 F.3d 540 (D.C. Cir. 1995).

U.S. Department of the Interior. 1998a. Golden Gate National Recreation Area. Code of Federal Regulations, Title 36, Chapter 1, compendium amendment and Administrative Record.

U.S. Department of the Interior. 1998b. Point Reyes National Seashore. Code of Federal Regulations, Title 36, Chapter 1, compendium.

U.S. Department of the Interior. 1998c. Proposed Rule: Personal Watercraft Use Within the NPS System. 63 FR 49312 (Sept. 15, 1998).

U.S. Fish and Wildlife Service. 1992. Management Agreement for the Florida Keys Refuges—Monroe County, Florida.

Wagner, K.J. 1994. Of hammacks and horsepower: the noise issue at lakes. Lakeline, June 1994, pp. 24–28.

Woolley, T. 1996. Testimony prepared for the Superior Court of Washington for Whatcom County.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

Authority: 16 U.S.C. Section 1431 *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

April 3, 1999.

Ted Lillestolen,

Deputy Assistant Administrator, Ocean Services and Coastal Zone Management.

Accordingly, for the reasons set forth above, 15 CFR 922, Subpart H is proposed to be amended as follows:

PART 922, SUBPART H—THE GULF OF THE FARALLONES NATIONAL MARINE SANCTUARY

1. Section 922.81 is amended by adding the following definition, in the appropriate alphabetical order.

§ 922.81 Definitions.

* * * * *

Motorized personal watercraft means a vessel which uses an inboard motor powering a water jet pump as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on the vessel, rather than the conventional manner of sitting or standing inside the vessel.

2. Section 922.82 is amended by adding new paragraph (a)(7) as follows:

§ 922.82 Prohibited or otherwise regulated activities.

(a) * * *

(7)(i) Except for transit through an established access corridor described in Appendix B to this subpart, operation of any motorized personal watercraft from the mean high-tide line seaward to 1,000 yards (approximately 0.5 nautical mile), including 1,000 yards seaward from the Farallon Islands. The restricted areas include Drakes Bay, Tomales Bay, Bolinas Lagoon, Estero Americano and Estero de San Antonio.

(ii) This prohibition shall not apply to the use of personal watercraft for emergency search and rescue missions or law enforcement operations carried out by National Park Service, U.S. Coast Guard, San Francisco Fire or Police Departments or other Federal, State or local jurisdictions.

* * * * *

3. A new appendix is added to subpart H, as follows:

Appendix B to Subpart H of Part 922—Access Corridor Within the Sanctuary Where the Operation of Motorized Personal Watercraft Is Allowed

There shall be an access corridor at Bodega Bay where MPWC can launch and motor out to waters that are outside the 1,000 yard buffer where operation of MPWC are prohibited. This access corridor shall be between the following coordinates at Bodega Harbor: South Jetty: 38__ 18′18″ N, 123__ 02′54″ W; North Jetty: 38__ 18′22″ N, 123__ 02′56″ W; and out 1,000 yards into the Bay on a 090__ T bearing.

[FR Doc. 99–9981 Filed 4–22–99; 8:45 am]

BILLING CODE 3510–08–M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

Waivers of Rights and Claims: Tender Back of Consideration

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) is publishing this notice of proposed rulemaking (NPRM) to address issues related to the United States Supreme Court's decision in *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998).

DATES: To be assured of consideration by EEOC, comments must be in writing and must be received on or before June 22, 1999.

ADDRESSES: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507.

FOR FURTHER INFORMATION CONTACT: Carol R. Miaskoff, Assistant Legal Counsel, or Paul E. Boymel, Senior Attorney-Advisor, 202–663–4689 (voice), 202–663–7026 (TDD).

SUPPLEMENTARY INFORMATION:

A. Background

1. Introduction

In *Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Supreme Court held that an individual was not required to return (''tender back'') consideration for a waiver in order to allege a violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA). The Court explained that, because the release did not comply with the ADEA, plaintiff's retention of the consideration did not constitute a ratification that made the release valid. Moreover, the employer could not invoke the employee's failure to tender back consideration as a way of excusing its own failure to comply with the statute.

EEOC is issuing proposed legislative regulations to address issues raised by the *Oubre* decision. In summary, EEOC's position is that: (1) an individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration as a precondition for challenging that waiver agreement; (2) a covenant not to sue or any other condition precedent, penalty, or other limitation adversely affecting any individual's right to challenge a waiver agreement is invalid under the ADEA; (3) although in some cases an employer may be entitled to setoff, recoupment, or restitution against an individual who has successfully challenged the validity of a waiver agreement, such setoff, recoupment, or restitution cannot be greater than the consideration paid to the individual or the damages awarded to the individual, whichever is less; and (4) no employer may unilaterally abrogate its duties under a waiver agreement, even if one or more of the signatories to the agreement successfully challenges the validity of that agreement under the ADEA.

2. The Older Workers Benefit Protection Act of 1990

Title II of OWBPA amended the ADEA to set out rules governing the validity of a waiver agreement. Section 7(f)(1) of the ADEA provides that ''[a]n

individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary.'' Section 7(f)(1) provides a list of minimum requirements that must be met in order for a waiver to be knowing and voluntary. The statutory language and legislative history of OWBPA make it clear that the listing in § 7(f)(1) is nonexhaustive, and that even waiver agreements meeting the stated minimum requirements would not satisfy the ADEA if, under the totality of the circumstances, the waiver were not knowing and voluntary. As recognized in *Oubre,* the ADEA waiver rules extend to the tender back situation.

3. Tender Back Requirement Before Oubre

Prior to the Supreme Court's decision in *Oubre,* the circuits were split on the issue of whether an individual who signed an agreement waiving rights and claims under the ADEA was required to tender back any consideration paid by the employer in order to challenge the validity of the waiver in court. Several courts took the position that an individual who accepted consideration in exchange for a waiver agreement was not required to tender back that consideration to the employer before challenging in court either the validity of the waiver agreement or any employment discrimination. *See, e.g., Long* v. *Sears Roebuck & Co.,* 105 F.3d 1529 (3d Cir. 1997), *cert denied,* 118 S.Ct. 1033 (1998); *Oberg* v. *Allied Van Lines,* Inc., 11 F.3d 679 (7th Cir. 1993). Other courts took the position that the tender back of consideration was necessary before an individual could challenge the waiver and the discrimination in court. These courts concluded that by retaining the consideration, the individual ''ratified'' the waiver agreement and therefore could not challenge the agreement in court. *See, e.g., Blistein* v. *St. John's College,* 74 F.3d 1459, 1465–66 (4th Cir. 1996); *Wamsley* v. *Champlin Refining & Chemicals, Inc.,* 11 F.3d 534 (5th Cir. 1993).

4. The Oubre Decision

In *Oubre* v. *Entergy Operations, Inc.,* 522 U.S. 422 (1998), the Supreme Court resolved the split among the circuits on the question of tender back. The facts in *Oubre* involved an employee who, upon her termination, signed an agreement waiving all claims against her employer in exchange for payments totalling $6,258. The waiver agreement failed to comply with at least three of the requirements of § 7(f)(1) of the ADEA. It did not: (1) give her the statutorily mandated 21 days to consider the waiver agreement, but instead provided only 14 days; (2) give her seven days to revoke the agreement; or (3) make specific reference to ADEA claims. *Oubre,* 522 U.S. at 424. After the employee received all of the consideration for the waiver, she filed an ADEA suit against the employer without tendering back the consideration. The lower courts ruled that she could not proceed with her lawsuit because she had not offered to return the consideration to the employer, agreeing with the employer's arguments under state contract and common law. *See Oubre* v. *Entergy Operations, Inc.,* 112 F.3d 787 (5th Cir. 1996), *rev'd* 522 U.S. 422 (1998).

The Supreme Court reversed the Fifth Circuit's decision, stating that under § 7(f)(1) of the ADEA:

> [T]he employee's mere retention of monies [did not] amount to a ratification equivalent to a valid release of her ADEA claims, since the retention did not comply with the OWBPA any more than the original release did. The statute governs the effect of the release on ADEA claims, and the employer cannot invoke the employee's failure to tender back as a way of excusing its own failure to comply.

Oubre, 522 U.S. at 428. Thus, the Court allowed the employee's case to proceed even though she had not tendered back the consideration for the waiver agreement.

In its decision, the Court addressed three main concerns. First, the Court stated that the ADEA foreclosed the employer's argument that state contract law and common law principles apply to ADEA waiver issues. The Court emphasized that ''the OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law.'' 522 U.S. at 427. The Court also noted that the contract law principles cited by the employer ''may not be as unified as the employer asserts.'' *Id.* at 426.

Second, the Court reasoned that the practical effect of the employer's position, requiring tender back of consideration as a condition of bringing suit, could frustrate the purposes of the ADEA and lead to an evasion of the statute:

> In many instances a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification.

Oubre, 522 U.S. at 427.

Finally, the Court observed that lower ''courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee, and these questions may be complex where a release is effective as to some claims but not as to ADEA claims.'' 522 U.S. at 428. The Court saw no need to resolve such questions in this case, however, and simply reversed the Fifth Circuit's judgment and remanded for further proceedings consistent with its opinion. *Id.*

5. EEOC Negotiated Rulemaking on Waivers Under OWBPA

In 1995 and 1996, EEOC conducted a negotiated rulemaking on ADEA waivers under OWBPA. Although the Rulemaking Committee considered the issue of tender back and ratification during its deliberations, the Committee decided that it would not reach consensus and the issue was not addressed in the regulatory language recommended by the Committee to the Commission. EEOC promulgated a final regulation at 29 CFR 1625.22 on June 5, 1998, 63 FR 30624. The preamble to the final regulation confirmed that the issues raised in *Oubre* would not be addressed in that section, but that the tender back issue would be covered in other guidance.

B. Purpose and Discussion of This Proposed Rule

1. Purpose: Pursuant to its regulatory authority under § 9 of the ADEA, EEOC has developed this proposed legislative regulation to address issues related to the *Oubre* decision. This proposal would add a new legislative regulation at 29 CFR § 1625.23.

2. Discussion: This regulation sets forth EEOC's position on several important issues concerning tender back.

a. An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency. Retention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver. A clause requiring tender back is invalid under the ADEA.

(i) *The Oubre Decision:* The Court in *Oubre* made it clear that ''[a]n employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. . . . Courts cannot with ease presume ratification of that which Congress forbids.'' 522 U.S. at 427. The Court emphasized that ''the employee's mere retention of monies [does not] amount to a ratification

equivalent to a valid release * * *'' *Id.* at 848.

The facts of the *Oubre* case concerned a waiver agreement that clearly did not satisfy at least three of the requirements of § 7(f)(1), and thus was invalid on its face. However, the holding and rationale of *Oubre,* which are based on the ADEA as well as important public policy concerns, are not limited to cases in which the terms of the waiver agreement are facially invalid. The ADEA's overarching standard is that waivers must be knowing and voluntary, and the specific provisions in § 7(f)(1) are only minimum requirements. While a waiver agreement that fails to meet these minimum criteria cannot be knowing and voluntary, even agreements that do meet these criteria still may not be knowing and voluntary under the ADEA.

For example, a waiver agreement that meets all of the enumerated requirements in § 7(f)(1) still would not be knowing and voluntary if the employer obtained an employee's signature by force or compulsion. As another example, an agreement might state on its face that an individual had 45 days to accept the offer. If the individual in fact were given only 5 days to make this decision, the waiver would not be knowing and voluntary under the ADEA. *See* 29 CFR 1625.22(e). Finally, with regard to the informational requirements under § 7(f)(1)(H), it is impossible to assess an employer's compliance by a mere examination of the waiver agreement. These requirements depend on the unique facts of a particular workforce reduction or voluntary termination program. *See* 29 CFR 1625.22(i); *see, e.g., Griffin* v. *Kraft General Foods, Inc.,* 62 F.3d 368 (11th Cir. 1995)(analyzing the validity of the information provided under § 7(f)(1)(H), the court found that, where the employer may have considered several plants for closure before it decided to close the plant at issue, it might need to provide information about employees at multiple facilities).

In summary, compliance with § 7(f)(1) of the ADEA cannot be determined based solely on the face of a waiver document. Because a waiver agreement may be invalid due to circumstances beyond the document itself, the Supreme Court's rationale in *Oubre* precludes tender back as a condition for any lawsuit or charge.

(ii) *ADEA Statutory Language and Legislative History:* In the ADEA, as amended by the OWBPA, Congress clearly contemplated that courts would decide the validity of waiver agreements. A requirement of tender back would, as the Oubre Court pointed out, effectively prevent access to the courts for many employees and therefore would undermine this statutory scheme.

Section 7(f) of the ADEA contemplates that the courts have the authority to determine the validity of a waiver agreement. Section 7(f)(3) states that:

> In any dispute that may arise over whether any of the requirements [of §§ 7(f)(1) or (2)] have been met, the party asserting the validity of a waiver shall have the burden of proving *in a court of competent jurisdiction* that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(Emphasis supplied). Thus, the statute does not envision a waiver agreement as a complete bar to litigation, but rather suggests that a waiver is an affirmative defense. A tender back requirement would be inconsistent with this statutory design.

A tender back requirement is inconsistent with the OWBPA legislative history, which also shows that Congress contemplated that litigation would be available for deciding the validity of waiver agreements. Here, Congress expressly stated that the burden of proof described in § 7(f)(3) establishes ''an affirmative defense.'' *See* S. 1511, Final Substitute Statement of Managers, 136 Cong. Rec. 13596–97 (1990). In reference to an earlier version of the OWBPA legislation, the Senate Committee on Labor and Human Resources explained:

> The Committee expects that courts reviewing the ''knowing and voluntary'' issue will scrutinize carefully the complete circumstances in which the waiver was executed. * * * The bill establishes specified minimum requirements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was ''knowing and voluntary.''

S. Rep. No. 101–263, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537 (hereinafter ''Senate Report'').

The law also is clear that a waiver agreement cannot interfere with an individual's right to file a charge of discrimination or assist EEOC in any administrative or legal proceedings. Section 7(f)(4) of the ADEA states:

> No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

See also 29 CFR 1625.22(i); *EEOC Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes,* #915.002, April 10, 1997, 3 EEOC Compl. Man. (BNA) No. 2345. In light of the *Oubre* Court's concern about the chilling effect of a tender back requirement, imposition of such a requirement as a condition for filing an EEOC charge clearly would ''interfer[e] with the protected right of an employee to file a charge * * *,'' and therefore would contravene the statute. 29 CFR § 1625.22 (i).

b. A covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement, is invalid under the ADEA, whether the covenant or other arrangement is part of the agreement or is contained in a separate document. A provision allowing an employer to recover costs, attorneys' fees, and/or damages for the breach of any covenant or other arrangement is not permitted.

(i) Covenants not to sue and other similar arrangements purport, on their face, to bar an individual's right to challenge a waiver agreement in court.[1] Like a tender back requirement, such a covenant or other arrangement directly offends the congressional intent to afford an individual the right to challenge the validity of a waiver agreement. The ADEA clearly envisions that courts would have authority to determine the validity of the waiver and, therefore, necessarily contemplates that individuals would have the opportunity to bring such a challenge. *See* § 7(f)(1) of the ADEA (setting out the specific standards for a court to determine the validity of a waiver agreement); § 7(f)(3) of the ADEA (referring to a ''court of competent jurisdiction'' as the entity expected to decide the validity of a challenged waiver); *accord* Senate Report at 32. See also *Raczak* v. *Ameritech Corp.,* 103 F.3d 1257, 1271 (6th Cir. 1997) (''[i]t was the intent of Congress that waivers would not preclude parties from bringing suit under the OWBPA''), *cert. denied,* 118 S.Ct. 1033 (1998).

(ii) Covenants not to sue and other such arrangements also carry with them the threat of a counterclaim for breach of the covenant and liability for costs, attorneys' fees, and damages. The threat of such a counterclaim or a similar threat,[2] with the prospect of being

---

[1] No waiver agreement, covenant, or other arrangement may prohibit any person from filing a charge of discrimination or assisting EEOC in its law enforcement activities. *See* 29 CFR 1625.22(i).

[2] For example, it would be impermissible for an employer to bring an independent legal action, such as a state or federal breach of contract lawsuit, because an employee filed a charge of discrimination or challenged a waiver agreement in court. Such lawsuits would constitute retaliation

forced to pay defendant's legal expenses, easily could chill persons with valid claims from challenging waiver agreements. This chilling effect runs counter to the purposes of the ADEA, a remedial civil rights statute that encourages employees to challenge illegal conduct by employers. *See generally, Commonwealth of Massachusetts* v. *Bull HN Information Systems, Inc.*, 16 F.Supp. 2d 90, 106 (D. Mass. 1998) (''[u]nder Bull's proffered interpretation, employers could functionally insulate themselves from ADEA suits and ignore the waiver provisions of the OWBPA simply by including a drastic penalty provision in the waiver as Bull has done. This interpretation offends the intent of Congress. * * *''); *Carroll* v. *Primerica Financial Services Insurance Marketing,* 811 F.Supp. 1558 (N.D.Ga. 1992); *Isaacs* v. *Caterpillar, Inc.*, 702 F.Supp. 711, 713 (C.D.Ill. 1988); *EEOC* v. *United States Steel Corp.*, 671 F.Supp. 351, 358–59 (W.D.Pa. 1987) (the court enjoined a waiver provision wherein an employee promised not to file a charge or claim under the ADEA since the waiver ''has the potential of deterring individuals from participating in ADEA claims. * * * [I]f an individual is deterred from bringing such an action in the first instance, the validity of the waiver of rights will not be able to be determined.'')

A position permitting covenants not to sue or similar arrangements would render the OWBPA amendments and the *Oubre* decision a nullity. Such provisions, coupled with the threat of counterclaims, would as a practical matter undo the ADEA's carefully crafted criteria for a knowing and voluntary waiver by encouraging employers to ignore those provisions. This in turn would undermine the ADEA's objective to ''ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.'' Senate Report at 5. EEOC does not find cases allowing covenants not to sue persuasive, because they are fundamentally at odds with the holding and rationale of the Supreme Court in *Oubre. See, e.g., Astor* v. *International Business Machines Corp.*, 7 F.3d 533, 540 (6th Cir. 1993) (covenant not to sue permissible in release of ERISA rights); *Artvale Inc.* v *Rugby Fabrics Corp.*, 363 F.2d 1002, 1008 (2d Cir. 1966).

(iii) An employer does not need to bring a counterclaim to obtain what it purchased with the waiver. With a valid waiver, an employer receives an affirmative defense against ADEA claims. *See Isaacs* v. *Caterpillar,* 765 F.Supp. 1359, 1371 (C.D.Ill. 1991); Senate Report at 53. Assuming that a waiver agreement is upheld in court, and consequently serves as an affirmative defense to a discrimination suit, the employer has received the benefit of its bargain. If the waiver is not upheld because it is not knowing and voluntary under the ADEA, the employer has no right to the benefit of its bargain.

c. In some circumstances an employer may be entitled to restitution, recoupment, or setoff against an employee's recovery of damages in court (or in the administrative process).

In *Oubre,* the Court commented that, ''[i]n further proceedings in this or other cases, courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee. * * *'' 522 U.S. at 428.[3] In EEOC's view, restitution, recoupment, or setoff should be in the discretion of the court but never exceed the lesser of the consideration given or the damages won. In the context of the *Oubre* decision, with its overriding prohibition of tender back requirements, permitting any restitution beyond the lesser of the amount the plaintiff wins in court, or the amount of consideration given, would operate constructively as a tender back penalty for bringing suit. Such a tender back penalty would interfere with the plaintiff's exercise of ADEA rights, impose significant hardship, and be contrary to public policy. Additionally, *Oubre* dictates that general contract principles are not applicable to ADEA cases if their application would deter protected individuals from vindicating their statutory rights or encourage employers to evade their statutory responsibilities. *See generally Daley* v. *United Technologies Corp.*, Civil No. 3:97 CV 00439 (AVC) (D.Conn. March 23, 1998); *Pace* v. *United Technologies Corp.*, Civil No. 3:97 CV 00481(AVC) (D.Conn. March 23, 1998) (post-*Oubre* cases stating that the employer would be entitled to a setoff consisting of all or part of the severance benefits paid if the plaintiffs should prevail on their ADEA claims); *Rangel* v *El Paso Natural Gas Co.*, 996 F. Supp. 1093, 1099 (D.N.M. 1998) (post-*Oubre* Title VII waiver case concluding that setoff against damages would be the proper way to handle reimbursement); 50 C.J.S. Judgment § 674 (stating that set-off ''is not demandable as of course, but rests in the discretion of the court'').

This limit also ensures that employees would not be penalized for a challenge to a waiver agreement when the amount of damages awarded is low (for example, when the employee has mitigated damages by finding new employment). Moreover, as stated in section b., above, covenants not to sue or other similar arrangements are not permitted. Therefore, an employer is not entitled to restitution, recoupment, or setoff for any costs, attorneys' fees or other amounts claimed as damages attributable to an alleged breach of such a covenant or other arrangement.

Finally, in a case involving more than one plaintiff, the reduction must be awarded on a plaintiff-by-plaintiff basis. Thus, no individual's award can be reduced based on the consideration received by any other person.

The following is a nonexhaustive list of the factors that may be relevant in calculating the proper amount of reduction to avoid unjust enrichment. These factors reflect, in the ADEA context, equitable principles that a reduction should be allowed only if it would promote justice, and should not be allowed if it results in injustice. *See generally* 50 C.J.S. Judgment § 674. These factors also reflect the *Oubre* Court's recognition that determining the proper amount of reduction may be complex when the waiver encompasses claims other than those arising under the ADEA. *Oubre,* 522 U.S. at 428. The factors include:

(i) Whether the employer apportioned the amount paid for the waiver agreement among the rights waived, if the waiver purports to waive rights other than ADEA rights. If the employer did not apportion the consideration among the rights waived, the apportionment should be done on an equitable basis;

(ii) Whether the employer's noncompliance with the ADEA waiver requirements was inadvertent or was in bad faith or fraudulent;

(iii) The nature and severity of the underlying employment discrimination

under § 4(d) of the ADEA and intentional discrimination for purposes of liquidated damages under § 7 of the ADEA.

[3] The terms ''recoupment'' and ''setoff'' refer to the ability of a defendant to reduce the plaintiff's award of damages by amounts otherwise due to the defendant. Recoupment and setoff serve to limit the defendant's recovery to no more than the amount of plaintiff's damages. Black's Law Dictionary (6th ed. 1990), at 1275 and 1372. ''Restitution is a return or restoration of what the [employee] has gained in a transaction.'' 1 Dan B. Dobbs, Law of Remedies, Damages-Equity-Restitution § 4.1(1) at 551 (1993). Generally, restitution is required to avoid the ''unjust enrichment'' of the party who previously obtained the money or property. Dobbs § 4.1(2) at 557. There are several exceptions to the unjust enrichment doctrine that are relevant to ADEA waivers, including when restitution would: (1) interfere with the rights of, or otherwise be inequitable to, the party who received payment; (2) cause significant hardship because an individual changed position based upon the payment; or (3) be contrary to public policy considerations. *Id*. at 563.

in the case, including whether the employer willfully violated the ADEA. If a willful violation occurred, any deduction from the award should be made after the damages are doubled pursuant to § 7(b) of the ADEA;

(iv) The employee's financial condition;

(v) The employer's financial condition;

(vi) The effect of the reduction upon the purposes and enforcement of the ADEA and the deterrence of future violations by the employer.

d. No employer may unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA.

In his concurrence in *Oubre,* Justice Breyer expressed concern that a successful challenge to a waiver agreement by one or more individuals not be construed to relieve an employer of its obligations to other individuals who did not challenge that agreement. *Oubre,* 522 U.S. at 431 (Breyer, J., concurring). Such an abrogation would penalize innocent employees for the employer's noncompliance with the ADEA, and would therefore be void as against public policy. *See generally* 17A Am. Jur. 2d Contracts § 327 (1991) (stating that an illegal contract will be enforced if refusal to enforce it ''would produce a harmful effect on the party for whose protection the law making the bargain illegal exists'').

e. The rules set out in this regulation apply to cases within the EEOC administrative process as well as to cases in court, and are fully consistent with the provisions of EEOC's regulation at 29 CFR 1625.22(i)(3).

Comments: As a convenience to commentors, the Executive Secretariat will accept public comments transmitted by facsimile (''FAX'') machine. The telephone number of the FAX receiver is 202–663–4114. (Telephone numbers published in this Notice are not toll-free). Only public comments of six or fewer pages will be accepted via FAX transmittal in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff on 202–663–4066.

Comments received will be available for public inspection in the EEOC Library, Room 6502, 1801 L Street, N.W., Washington, D.C. 20507, by appointment only, from 9:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice are available in the following alternative formats: large print, braille, electronic file on computer disk, and audio tape. To schedule an appointment or receive a copy of the Notice in an alternative format, call 202–663–4630 (voice), 202–663–4399 (TDD).

Executive Order 12866, Regulatory Planning and Review

Pursuant to § 6(a)(3)(B) of Executive Order 12866, EEOC has coordinated this NPRM with the Office of Management and Budget. Under § 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local or tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

Paperwork Reduction Act

EEOC certifies that the rule as proposed does not require the collection of information by EEOC or any other agency of the United States Government. The rule as proposed does not require any employer or other person or entity to collect, report, or distribute any information.

Regulatory Flexibility Act

EEOC certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this regulation will not result in a significant economic impact on a substantial number of small entities. For this reason, a regulatory flexibility analysis is not required. A copy of this proposed rule was furnished to the Small Business Administration.

In addition, in accordance with Executive Order 12067, EEOC has solicited the views of affected Federal agencies.

List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee Benefits, Equal Employment Opportunity, Retirement.

Signed at Washington, D.C. this 19th day of April, 1999.

Ida L. Castro,

Chairwoman.

It is proposed to amend chapter XIV of title 29 of the Code of Federal Regulations as follows:

PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10–68; Secretary's Order No. 11–68; sec. 12, 29 U.S.C. 631; Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. In part 1625, § 1625.23 would be added to Subpart B—Substantive Regulations, to read as follows:

§ 1625.23 Waiver of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency. Retention of consideration does not foreclose a challenge to any waiver agreement; nor does the retention constitute the ratification of any waiver. A clause requiring tender back is invalid under the ADEA.

(b) A covenant not to challenge a waiver agreement, or any other arrangement that imposes any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge a waiver agreement, is invalid under the ADEA, whether the covenant or other arrangement is part of the agreement or is contained in a separate document. A provision allowing an employer to recover costs, attorneys' fees, and/or damages for the breach of any covenant or other arrangement is not permitted.

(c) *Restitution, recoupment, or setoff.* (1) Where an employee successfully challenges a waiver agreement and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment, or setoff (hereinafter, ''reduction'') against the employee's damages award. These amounts never can exceed the lesser of the consideration the employee received for signing the waiver agreement or the amount recovered by the employee. Consistent with paragraph (b) of this section, an employer is not entitled to restitution, recoupment, or setoff for any costs, attorneys' fees or other amounts claimed as damages attributable to an alleged breach of such a covenant or other arrangement.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced

based on the consideration received by any other person.

(3) A nonexhaustive list of the factors that may be relevant to determine whether, or in what amount, a reduction should be granted, includes:

(i) Whether the employer apportioned the amount paid for the waiver agreement among the rights waived, if the waiver purports to waive rights other than ADEA rights. If the employer did not apportion the consideration among the rights waived, the apportionment should be done on an equitable basis;

(ii) Whether the employer's noncompliance with the ADEA waiver requirements was inadvertent or was in bad faith or fraudulent;

(iii) The nature and severity of the underlying employment discrimination in the case, including whether the employer willfully violated the ADEA. If a willful violation occurred, any deduction from the award should be made after the damages are doubled pursuant to § 7(b) of the ADEA;

(iv) The employee's financial condition;

(v) The employer's financial condition;

(vi) The effect of the reduction upon the purposes and enforcement of the ADEA and the deterrence of future violations by the employer.

(d) No employer may unilaterally abrogate its duties under a waiver agreement to any signatory, even if one or more of the signatories to the agreement or EEOC successfully challenges the validity of that agreement under the ADEA.

[FR Doc. 99–10143 Filed 4–22–99; 8:45 am]
BILLING CODE 6570–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–84–1–7341b; FRL–6324–1]

Approval and Promulgation of Air Quality State Implementation Plans (SIP); Texas: Motor Vehicle Inspection and Maintenance (I/M) Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes approval of the State of Texas supplemental I/M SIP submittals dated May 29, 1997, June 23, 1998, and December 22, 1998, which would thereby remove the conditions from the July 11, 1997, conditional interim approval. The May 29, 1997, submittal changes the definition of ''primarily operated,'' includes a Memorandum of Agreement between the Texas Natural Resource Conservation Commission and the Texas Department of Public Safety, and removes the test-on-resale requirement from the SIP. The June 23, 1998, submittal commits the State to implementing On-Board Diagnostic testing in January 2001. The December 22, 1998, submittal is the legislative authority needed to meet the requirements of the Clean Air Act and the Federal I/M regulations. In the Rules section of this **Federal Register**, EPA is issuing direct final approval of the above SIP submittals and removing the conditions from the July 11, 1997, conditional interim approval. The Agency views this rulemaking as noncontroversial and anticipates no adverse comment. A rationale for the approval is set forth in the direct final rule. If no adverse comments are received, no further action is contemplated with regard to this proposal. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by May 24, 1999.

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section, at the EPA Regional Office listed below. Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78711–3087.

FOR FURTHER INFORMATION CONTACT: Sandra Rennie, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7214.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title located in the Rules section of this **Federal Register**.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: March 30, 1999.

Jerry Clifford,

Acting Regional Administrator, Region 6.

[FR Doc. 99–9461 Filed 4–22–99; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA126–0129b FRL–6233–2]

Approval and Promulgation of Implementation Plans for Arizona and California; General Conformity Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: This action proposes to approve various revisions to State Implementation Plans (SIP) which contain regulations for implementing and enforcing the general conformity rules which the EPA promulgated on November 30, 1993. EPA is proposing to approve SIP revisions which contain general conformity rules for the Arizona SIP and the California SIP for the following California Air Pollution Control Districts (APCD) and Air Quality Management Districts (AQMD): El Dorado County APCD, Great Basin Unified APCD, Monterey Bay Unified APCD, San Joaquin Valley Unified APCD, Santa Barbara County APCD, South Coast AQMD, Feather River AQMD, Placer County APCD, Sacramento Metro AQMD, Imperial County APCD, Bay Area AQMD, San Diego County APCD, Butte County AQMD, Ventura County APCD, Mojave Desert AQMD and Yolo-Solano AQMD.

The approval of these general conformity rules into the SIP will result in the SIP criteria and procedures governing general conformity determinations instead of the Federal rules at 40 CFR Part 93, Subpart B. The Federal actions by the Federal Highway Administration and Federal Transit Administration (under Title 23 U.S.C. or the Federal Transit Act) are covered by the transportation conformity rules under 40 CFR Part 51, Subpart T—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. or the Federal Transit Act (and 40 CFR Part 93, Subpart A) and are not affected by this action.

EPA proposes to approve these SIP revisions under sections 110(k) and 176(c) of the Clean Air Act (CAA or the Act). A more detailed discussion of