I. HISTORY OF ADEA [430-432]
   a. Congress commissioned a study in 1960’s to determine whether age discrimination in employment warranted a statute prohibiting such practices.
   b. In 1967: 50% of job openings in private sector expressly excluded applicants over 55 years of age
      i. Older aged workers seemed to have an advantage regarding promotion, though.
      i. "economics", not malice or prejudice, motivated age discrimination: thus, limited protection to this age group.
   d. 1974: “Gray Lobby:“ ADEA extends to state and federal employers
   e. 1978: ADEA’s protected class expanded from 65 to 70 years old.
   f. 1986: ADEA’s “age limit” removed: now protects those who are 40 or over from age discrimination.
         1. voluntary retirements may still be valid (see VII below)
         2. mandatory retirements valid for public safety officers under ADEA exemption (see II C below).

II. PROTECTIONS UNDER ADEA TODAY
   a. Protects those who are 40 or over from discrimination based on age in hiring and other employment actions.
   b. Kimel v. Florida (2000): U.S. Supreme Court rules that state governments are immune from liability under ADEA: State workers who are discriminated against by state employer based on age must rely on state anti-discrimination protections, not the federal law.
   c. Statutory exemptions include:
i. Public safety officers (e.g. FBI, firefighters, etc).
ii. Political appointments
iii. "Key-decision makers" in private sector not protected under ADEA in being terminated:
   1. if they receive at least a 45,000 per year pension
d. Discrimination of "younger members" of protected class (e.g. employees in their 40's)
i. U.S. Supreme Court reviewing General Dynamics v. Cline: can an employer limit retiree health benefits to workers aged 50 or over without liability for age discrimination to workers in their 40's? (look for decision before July 2004)
   1. note that ADEA excludes "bona fide retirement plans" that distinguish based on age [p. 443]

III. PRIMA FACIE CASE OF DISPARATE TREATMENT [432-433]: note the missing term in O'Conn decision noted on p. 433: "substantially younger"
   a. O'Connor v. Consolidated (1996): U.S. Supreme Court reviews the prima facie requirement of disparate treatment:
      i. Pre-O'Connor: had to prove that replaced or passed over in favor of one under 40.
      ii. Post-O'Connor: must prove to judge/jury that replaced or passed over in favor of one "substantially younger."

b. Employer's Defenses [434-435]
   i. "reasonable factor other than age" (valid business reason)
   ii. BFOQ
      1. is there a less discriminatory means available to fulfill same business goal? (e.g. eye test, driving record review, etc.)
   iii. Economic concerns: [440-441] (e.g. layoff based on salary differential in organization with a compensation system based on seniority)
      1. must be strictly an "economic necessity" (FEHA amended after Marks v. Loral [p. 456])

IV. LAYOFFS ("RIFs"): [452-459]
a. What if layoff has “disparate impact” on older workers? [452-453]
   i. Courts are “split” as to whether ADEA protects against “disparate impact” discrimination.
   ii. If layoff is an absolute economic necessity, then it is valid, even if disparate impact on older workers (who earn more, hold managerial positions, etc.)
   iii. 2002: U.S. Supreme Court withdrew its grant of review in Adams v. Florida Power Corp. (FPC): Wanda Adams and over 1,200 other employees were laid off by FPC between 1992 and 1996, during a series of reorganizations the company states were necessary to maintain its competitiveness in the newly deregulated market. Of the 1,200 workers “laid off” by FPC, over 70% were over the age of 40. (“the Adams Group.”) The Adams Group sued FPC under the ADEA, alleging that the downsizing disproportionately affected older workers in violation of the ADEA. The lower courts rejected the disparate impact claim.

V. AGE-RELATED HARASSMENT AND STEREOTYPES
a. Harassment is a form of discrimination
b. Stereotypes “at work:”
   i. Older workers are inflexible, “untrainable.”
   ii. Expensive (more health care needs, medical leave, etc.)
   iii. Not “long term” employees.

c. What if job requires physical agility, strength, etc.?
   i. Test applicants/employees for job-related requirements such as eyesight (e.g. DOT licensing requires certain periodic exams)
   ii. Uniformly test applicants/employees (do not make age-based assumptions).

VI. FEHA PROTECTIONS

a. Who is protected from discrimination in employment?
   i. Applicants and employees who are 40 or over
ii. If applicant is under 40 and asked unacceptable preemployment inquiry, should report it to the DFEH.

**b. Pre-employment Inquiries**

i. Unacceptable:
   1. age?
   2. birthdate
   3. dates of attendance or completion of grade school
   4. questions tending to identify applicant as over 40
   5. Do you have a work permit?
   6. Do you live with your parents?

ii. Acceptable:
   1. Statement that hire is subject to verification that applicant meets legal age requirements
   2. If hired can you show proof of age?
   3. Are you over 18 years of age?
   4. If under eighteen, can you, after employment, submit a work permit?

**c. Rejecting applicants because they are “overqualified:”**

i. valid if reason for rejection is job-related and clearly defined

ii. if not clear why or how applicant is “overqualified” then such a statement could lead to inference of age-related discriminatory intent.

**VII. OWBPA and ADEA Waivers**

a. 1990: Elimination of mandatory retirement in 1986 and a recession created a proliferation of voluntary/early retirement plans arose.
   i. Employers pressured older workers to take early retirement
   ii. Had older workers taking early retirement sign “ADEA waiver”
b. Congress intervened: Older Workers Benefits Protection Act (OWBPA)

c. Requirements for ADEA Waiver:
   i. "Plain English"
   ii. Refer to the rights being waived under ADEA (explain ADEA)
   iii. Does not apply to claims arising after date of waiver
   iv. Employee must be given consideration ("benefit of bargain") in addition to what the employee was already entitled to (e.g. existing pension, compensation, etc.) (e.g. extra money on top of pension is "consideration.")
   v. employee advised to consult an attorney
   vi. 45 days to consider it if the waiver accompanies an exit incentive (as opposed to a demotion, decrease in pay, etc. which requires 21 days to consider it)
   vii. 7 days to revoke if employee changes his/her mind.

VIII. EEOC Regulations regarding ADEA Waivers
   a. Employees who successfully challenge defective waiver need not return the money or "value" such as stock options that they received as consideration for the waiver. (Oubre)
   b. By accepting the consideration given, the employee does not "ratify" the defective waiver.
   c. "Covenants not to sue" that include ADEA liability are considered ADEA waivers: therefore, must comply with OWBPA requirements (note: this is a change made to the EEOC's "proposed rules" shown in text.)