

## INSIGHTS + NEWS

## Client Alert for State and Local Government: When the Supreme Court Gives You Mount Lemmon...Make Post-Lemmon-ADEA-Compliant Policy

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In the first opinion of its current term, the Supreme Court held that state and local governments are covered “employers” under the [Age Discrimination in Employment Act of 1967](#) (29 U.S.C. § 621, et seq. “ADEA”) regardless of how many employees they have. *Mount Lemmon Fire Department v. Guido*, 586 U.S. \_\_\_\_ (2018). The case was brought against the Mount Lemmon Fire District by its two most senior firefighters, who claimed that their termination in the midst of budgetary constraints violated the ADEA. The Fire District contested the claims on grounds that it was too small to qualify as an “employer” under the ADEA’s definition. The grounds for the Court’s opinion are briefly summarized below, along with a few basic pointers for state and local government employers to keep in mind as they review their policies to ensure compliance with the ADEA.

### *MOUNT LEMMON FIRE DEPARTMENT V. GUIDO*

The decision in *Mount Lemmon Fire Department v. Guido*, written by Justice Ginsburg for an 8-0 majority of the Court (with Justice Kavanaugh taking no part in consideration or decision of the case), rests upon the Court’s interpretation of the ADEA definition of “employer,” 29 U. S. C. §630(b): “The term ‘employer’ means a person engaged in an industry affecting commerce who has twenty or more employees.... The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State....” Ultimately, the decision affirms the Ninth Circuit’s reading of the definitional language “also means” to denote inclusion of two “separate categories” within the definition:

1. “persons engaged in an industry affecting commerce with 20 or more employees;” and
2. “States or political subdivisions with no attendant numerosity limitation.”

The interpretation is based upon the common usage of “also means” to be “additive rather than clarifying,” as supported by several instances where the phrase appears in other sections of the U.S. Code. Further support for this interpretation is found in comparing the language Congress used to amend [Title VII of the Civil Rights Act of 1964](#), which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, to encompass only governmental employers of a certain size with the different language it used to amend the ADEA two years later.

Initially, Title VII and the ADEA applied solely to private sector employees, but in 1972, Congress amended Title VII by adding “governments, governmental agencies, [and] political subdivisions” to the statute’s definition of “persons” and “governmental industry, business, or activity” to the statutory definition of “industry affecting commerce.” Because

Title VII defines “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees,” its strictures do not reach governmental entities with fewer than fifteen employees. This is not the case with the ADEA, which Congress amended in 1974 by adding state and local government entities directly to that statute’s definition of “employer,” as quoted above. As a result of *Mount Lemmon*, the application of the ADEA is now broader than that of Title VII.

## ENSURING COMPLIANCE IN THE WAKE OF MOUNT LEMMON

Following *Mount Lemmon*, all state and local government entities, regardless of their size, are urged to conduct a comprehensive review of their policies to comply with ADEA and the applicable EEOC regulations. Below are a few basic suggestions to keep in mind as you review and revise.

- Who the ADEA Protects: employees and applicants for employment age 40 or older
- What the ADEA Prohibits:
  - Discrimination against (*i.e.* less favorable treatment of) employees and applicants for employment age 40 or older on the basis of age.
  - Harassment of employees age 40 or older on the basis of age.
- The ADEA applies to all important employment decisions. Consider reviewing policies and conduct affecting the following:
  - Hiring
  - Termination: Firing or Layoff
  - Promotions
  - Demotions
  - Pay
  - Benefits
  - Training
- General Principals:
  - Unless it is absolutely necessary for a business-related purpose, do not ask for age (or date of birth) on any forms or in other inquiries.
  - Do not place age limits on benefits, training availability, or other opportunities.
  - Apply policies consistently to all employees regardless of age. Note that even if a policy is facially neutral with regard to age, there may still be a violation of the ADEA where it has a disparate impact on those 40 and over.
  - Focus on merit and qualifications rather than age as grounds for decision-making.
- Ensure proper training of personnel regarding what constitutes age discrimination and harassment.
- While there is no one-size-fits-all severance agreement, revise standard release language to encompass release of ADEA claims.