



Federal Register

**Friday,
April 2, 2004**

Part IV

Department of Labor

Office of the Secretary

29 CFR Part 35

**Nondiscrimination on the Basis of Age in
Programs or Activities Receiving Federal
Financial Assistance from the Department
of Labor; Final Rule**

DEPARTMENT OF LABOR**Office of the Secretary****29 CFR Part 35**

RIN 1291-AA21

Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance From the Department of Labor**AGENCY:** Office of the Secretary, Labor.**ACTION:** Final rule.

SUMMARY: In this final rule, the U.S. Department of Labor (“DOL” or “the Department”) implements the Age Discrimination Act of 1975, as amended (“Age Act” or “the Act”). The Age Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also contains certain exceptions that permit, under limited circumstances, use of age distinctions, or factors other than age that might have a disproportionate effect on the basis of age. The Age Act applies to persons of all ages.

EFFECTIVE DATE: May 3, 2004.**FOR FURTHER INFORMATION CONTACT:**

Annabelle T. Lockhart, Director, Civil Rights Center (CRC), Frances Perkins Building, 200 Constitution Ave., NW., Room N-4123, Washington, DC 20210, CivilRightsCenter@dol.gov, (202) 693-6500 (VOICE) or (202) 693-6515, (800) 326-2577 (TTY/TDD).

SUPPLEMENTARY INFORMATION:**I. Background Information**

The Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Age Act applies to discrimination at all age levels. The Act also contains specific exceptions that permit the use of certain age distinctions and factors other than age that meet the Act’s requirements.

The Age Act required the former Department of Health, Education, and Welfare (HEW) to issue general, government-wide regulations setting standards to be followed by all Federal agencies in implementing the Act. These government-wide regulations, which were issued on June 12, 1979 (45 CFR part 90; 44 FR 33768), and became effective on July 1, 1979, require each Federal agency providing financial assistance to any program or activity to publish final regulations implementing the Age Act, and to submit final agency regulations to HEW (now the Department of Health and Human

Services (HHS)), before publication in the **Federal Register**. (See 45 CFR 90.31.)

II. Rulemaking History

On December 29, 1998, DOL published its first NPRM to implement the Age Act. See 63 FR 71714 (1998). No comments were received by DOL regarding the proposal. A second NPRM (NPRM II) was published on June 10, 2002, to address changes in statutory and case law that occurred after the first NPRM was published. See 67 FR 39830 (2002). No comments were received by DOL regarding the second proposal.

As part of the clearance process required by the government-wide Age Act regulations, DOL submitted its draft final rule to the Department of Health and Human Services (HHS) for review prior to publication, as required by 45 CFR 90.31(c). HHS raised concerns about consistency between the draft DOL final Age Act rule and the government-wide Age Act regulations, as well as a few additional minor matters. DOL published a third NPRM (NPRM III) on July 11, 2003, that addressed the HHS concerns and proposed minor technical corrections to the rule. See 68 FR 41511 (2003). Again, DOL received no comments in response to the proposed rule.

III. Overview of the Final Rule

The final rule published today is nearly identical to the rule as proposed in the July 11, 2003, NPRM. We have made a few non-substantive changes to improve readability of the final rule. We also have amended paragraph 35.32(a)(1) from reading “an exemption under section 35.2(c)” to read “an exception.” This change was made because the NPRM did not contain a section 35.2(c), and to make the rule’s language consistent with HHS’s government-wide Age Act regulations.

In addition, HHS’s government-wide Age Act regulations require that “each agency shall publish an appendix to its final age discrimination regulations containing a list of each age distinction provided in a Federal statute or in regulations affecting financial assistance administered by the agency.” 45 CFR 90.31(f). The Department of Labor has complied with this requirement by including Appendix A with this final rule. The material in Appendix A is self-explanatory.

We have made one substantive change to the rule, in paragraph 35.2(b). That paragraph lists circumstances in which the rule does not apply. Subparagraph 35.2(b)(2) of the NPRM stated that the rule would not apply to the employment practices of certain listed entities,

except those of “any program or activity receiving Federal financial assistance under the Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*.” The exception for WIA-financially assisted programs and activities was derived from the Age Act. However, in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Public Law 105-277, Congress eliminated this exception. Therefore, we are deleting the exception from this final rule. Applicants to, participants in, and employees of programs and activities receiving Federal financial assistance under WIA remain protected from age-based discrimination by WIA Section 188, 29 U.S.C. 2938, and DOL’s regulations implementing that section, found at 29 CFR part 37.

Because the change described above is the only substantive difference between the regulatory text of this final rule and the corresponding text in NPRM III, we have not included a Section-by-Section Analysis in this preamble. Anyone interested in learning more about the differences between this final rule and NPRM II (published in 2002) should read the preamble to NPRM III at 68 FR 41511.

IV. Regulatory Procedures*Executive Order 12866*

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this final rule is a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, yet is not economically significant as defined in section 3(f)(1), and, therefore, the information enumerated in section 6(a)(3)(C) of the Order is not required. Pursuant to the Order, this final rule has been reviewed by the Office of Management and Budget.

Unfunded Mandates Reform

Executive Order 12875—This final rule does not create an unfunded Federal mandate on any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This final rule does not include any Federal mandate that might result in increased expenditures by State, local and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

Regulatory Flexibility Act

This final rule clarifies existing requirements for entities receiving financial assistance from DOL. The

requirements prohibiting age discrimination by recipients of Federal financial assistance that are in the Age Act and the government-wide regulations have been in effect since 1979. In addition, entities receiving financial assistance from DOL under WIA have been expressly informed of their obligations to comply with the Age Act by both WIA statutory language and by the DOL regulations implementing the civil rights provisions of WIA. Because this final rule does not substantively change existing obligations on recipients, but merely clarifies such duties, the Department certifies that the final rule does not have a significant economic impact on a substantial number of small entities. Consequently, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

Section 35.31(c)(1) of the final rule allows a complainant to file a complaint by submitting a written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant. Section 35.40(b)(3)(iii) of the final rule requires a complainant to give 30 days notice to the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient, before commencing a civil action in the event that CRC issues a finding in favor of the recipient or fails to make a finding within 180 days. Based on the history of the program, the Department projects that fewer than 9 persons per year will either file a complaint with CRC or give notice that a civil action is being pursued. Accordingly, the Department believes the Paperwork Reduction Act is inapplicable to this rule.

Executive Order 13132

This final rule has been reviewed in accordance with Executive Order 13132 regarding Federalism. This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the requirements of section 6 of Executive Order 13132 do not apply to this rule.

List of Subjects in 29 CFR Part 35

Administrative practice and procedure, Age discrimination, Children, Civil rights, Elderly, Grant programs—Labor.

Signed at Washington, DC this 22nd day of March, 2004.

Elaine L. Chao,
Secretary of Labor.

■ For the reasons set out in the preamble, 29 CFR subtitle A is amended by adding a new Part 35 to read as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF LABOR

Subpart A—General

Sec.

- 35.1 What is the purpose of the Department of Labor (DOL) age discrimination regulations?
35.2 To what programs or activities do these regulations apply?
35.3 What definitions apply to these regulations?

Subpart B—Standards for Determining Age Discrimination

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35.13 Exceptions to the rules against age discrimination: reasonable factors other than age.
35.14 Burden of proof.
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35.16 Special benefits for children and the elderly.
35.17 Age distinctions in DOL regulations.

Subpart C—Duties of DOL Recipients

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35.22 Information requirements.
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Subpart D—Investigation, Conciliation, and Enforcement Procedures

- 35.30 Compliance reviews.
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35.33 Investigations.
35.34 Effect of agreements on enforcement effort.
35.35 Prohibition against intimidation or retaliation.
35.36 Enforcement.
35.37 Hearings, decisions, and post-termination proceedings.
35.38 Procedure for disbursement of funds to an alternate recipient.
35.39 Remedial action by recipient.
35.40 Exhaustion of administrative remedies.

Appendix A to Part 35—Age Distinctions in Statutes Affecting Federal Financial Assistance Administered by DOL

Authority: 42 U.S.C. 6101 *et seq.*; 45 CFR Part 90.

Subpart A—General

§ 35.1 What is the purpose of the Department of Labor (DOL) age discrimination regulations?

The purpose of this part is to set out the DOL rules for implementing the Age Discrimination Act of 1975, as amended. The Act prohibits discrimination on the basis of age by recipients of Federal financial assistance and in federally assisted programs or activities, but permits the use of certain age distinctions and factors other than age that meet the requirements of the Act and this part.

§ 35.2 To what programs or activities do these regulations apply?

(a) *Application.* This part applies to any program or activity that receives Federal financial assistance, directly or indirectly, from DOL.

(b) *Limitation of application.* This part does not apply to:

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body that:

- (i) Provides persons with any benefits or assistance based on age; or
- (ii) Establishes criteria for participation in age-related terms; or
- (iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprentice training program.

§ 35.3 What definitions apply to these regulations?

As used in this part:

Act means the Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*).

Action means any act, activity, policy, rule, standard, or method of administration, or the use of any policy, rule, standard, or method of administration.

Age means how old a person is, or the number of years from the date of a person's birth.

Age distinction means any action using age or an age-related term.

Age-related term means a word or words that necessarily imply a particular age or range of ages (*e.g.*, “child,” “adults,” “older persons,” but not “student”).

Applicant for Federal financial assistance means the individual or entity submitting an application, request, or plan required to be approved by a DOL official or recipient as a

condition to becoming a recipient or subrecipient.

Beneficiary means the person(s) intended by Congress to receive benefits or services from a recipient of Federal financial assistance from DOL.

CRC means the Civil Rights Center, Office of the Assistant Secretary for Administration and Management, United States Department of Labor.

Director means the Director of CRC.

Department means the United States Department of Labor.

DOL means the United States Department of Labor.

Federal financial assistance means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which DOL provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of property, including:

(i) Transfers or leases of property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

Program or activity means all of the operations of any entity described in paragraphs (1) through

(4) of this definition, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education,

health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

Recipient means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance from DOL is extended, directly or through another recipient, but excludes the ultimate beneficiary of the assistance. Recipient includes any subrecipient to which a recipient extends or passes on Federal financial assistance, and any successor, assignee, or transferee of a recipient.

Secretary means the Secretary of Labor, or his or her designee.

State means the individual States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the Virgin Islands, American Samoa, Wake Island and the Commonwealth of the Northern Mariana Islands.

Subpart B—Standards for Determining Age Discrimination

§ 35.10 Rules against age discrimination.

The rules stated in this section are subject to the exceptions contained in §§ 35.12 and 35.13.

(a) *General rule.* No person in the United States shall be, on the basis of age, excluded from participation in, denied the benefits of or subjected to discrimination under, any program or activity receiving Federal financial assistance from DOL.

(b) *Specific rules.* A recipient may not, directly or through contractual, licensing, or other arrangements, use age distinctions or take any other actions that have the effect of, on the basis of age:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance from DOL; or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance from DOL.

(c) *Other forms of age discrimination.* The listing of specific forms of age

discrimination in paragraph (b) of this section is not exhaustive and does not imply that any other form of age discrimination is permitted.

§ 35.11 Definitions of the terms “normal operation” and “statutory objective.”

As used in this part, the term:

(a) *Normal operation* means the operation of a program or activity without significant changes that would impair the ability of the program or activity to meet its objectives.

(b) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 35.12 Exceptions to the rules against age discrimination: normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action otherwise prohibited by § 35.10 if the action reasonably takes age into account as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes age into account as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity if:

(a) Age is used as a measure or approximation of one or more other characteristics;

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can reasonably be measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 35.13 Exceptions to the rules against age discrimination: reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by § 35.10, if that action is based on a factor other than age, even though the action may have a disproportionate effect on persons of different ages. An action is based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 35.14 Burden of proof.

The recipient has the burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 35.12 and 35.13.

§ 35.15 Remedial action.

Even in the absence of a finding of discrimination, a recipient, in administering a program, may take steps to overcome the effects of conditions that resulted in a limited participation on the basis of age. Nothing in this section will permit any otherwise prohibited use of age distinctions that have the effect of excluding individuals from, denying them benefits of, subjecting them to discrimination under, or limiting them in their opportunity to participate in any program or activity receiving Federal financial assistance from DOL.

§ 35.16 Special benefits for children and the elderly.

If a recipient is operating a program or activity that provides special benefits to the elderly or to children, the use of such age distinctions is presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 35.12.

§ 35.17 Age distinctions in DOL regulations.

Any age distinction in regulations issued by DOL is presumed to be necessary to the achievement of a statutory objective of the program or activity to which the regulations apply, notwithstanding the provisions of § 35.12.

Subpart C—Duties of DOL Recipients**§ 35.20 General responsibilities.**

Each DOL recipient has primary responsibility for ensuring that its programs or activities are in compliance with the Act and this part and for taking appropriate steps to correct any violations of the Act or this part.

§ 35.21 Recipient responsibility to provide notice.

(a) *Notice to other recipients.* Where a recipient of Federal financial assistance from DOL passes on funds to other recipients, that recipient shall notify such other recipients of their obligations under the Act and this part.

(b) *Notice to beneficiaries.* A recipient shall notify its beneficiaries about the provisions of the Act and this part and their applicability to specific programs or activities. The notification must also identify the responsible employee designated under § 35.24 by name or title, address, and telephone number.

§ 35.22 Information requirements.

Each recipient shall:

(a) Keep such records as CRC determines are necessary to ascertain whether the recipient is complying with the Act and this part;

(b) Upon request, provide CRC with such information and reports as the Director determines are necessary to ascertain whether the recipient is complying with the Act and this part; and

(c) Permit reasonable access by CRC to books, records, accounts, reports, other recipient facilities and other sources of information to the extent CRC determines is necessary to ascertain whether the recipient is complying with the Act and this part.

§ 35.23 Assurances required.

A recipient or applicant for Federal financial assistance from DOL shall sign a written assurance, in a form specified by DOL, that the program or activity will be operated in compliance with the Act and this part. In subsequent applications to DOL, an applicant may incorporate this assurance by reference.

§ 35.24 Designation of responsible employee.

Each recipient shall designate at least one employee to coordinate its compliance activities under the Act and this part, including investigation of any complaints that the recipient receives alleging any actions that are prohibited by the Act or this part.

§ 35.25 Complaint procedures.

Each recipient shall adopt and publish complaint procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by the Act or this part.

§ 35.26 Recipient assessment of age distinctions.

(a) In order to assess a recipient's compliance with the Act and this part, as part of a compliance or monitoring review, or a complaint investigation, CRC may require a recipient employing the equivalent of 15 or more full-time employees to complete a written self-evaluation, in a manner specified by CRC, of any age distinction imposed in its program or activity receiving Federal financial assistance from DOL.

(b) Whenever such an assessment indicates a violation of the Act or this part, the recipient shall take prompt and appropriate corrective action.

Subpart D—Investigation, Conciliation, and Enforcement Procedures**§ 35.30 Compliance reviews.**

(a) CRC may conduct such compliance reviews, pre-award reviews, and other similar procedures as permit CRC to investigate and correct violations of the Act and this part, irrespective of whether a complaint has been filed

against a recipient. Such reviews may be as comprehensive as necessary to determine whether a violation of the Act or this part has occurred.

(b) Where a review conducted pursuant to paragraph (a) of this section indicates a violation of the Act or this part, CRC will attempt to achieve voluntary compliance. If voluntary compliance cannot be achieved, CRC will begin enforcement proceedings, as described in § 35.36.

§ 35.31 Complaints.

(a) *Who may file.* Any person, whether individually, as a member of a class, or on behalf of others, may file a complaint with CRC alleging discrimination in violation of the Act or these regulations, based on an action occurring on or after July 1, 1979.

(b) *When to file.* A complainant must file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. The Director may extend this time limit for good cause shown.

(c) *Complaint procedure.* A complaint is considered to be complete on the date CRC receives all the information necessary to process it, as provided in paragraph (c)(1) of this section. CRC will:

(1) Accept as a complete complaint any written statement that identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant;

(2) Freely permit a complainant to add information to the complaint to meet the requirements of a complete complaint;

(3) Notify the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure; and

(4) Notify the complainant and the recipient (or their representatives) of their right to contact CRC for information and assistance regarding the complaint resolution process.

(d) *No jurisdiction.* CRC will return to the complainant any complaint outside the jurisdiction of this part, with a statement indicating why there is no jurisdiction.

§ 35.32 Mediation.

(a) *Referral to mediation.* CRC will promptly refer to the Federal Mediation and Conciliation Service or the mediation agency designated by the Secretary of Health and Human Services

under 45 CFR part 90, all complaints that:

(1) Fall within the jurisdiction of the Act or this part, unless the age distinction complained of is clearly within an exception; and

(2) Contain all information necessary for further processing, as provided in § 35.31(c)(1).

(b) *Participation in mediation process.* Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or to make an informed judgment that an agreement is not possible. The recipient and the complainant do not need to meet with the mediator at the same time, and a meeting may be conducted by telephone or other means of effective dialogue if a personal meeting between the party and the mediator is impractical.

(c) *When agreement is reached.* If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement, have the complainant and recipient sign it, and send a copy of the agreement to CRC.

(d) *Confidentiality.* The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator may testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process, unless the mediator has obtained prior approval of the head of the mediation agency.

(e) *Maximum time period for mediation.* The mediation shall proceed for a maximum of 60 days after a complaint is filed with CRC. This 60-day period may be extended by the mediator, with the concurrence of the Director, for not more than 30 days, if the mediator determines that agreement is likely to be reached during the extended period. In the absence of such an extension, mediation ends if:

(1) Sixty days elapse from the time the complaint is filed; or

(2) Prior to the end of the 60-day period, either

(i) An agreement is reached; or

(ii) The mediator determines that agreement cannot be reached.

(f) *Unresolved complaints.* The mediator shall return unresolved complaints to CRC.

§ 35.33 Investigations.

(a) *Initial investigation.* CRC will investigate complaints that are unresolved after mediation or reopened because the mediation agreement has been violated.

(1) As part of the initial investigation, CRC will use informal fact-finding

methods, including joint or separate discussions with the complainant and recipient to establish the facts and, if possible, resolve the complaint to the mutual satisfaction of the parties. CRC may seek the assistance of any involved State, local, or other Federal agency.

(2) Where agreement between the parties has been reached pursuant to paragraph (a)(1) of this section, the agreement shall be put in writing by DOL, and signed by the parties and an authorized official of DOL.

(b) *Formal findings, conciliation, and hearing.* If CRC cannot resolve the complaint during the early stages of the investigation, CRC will complete the investigation of the complaint and make formal findings. If the investigation indicates a violation of the Act or this part, CRC will attempt to achieve voluntary compliance. If CRC cannot obtain voluntary compliance, CRC will begin appropriate enforcement action, as provided in § 35.36.

§ 35.34 Effect of agreements on enforcement effort.

An agreement reached pursuant to either § 35.32(c) or § 35.33(a) shall have no effect on the operation of any other enforcement effort of DOL, such as compliance reviews and investigations of other complaints, including those against the recipient.

§ 35.35 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or this part; or

(b) Cooperates in any mediation, investigation, hearing or other part of CRC's investigation, conciliation, and enforcement process.

§ 35.36 Enforcement.

(a) DOL may enforce the Act and this part through:

(1) Termination of, or refusal to grant or continue, a recipient's Federal financial assistance from DOL under the program or activity in which the recipient has violated the Act or this part. Such enforcement action may be taken only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) Any other means authorized by law, including, but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligation of the recipient created by the Act or this part; or

(ii) Use of any requirement of, or referral to, any Federal, State, or local

government agency that will have the effect of correcting a violation of the Act or this part.

(b) Any termination or refusal under paragraph (a)(1) of this section will be limited to the particular recipient and to the particular program or activity found to be in violation of the Act or this part. A finding with respect to a program or activity that does not receive Federal financial assistance from DOL will not form any part of the basis for termination or refusal.

(c) No action may be taken under paragraph (a) of this section until:

(1) DOL has advised the recipient of its failure to comply with the Act or with this part and has determined that voluntary compliance cannot be obtained; and

(2) Thirty days have elapsed since DOL sent a written report of the circumstances and grounds of the action to the committees of Congress having jurisdiction over the program or activity involved.

(d) *Deferral.* DOL may defer granting new Federal financial assistance to a recipient when termination proceedings under paragraph (a)(1) of this section are initiated.

(1) New Federal financial assistance from DOL includes all assistance for which DOL requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from DOL does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the initiation of a hearing under paragraph (a)(1) of this section.

(2) DOL may not defer a grant until the recipient has received notice of an opportunity for a hearing under paragraph (a)(1) of this section. A deferral may not continue for more than 60 days unless a hearing has begun within the 60-day period or the recipient and DOL have mutually agreed to extend the time for beginning the hearing. If the hearing does not result in a finding against the recipient, the deferral may not continue for more than 30 days after the close of the hearing.

§ 35.37 Hearings, decisions, and post-termination proceedings.

Certain DOL procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to DOL enforcement of these regulations. They are found at 29 CFR 31.9 through 31.11.

§ 35.38 Procedure for disbursement of funds to an alternate recipient.

(a) If funds are withheld from a recipient under this part, the Secretary

may disburse the funds withheld directly to an alternate recipient.

(b) The Secretary will require any alternate recipient to demonstrate:

(1) The ability to comply with the Act and this part; and

(2) The ability to achieve the goals of the Federal statute authorizing the Federal financial assistance.

§ 35.39 Remedial action by recipient.

Where CRC finds discrimination on the basis of age in violation of this Act or this part, the recipient shall take any remedial action that CRC deems necessary to overcome the effects of the discrimination. In addition, if a recipient funds or otherwise exercises control over another recipient that has discriminated, both recipients may be required to take remedial action.

§ 35.40 Exhaustion of administrative remedies.

(a) A complainant may file a civil action under the Act following the

exhaustion of administrative remedies. Administrative remedies are exhausted if:

(1) One hundred eighty days have elapsed since the complainant filed the complaint with CRC, and CRC has made no finding with regard to the complaint; or

(2) CRC issues any finding in favor of the recipient.

(b) If CRC fails to make a finding within 180 days, or issues a finding in favor of the recipient, CRC will promptly:

(1) Notify the complainant;

(2) Advise the complainant of his or her right to bring a civil action for injunctive relief; and

(3) Inform the complainant that:

(i) The complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) A complainant who prevails in a civil action has the right to be awarded

the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint filed with the court;

(iii) Before commencing the action, the complainant must give 30 days notice by registered mail to the Secretary, the Secretary of Health and Human Services, the Attorney General of the United States, and the recipient;

(iv) The notice required by paragraph (b)(3)(iii) of this section must state the alleged violation of the Act, the relief requested, the court in which the complainant is bringing the action, and whether or not attorney's fees are demanded in the event that the complainant prevails; and

(v) The complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

APPENDIX A TO PART 35—AGE DISTINCTIONS IN STATUTES AFFECTING FINANCIAL ASSISTANCE ADMINISTERED BY DOL

Program	Statute	Section and age distinction	Regulation
Employment and Training Administration			
1. Senior Community Service Employment Program (SCSEP).	Title V, Older Americans Act Amendments of 2000, Pub. L. 106-501, 42 U.S.C.3056, 3056N.	Sec. 516(2) defines the term "eligible individuals" to mean "an individual who is 55 years old or older, who has a low income * * *, except that, * * *, any such individual who is 60 years of older shall have priority * * *."	20 CFR part 641.
2. Job Corps	Title I, Subtitle C, Workforce Investment Act of 1998 (WIA), Pub. L. 105-220, 29 U.S.C. 2881-2901.	Sec. 144 of WIA (29 U.S.C. 2884) establishes eligibility criteria for the Job Corps program. These criteria require an enrollee to "be—(1) not less than age 16 and not more than age 21 on the date of enrollment, except that—(A) not more than 20 percent of the individuals enrolled in the Job Corps may be not less than age 22 and not more than age 24 on the date of enrollment; and (B) either such maximum age limitation may be waived by the Secretary, * * * in the case of an individual with a disability."	20 CFR 670.400.
3. Indian and Native American Supplemental Youth Services.	Title I, Workforce Investment Act of 1998 (WIA), Pub. L. 105-220, 29 U.S.C. 2911.	Sec. 166(d)(2)(A)(ii) of WIA (29 U.S.C. 2911(d)(2)(A)(ii)) states that funds made available under the program shall be used for "supplemental services for Indian or Native Hawaiian youth on or near Indian reservations and in Oklahoma, Alaska, or Hawaii." Sec. 101(13) of WIA (29 U.S.C. 2801(13)) defines an eligible youth as an individual who "is not less than age 14 and not more than age 21 * * *".	20 CFR 668.430.
4. Migrant and Seasonal Farmworker (MSFW) Youth Program.	Title I, Workforce Investment Act of 1998 (WIA), Pub. L. 105-220, 29 U.S.C. 2912.	Sec. 167 of WIA (29 U.S.C. 2912) outlines the MSFW program. WIA Sec. 127(b)(1)(A)(iii) authorizes the MSFW Youth Program. That provision states that, "the Secretary shall make available 4 percent of such portion to provide youth activities under sec. 167." Sec. 101(13) of WIA (29 U.S.C. 2801(13)) defines an eligible youth as an individual who "is not less than age 14 and not more than age 21; * * *".	20 CFR 669.670.

APPENDIX A TO PART 35—AGE DISTINCTIONS IN STATUTES AFFECTING FINANCIAL ASSISTANCE ADMINISTERED BY DOL—
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Program	Statute	Section and age distinction	Regulation
5. Responsible Reintegration of Young Offenders (Youth Offender Demonstration Project).	Title I, Workforce Investment Act of 1998 (WIA), Pub. L. 105–220, 29 U.S.C. 2916; Departments Of Labor, Health And Human Services, And Education, And Related Agencies Appropriation Bill, 2003.	(a) Sec. 171(b)(1) of WIA (29 U.S.C. 2916(b)(1)) states that the “Secretary shall, through grants or contracts, carry out demonstration and pilot projects for the purpose of developing and implementing techniques and approaches, and demonstrating the effectiveness of specialized methods, in addressing employment and training needs. Such projects shall include the provision of direct services to individuals to enhance employment opportunities and an evaluation component * * *.” The Responsible Reintegration of Young Offenders program was established in FY 2001 by DOL, in collaboration with the Departments of Health and Human Services and Justice, pursuant to this authority. (b) Senate Report 107–84 on bill S. 1536 (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation for FY 2002) noted that the Responsible Reintegration of Young Offenders initiative would “link offenders under age 35 with essential services that can help make the difference in their choices in the future * * *” (p. 25). DOL has determined, based upon the re-entry needs of states and local communities, to provide services to a 14–24 year-old subset within this age limit. See 66 FR 30754, 30755 (June 7, 2001).	20 CFR 667.220.
6. WIA Youth Activities	Title I, Workforce Investment Act of 1998 (WIA), Pub. L. 105–220, 29 U.S.C. § 2854.	WIA Sec. 129 (29 U.S.C. 2854) provides the standards for WIA-financially assisted services to eligible youth. Eligible youth is defined in Sec. 101(13) as an individual who “is not less than age 14 and not more than age 21; * * *”.	20 CFR 664.200.
7. Work Opportunity Tax Credits (WOTCs).	Small Business Job Protection Act of 1996, Pub. L. 104–188, 26 U.S.C. 51.	WOTC is intended to assist individuals from groups with consistently high unemployment rates by providing tax credits to their employers. Sec. 1201(b) of the Act (26 U.S.C. 51(d)) defines the targeted groups, including high-risk youth (26 U.S.C. 51(d)(1)(D)), qualified summer youth employee (26 U.S.C. 51(d)(1)(F)), and qualified food stamp recipient (26 U.S.C. 51(d)(1)(G)). The definitions of “high-risk youth” and “qualified food stamp recipient” include a requirement that the individual have “attained age 18 but not age 25 on the hiring date.” 26 U.S.C. 51(d)(5)(A)(i), 51(d)(8)(A)(i). The definition of “qualified summer youth employee” includes a requirement that the individual have “attained age 16 but not 18 on the hiring date (or if later, on May 1 of the calendar year involved).” 26 U.S.C. 51(d)(2)(7)(A)(ii).	None.
8. Youth Opportunity Grants	Title I, Workforce Investment Act of 1998 (WIA), Pub. L. 105–220, 29 U.S.C. 2914.	Sec. 169 provides that “the Secretary shall make grants to eligible local boards and eligible entities * * * to provide activities * * * for youth to increase the long-term employment of youth who live in empowerment zones, enterprise communities, and high poverty areas and who seek assistance.” It defines “youth” as “an individual who is not less than age 14 and not more than age 21.”	20 CFR 664.820.

APPENDIX A TO PART 35—AGE DISTINCTIONS IN STATUTES AFFECTING FINANCIAL ASSISTANCE ADMINISTERED BY DOL—
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Program	Statute	Section and age distinction	Regulation
9. Youth Apprenticeship Program.	29 U.S.C. 50	Sec. 1 of the National Apprenticeship Act of 1937 authorizes and directs the Secretary of Labor to promote the labor standards necessary to safeguard the welfare of apprentices, encourage contracts of apprenticeship, and bring employers and labor together to form apprenticeships. An apprentice is defined in 29 CFR 29.2 of the Act's implementing regulations as "a worker at least 16 years of age, * * *, who is employed to learn a skilled trade * * * under standards of apprenticeship * * *". The regulations also require that the "eligible starting age" of an apprenticeship program be "not less than 16 years."	29 CFR 29.2, 29.5(b)(10).
10. Trade Adjustment Assistance.	Trade Adjustment Assistance Reform Act of 2002 (Pub. L. 107-210), 19 U.S.C. 2318.	Sec. 246 of the Act requires the Secretary of Labor to establish a demonstration project for alternative trade adjustment assistance (ATAA) for workers age 50 or older. Under this demonstration project, workers petitioning for certification under the Trade Adjustment Assistance (TAA) program may request certification under the ATAA program as well. Certification will be granted if a number of conditions are met, including that a significant number of workers in the affected firm are 50 or over. Once the worker group is certified, individual workers may choose the program they prefer. Additional qualifications for individual workers include an age at least 50.	20 CFR part 617; see also TAA Training and Employment Guidance Letter, 67 FR 69029 (Nov. 14, 2002).
Employment Standards Administration			
11. Defense Base	Defense Base Act, Pub. L. 77-208, Act of Aug. 16, 1941, ch. 357, 55 Stat. 623, 42 U.S.C. 1651-1654.	The Defense Base Act (DBA) extends the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, "except as modified" in the DBA to certain persons employed at military bases outside the continental United States. DBA sec. 2(b), 42 U.S.C. 1652(b), provides that compensation for disability or death to aliens and non-nationals of the United States who are not residents of the United States or Canada under the Defense Base Act is in the same amount as residents, "except that dependents in any foreign country shall be limited to surviving wife and child or children." The DBA does not modify the LHWCA's definition of a child and the latter is defined as a person who is under 18 years of age, or who though 18 years of age or over, is wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or is a student.	20 CFR part 702.

APPENDIX A TO PART 35—AGE DISTINCTIONS IN STATUTES AFFECTING FINANCIAL ASSISTANCE ADMINISTERED BY DOL—
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Program	Statute	Section and age distinction	Regulation
12. Energy Employees Occupational Illness Compensation Program.	Energy Employees Occupational Illness Compensation Program Act, Pub. L. 106-398, Title XXXVI, October 30, 2000, 114 Stat. 1654 42 U.S.C. 7384 <i>et seq.</i>	<p>(a) The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) provides compensation and medical benefits to nuclear weapons industry employees or their eligible survivors who have covered illnesses related to exposure to beryllium, cancers related to exposure to radiation, and chronic silicosis. Some uranium employees or their eligible survivors are also eligible for compensation under the Act. Sec. 3628(e) of EEOICPA, 42 U.S.C. 7384s(e)(1)(F)(ii), as amended by Sec. 3151 of Pub. L. 107-107, the National Defense Authorization Act for Fiscal Year 2002, relating to claims for radiogenic cancer, beryllium illnesses, or silicosis, provides that notwithstanding other provisions pertaining to payments in the case of deceased persons, if there is a surviving spouse and "at least one child of the covered employee who is living and a minor at the time of payment and who is not a recognized natural child or adopted child of such surviving spouse, then half of such payment shall be made to such surviving spouse, and the other half of such payment shall be made in equal shares to each child of the covered employee who is living and a minor at the time of payment."</p> <p>(b) Sec. 3630(e) of EEOICPA, 42 U.S.C. 7384u(e)(1)(F)(ii), as amended by Sec. 3151 of Pub. L. 107-107, the National Defense Authorization Act for Fiscal Year 2002, relating to claims by uranium employees contains a provision identical to that described above in Sec. 3628(e).</p>	20 CFR 30.5(ee).
13. Federal Employees' Compensation.	Federal Employees' Compensation Act, Act of Sept. 7, 1916, ch. 458, 39 Stat. 742 5 U.S.C. 8101-8151.	<p>(a) Sec. 8101(8), 5 U.S.C. 8108(8), defines "brother" and "sister" as meaning "one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support."</p> <p>(b) Sec. 8101(9), 5 U.S.C. 8108(9), defines "child" as "one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but does not include married children."</p> <p>(c) Sec. 8101(10), 5 U.S.C. 8108(10), defines "grandchild" as "one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support."</p> <p>(d) Sec. 8101(17), 5 U.S.C. 8108(17), defines "student" as "an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training".</p>	20 CFR 10.405, 10.410, 10.413-.417, 10.535-.537, 25.101 and 25.202.

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Program	Statute	Section and age distinction	Regulation
		<p>(e) Sec. 8109, 5 U.S.C. 8109, sets forth the order of precedence for payments of scheduled awards unpaid at the time of the employee's death from a cause other than the employment-related injury. It establishes the order as, "if no child, to the widow or widower, if there are both a widow or widower and a child or children, one-half to the widow or widower and one-half to the child or children, [and] if there is no widow or widower, to the child or children."</p> <p>(f) Sec. 8110(a), 5 U.S.C. 8110(a)(3), defines "dependent" for purposes of determining eligibility for augmented compensation for dependents as including "an unmarried child, while living with the employee or receiving regular contributions from the employee toward his support, and who is (A) under 18 years of age; or (B) over 18 years of age and incapable of self-support because of physical or mental disability." Notwithstanding paragraph (3), compensation payable for a child that would otherwise end because the child has reached 18 years of age shall continue if he is a student as defined by section 8101 * * * at the time he reaches 18 years of age for so long as he continues to be a student or until he marries."</p> <p>(g) Sec. 8113(a), 5 U.S.C. 8113(a), permits the Secretary, after the time the wage-earning capacity of the individual would probably have increased but for the injury, to recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity, "if an individual (a) was a minor or employed in a learner's capacity at the time of injury and (b) was not physically or mentally handicapped before the injury."</p> <p>(h) Sec. 8115(a)(4), 5 U.S.C. 8115(a)(4), states that the age of an employee is one factor that shall be used in determining his wage-earning capacity for purposes of eligibility for partial disability compensation when the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or the employee has no actual earnings.</p> <p>(i) Sec. 8122(d)(1), 5 U.S.C. 8122(d)(1), provides that the time limitations for making a claim under FECA do not begin to run against a minor until he reaches 21 years of age or has had a legal representative appointed.</p> <p>(j) Sec. 8133(a), 5 U.S.C. 8133(a), provides for compensation if death results from an injury sustained in the performance of duty and makes such compensation payable in accordance with a schedule that makes numerous references to children and grandchildren.</p> <p>(k) Sec. 8133(b)(1), 5 U.S.C. 8133(b)(1), provides that the compensation payable for death under subsection (a) terminates for a widow or widower if they die or remarry before reaching age 55.</p>	

APPENDIX A TO PART 35—AGE DISTINCTIONS IN STATUTES AFFECTING FINANCIAL ASSISTANCE ADMINISTERED BY DOL—
Continued

Program	Statute	Section and age distinction	Regulation
14. Longshore and Harbor Workers' Compensation.	Longshore and Harbor Workers' Compensation Act, Act of March 4, 1927, ch. 509, 44 Stat. 1424 33 U.S.C. 901–950.	<p>(l) Sec. 8133(b)(2), 5 U.S.C. 8133(b)(2), provides that the compensation payable for death under subsection (a) terminates for a child, a brother, a sister, or a grandchild when they die, marry, or become 18 years of age, or if over age 18 and incapable of self-support becomes capable of self-support but such compensation that would otherwise end because they reached 18 years of age shall continue if they are a student at the time they reach 18 years of age for as long as they continue to be a student or until they marry.</p> <p>(m) Sec. 8135(b), 5 U.S.C. 8135(b), provides that if a widow or widower entitled to death benefits remarries before reaching age 55, they shall be paid a lump sum equal to twenty-four times the monthly compensation to which they were entitled immediately before the remarriage.</p> <p>(n) Sec. 8141(a), 5 U.S.C. 8141(a), Civil Air Patrol Cadets under 18 years of age are not covered by FECA.</p> <p>(o) Sec. 8141(b)(2), 5 U.S.C. 8141(b)(2), volunteer civilian members of the Civil Air Patrol, other than Civil Air Patrol Cadets under 18 years of age, are entitled to death benefits under sec. 8133 but only receive certain specified percentages of those benefits with no additional payments for a child or children in certain circumstances.</p> <p>(a) The Longshore and Harbor Workers' Compensation Act (LHWCA) provides workers' compensation for maritime employees. Sec. 2(14), 33 U.S.C. 902(14), defines a child and provides that a child, grandchild, brother or sister to include only a person who is under 18 years of age, or who though 18 years of age or over, is wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or is a student.</p> <p>(b) Sec. 2(18), 33 U.S.C. 902(18), defines a student as a person regularly pursuing a full-time course of study or training at certain specified institutions but not after he reaches the age of 23 or has completed 4 years of education beyond the high school level, except that, where his 23rd birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child is deemed not a student during a period of service in the Armed Forces of the United States. A child is not deemed to have ceased to be a student during any interim between school years if certain conditions are met.</p> <p>(c) Sec. 8(d)(1), 33 U.S.C. 908(d)(1), provides a scheme of distribution for payment of unpaid scheduled permanent partial disability benefits when an employee who is receiving such benefits dies from causes other than the injury. The distribution contains numerous references to child or children.</p>	20 CFR 702.142(a) and 702.222(a).

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Program	Statute	Section and age distinction	Regulation
		<p>(d) Sec. 9(b)–(d), 33 U.S.C. 909(b)–(d), provide for the payment of death benefits and the amount of such payments varies in part according to whether the deceased employee has a child or children.</p> <p>(e) Sec. 9(g), 33 U.S.C. 909(g), provides that compensation for aliens who are not residents (or about to become residents) of the United States or Canada is the same as for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported.</p> <p>(f) Sec. 10(e), 33 U.S.C. 910(e), provides that in determining the average weekly wages of an employee who is injured when a minor, the fact can be considered that under normal conditions his wages should be expected to increase during the period of disability.</p> <p>(g) Sec. 11, 33 U.S.C. 911, permits the district director to require the appointment of a guardian or other representative for a minor or any person who is mentally incompetent to receive compensation payable to the minor or incompetent and to exercise the powers granted to or to perform the duties required of them under the LHWCA.</p> <p>(h) Sec. 13(c), 33 U.S.C. 913(c), establishes the time requirement for filing a claim. The usual one year time limit is not applicable if the person entitled to compensation is mentally incompetent or a minor and such person has no guardian or other authorized representative. This freeze ends for a minor when a guardian is appointed or when he becomes of age.</p>	
15. War Hazards Compensation.	War Hazards Compensation Act, Act of Dec. 2, 1942, ch. 668, Title I, 56 Stat. 1028 42 U.S.C. 1701–1717.	The War Hazards Compensation Act provides that certain provisions of the FECA and the LHWCA apply to certain persons employed by government contractors outside the continental United States who sustain an injury proximately caused by a war risk hazard. Sec. 101(c), 42 U.S.C. 1701(c), provides that compensation for disability or death to aliens and non-nationals of the United States who are not residents of the United States or Canada under the Act is in the same amount as residents, “except that dependents in any foreign country shall be limited to surviving wife or husband and child or children.”	20 CFR 61.203.
16. Child Labor Restrictions	Walsh-Healey Public Contracts Act, 41 U.S.C. 35 <i>et seq.</i> ,	The Act contains child labor restrictions for government manufacturing and supply contracts.	41 CFR part 50–201.
17. Child Labor Restrictions	Fair Labor Standards Act, 29 U.S.C. 201 <i>et seq.</i> ,	The Act contains child labor restrictions applicable to almost all employers receiving Federal financial assistance.	29 CFR part 570.

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Program	Statute	Section and age distinction	Regulation
18. Black Lung Benefits	Black Lung Benefits Act, 30 U.S.C. 901–945.	(a) 30 U.S.C. 902(a), BLBA definition of “dependent”: refers to sec. 902(g), definition of “child”. (b) 30 U.S.C. 902(g), BLBA definition of “child”: defines a child or step-child as an individual who is under 18 years of age; defines a child who is a “student” by cross-reference to 42 U.S.C. 402(d)(7) (age 19) and 5 U.S.C. 8101(17) (age 23); and defines a disabled child as one whose disability began before the age specified in 42 U.S.C. 402(d) (age 22). 30 U.S.C. 922(a)(5)(1)(A), BLBA criteria for entitlement for a minor’s “brother” using same criteria applicable to “child”.	20 CFR part 725, subpart B.
19. Black Lung Benefits	Black Lung Benefits Act, 30 U.S.C. 901–945.	This sec. defines who may file a benefits claim. Persons aged 18 or older may file claims on their own behalf, while persons under age 18 generally must rely on an authorized individual to file the claim (with a limited exception for certain persons between 16 and 18 years of age).	20 CFR 725.301.

[FR Doc. 04–7006 Filed 4–1–04; 8:45 am]

BILLING CODE 4510–23–P