
How to Manage Your Aging Workforce

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Introduction

American employers are facing ever-evolving issues related to the age demographics of their workers. The Baby Boomer generation is advancing inevitably toward that traditional retirement decade — the 60s. Life expectancy continues to increase with a corresponding anticipation of continued employment. The Bureau of Labor Statistics expects the number of people in the labor force age 55 and older to grow 32 percent by 2010, while those between ages 35 and 44 will shrink by 10.2 percent. These statistics seem to encourage businesses to actively attract or retain older workers, as there will not likely be enough younger workers to fill the need.

Some employers have seen the advantages of employing older workers: more experience, maturity, and often a better work ethic. Starbucks is among the companies that have developed a strategic plan to entice older workers to come and work for them. Their plan includes full-time benefits packages for part-time hours, and flexible scheduling options.

At the same time that there is an influx of older workers, the explosion of technological developments has increased employers' reliance on younger workers who grew up in the computer age. So although there may be more older workers in the job market, there is still a risk of age discrimination lawsuits.

With this increase in older workers, age discrimination claims have risen correspondingly. The number of age discrimination claims filed with the Equal Employment Opportunity Commission has risen 23.5 percent in the past two years, making it the fastest growing category of discrimination cases.

It is easy to see why age discrimination claims are of particular concern to employers. Age is a uniquely unifying characteristic in the panoply of state, federal, and local laws against workplace discrimination, which often tend to highlight and exacerbate differences among individual workers. Everyone is a potential protected party because the aging process is inevitable. Every potential juror either is over 40 or has close personal and family relationships with older people and can empathize with the plight of the senior worker.

As these factors come together, the idealized image of the celebratory retirement party with a gold watch presented by appreciative management to the worker in the presence of admiring and envious co-workers becomes less

Everyone is a potential protected party because the aging process is inevitable.

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and less often a reality. Labor and employment lawyers are frequently called upon by their clients to assist in termination, reduction in force, or downsizing of individual, or groups of, older workers. Yet, the best employer strategies for avoiding litigation in these circumstances involve a far more global, long-term approach to the inevitability that their employees will continue to grow older.

This report will highlight the following issues that you need to be aware of when dealing with older workers:

- The requirements of federal law that governs claims of age discrimination.
- The rules to follow when hiring or firing older workers.
- The many exceptions that apply to the rules governing age discrimination.
- The requirements of the Older Workers Benefit Protection Act.
- How to institute a reduction-in-force without subjecting your company to legal liability.
- How to structure severance plans and employment discrimination releases.

Background on Age Discrimination Laws

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In general, there are two federal age discrimination laws that employers need to comply with: the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA). The purpose of both laws is to ensure that older employees are dealt with fairly by their employers. The ADEA is intended to prohibit age discrimination and harassment, whereas the OWBPA's purpose is to make sure older workers' retirement rights and benefits are protected. In addition, your state may have laws that offer greater protection to older workers. Therefore, make sure that you double-check any state law requirements to be sure you are in compliance.

WHAT IS THE AGE DISCRIMINATION IN EMPLOYMENT ACT?

The Age Discrimination in Employment Act is the federal law governing age discrimination.¹ It was enacted in 1967 to promote the employment of older persons based on ability rather than age, prevent discrimination, and help solve the problems that arise with an aging workforce. The ADEA prohibits an employer from refusing to hire or fire, or otherwise discriminate against a person age 40 or over, solely on the basis of age. Thus, an employer cannot deny an employee pay or fringe benefits where the only justification is age. Nor may an employer classify employees into groups on the basis of age in a way that unfairly deprives individuals of employment opportunities. For example, an employer may not relegate all older workers to a particular level of employment within a company and then decline to promote them.

The ADEA protects individuals who are at least 40 years old. There is no cap, so every person age 40 and over is protected by the Act, with a few exclusions and exceptions. For instance, an elected official and his or her staff and "policy making appointees" are excluded from the Act. And the ADEA carves out a compulsory retirement exception for "bona fide executives" or "high policymakers" — i.e., an employer may impose compulsory retirement on any employee age 65 or over who is either a bona fide executive or high policymaker and who is entitled to receive a nonforfeitable annual retirement benefit of at least \$44,000. We will discuss these exceptions in depth in Section 3.

WHAT IS THE OLDER WORKERS BENEFIT PROTECTION ACT?

In 1990, Congress passed another law to protect older workers. The Older Workers Benefit Protection Act ² amended the ADEA to safeguard employee benefits from age discrimination. Even with the OWBPA amendments, employers may observe the terms of “bona fide employee benefit plans” such as retirement, pension, or insurance plans that contain age-based distinctions, but only if the distinctions are cost-justified. Employers must pay the same amount for each benefit provided to an older worker as is paid for a younger worker. But the Act does make provision for the increased costs of providing certain benefits, such as life insurance, to older workers. The OWBPA is discussed in detail in Section 4.

BASIC PRINCIPLES OF THE ADEA

The Age Discrimination in Employment Act functions similarly to other federal discrimination laws, such as Title VII and the Americans with Disabilities Act. However, it has its own rules concerning which employers are covered and other requirements. Let’s take a look at the basic principles of the Act.

Who Qualifies As an Employer Under the ADEA?

The ADEA defines “employer” to include every individual, partnership, association, labor organization, corporation, business trust, legal representative, or organized group of persons who (1) is engaged in an industry affecting commerce (most every industry will affect commerce within the meaning of the ADEA); and (2) has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.³

The definition includes state and local governments and agencies. However, the Supreme Court has ruled that individuals cannot sue states in federal court under the ADEA due to sovereign immunity.⁴ States, state agencies, and political subdivisions must abide by the terms of the ADEA; however, states cannot be sued by individuals in federal court. Alternatively, individuals may bring a state court claim against the state, if applicable, or the EEOC may sue on their behalf.

The ADEA contains a separate section that applies to federal government employment. The Act also applies to any agent of an employer that is subject to the Act. In addition to its application to employers in the traditional sense, the ADEA applies to labor unions and employment agencies.

To summarize, in order to be covered by the ADEA you must:

- Be engaged in an industry affecting commerce;
- Have 20 or more employees; and
- Have an employment relationship with the claimed employee.

Who Qualifies As an Employee Under the ADEA?

Whether an individual is an employee for purposes of the ADEA depends mainly on the conduct of the worker. Very few persons are expressly excluded from the definition of “employee” in the ADEA. Independent contractors are not employees within the meaning of the ADEA and are not entitled to its protections. There must be an employer/employee relationship for the ADEA to come into play.

Persons elected to office in a state or a political subdivision of the state are excluded, as are the personal staff, policymaking appointees, and immediate advisers of the elected officer.

Independent contractors are not employees within the meaning of the ADEA.

Practices Prohibited by the ADEA

The ADEA makes it illegal to deprive an individual of “compensation” or any of the “terms, conditions, or privileges of employment” due to age. In other words, an employer cannot deny an employee pay or fringe benefits where the only justification is age. This prohibition encompasses a wide array of employment issues.

Generally speaking, the term “compensation” means an employee’s pay. But the ADEA also prohibits discrimination in the “terms, conditions, or privileges of employment.” This would include all adverse employment actions, such as termination, demotion, and failure to promote.

Example

When Ivy, a 56-year-old employee, was demoted from her accounting manager’s position, she filed a claim of age discrimination. Her employer responded that she had been unable to perform the more complex duties required by a new, more demanding accounting system that it had implemented. However, Ivy’s supervisor had made several comments to her, such as: “You are as old as Methuselah,” and “You are a useless old woman.” Needless to say, a court found that was enough evidence to state a claim of age discrimination to a jury.⁵

The ADEA defines terms and conditions and privileges of employment as “all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.” A benefit within the meaning of the ADEA may include medical, dental, life, and disability insurance; pension, retirement,

and profit-sharing plans; sick leave, holidays, and vacations. Severance pay may be a fringe benefit in some cases and be considered compensation in others, but in any case it is protected under the ADEA. Basically, a benefit is any “privilege of employment” offered to employees as an incentive to work, over and above compensation. Unless one of the narrowly defined ADEA exemptions applies, once an employer undertakes to provide a benefit, the employer cannot discriminate with respect to the particular benefit on the basis of age.

Example

Retired county employees sued the county over a health plan that offered different, allegedly inferior benefits to retirees eligible for Medicare than for younger retirees not eligible for Medicare. The Medicare-eligible employees claimed the county was violating the ADEA by discriminatorily placing them in a less generous retirement health plan on the basis of their age. The case went all the way to the Supreme Court. The Supreme Court had to first decide whether the ADEA even provided protection to retired workers receiving health benefits through their prior employers. The court determined that it did. It held that the ADEA should be understood to encompass health coverage and other benefits a retired person receives from his or her former employer. The court held that the Act covers discrimination in a postemployment benefit in which the facially discriminatory policy is instituted while an individual is still an active employee.⁶

Fringe benefits, including group life insurance plans and pension coverage, are privileges of employment. However, both may be exempt from coverage under the ADEA if age-based differentiation is cost-justified.

Example

Acme Electric had a life insurance plan that allowed all employees to enroll in the plan after 15 days of continuous employment, during their first 60 days on the job. Thereafter, applications were approved only if the employee was under age 40, subject to insurability. The union sued under the ADEA, arguing that the age ban violated the ADEA. However, the court disagreed. All employees had the right to enroll in the plan when hired, regardless of age. The cutoff in eligibility at age 40 reflected actuarial principles and cost justifications, not discrimination. Without the age cutoffs, older employees could opt into the plan at an advanced age when the risk of a claim is higher

without having contributed to the premium pool during the younger low-risk years. However, the court stated that the result might have been different if the plan did not allow for open enrollment at the beginning of employment.⁷



PRACTICAL POINTERS

- Private employers do not have to provide any fringe benefits. But once an employer creates a privilege of employment, the employer cannot dole out the privilege in a discriminatory manner.
- Medical, dental, life, and disability insurance, pension, retirement, and profit-sharing plans, sick leave, holidays, and vacations are all “privileges of employment” subject to the protections of the ADEA.

AGE HARASSMENT



As with other protected worker classifications, age can form the basis of a harassment claim. The Supreme Court has not yet ruled whether an employee can sue for age harassment under the ADEA. However, federal appellate and trial courts have found that a cause of action for age harassment does exist.⁸ What this means for employers is that, regardless of what state you do business in, you should act as though age harassment is a protected classification and admonish your employees not to engage in such behavior.

In addition, age harassment claims tend to arise in the context of an employer’s age-biased comments — or tolerance for co-worker comments — offered as proof of age as the motivation for an adverse job action. Even if the employee is not alleging harassment, she can use the evidence of the harassment to strengthen her case that your company was biased on the basis of age.

DEFENSES TO AGE DISCRIMINATION



There are some explicit defenses and exceptions in the Act defining when an employer may adversely affect the employment of a person age 40 or over. In general, employers may make employment decisions that adversely affect a person’s employment status and pay and benefits if the employer’s motivation is a “reasonable factor other than age” or falls into one of the narrowly defined exceptions. These defenses will be covered in detail in Section 2.

RETALIATION

Retaliating against an employee who files an age discrimination charge is unlawful under the ADEA. Retaliation may include firing, demoting, or refusing to promote an employee because the employee complained of discrimination or harassment. The employee does not have to complain to the EEOC, the employee can merely complain to a supervisor in your company.

After an employee has filed a charge or complaint, whether externally or internally, you should refrain from taking any action against the employee that might be construed as retaliation. Publicly humiliating or embarrassing an ex-employee may constitute retaliation. Refusing to give a reference for an ex-employee who has filed a discrimination charge or complaint also may be considered retaliation *if* the employee can show that a reference would have been given had the employee not filed the charge or complaint. This does not mean that you must give a positive reference for every employee. However, if a request for a reference is made, it is wise to refrain from mentioning any charge, complaint, or suit that the ex-employee has filed and to restrict comments to objective data reflected in the ex-employee's personnel file, such as dates of employment, absenteeism, and general comments about performance that can be backed up later if necessary.



PRACTICAL POINTERS

- Sometimes it is necessary to fire, demote, or refuse to promote someone who has filed a charge for valid reasons that have nothing to do with the charge. When taking action in such a case, document all reasons for the action taken and obtain statements from other employees with knowledge of the situation.
- Examine your reference policy and consider adopting a policy of obtaining a release from ex-employees before giving out employment information about them.

About the Author

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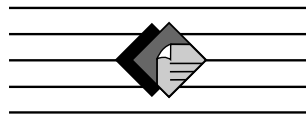
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