

AGE DISCRIMINATION IN EMPLOYMENT LEGISLATION THE UNITED STATES EXPERIENCE

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WHAT IS AGE DISCRIMINATION?

The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us."¹ Butler describes ageism as:

a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.²

Age discrimination occurs when employers use age as a determining (and negative) factor in employment-related decisions. So, for example, age discrimination takes place when an employer denies an applicant a job based on age. Similarly, age discrimination occurs any time an employer denies training, promotions, or any other opportunities based on age.

What are the causes of age discrimination?

Many factors result in age discrimination including ageist attitudes, unfounded assumptions and stereotypes about older workers, and ignorance. The most common stereotypes about older workers can be summarized as follows:

- Older workers are less productive than younger workers.
- Older workers are more expensive than younger workers.
- Older workers are less adaptable and more rigid than younger workers.
- Older people want to retire early; they don't want to work.

The facts, however, clearly refute these stereotypes.

Productivity is Ageless

Studies consistently demonstrate that aging has no impact on job performance or productivity except in jobs that are physically demanding.³ Older employees generally have

¹ Robert N. Butler, *Why Survive?: Being Old in America*, 11 (1975).

² Butler, at 12.

³ Harvey L. Sterns & Michael A. McDaniel, "Job Performance and the Older Worker," in *Older Workers: How Do They Measure Up?* 27, 29 (Sara E. Rix ed., 1994); G. McEvoy and W. Cascio, "Cumulative Evidence of the Relationship Between Employee Age and Job Performance," 74 *Journal of Applied Psychology*, 11-17 (1989); D. Waldman & B. Avolio, "A

better attendance records than younger employees.⁴ Older employees also demonstrate a greater degree of commitment to quality and loyalty to their employer than do younger employees.⁵

Costs and Benefits

While the costs of some benefits increase with age (health, life, and disability insurance), surveys reveal that older workers tend to use less overall medical benefits than younger employees.⁶ Companies report that younger employees with dependents are in reality more expensive than older employees.⁷ Older persons that remain in the workforce into their 60s, 70s, or 80s, are likely to represent a self-selected group of healthy individuals.⁸ They also incur fewer workplace injuries in proportion to their workforce participation.

Adaptability

Studies show that interest, motivation, and skill do not decline with age.⁹ Yet, some employers perceive older workers as resistant to change, slow to learn new skills, and uncomfortable with new technologies.¹⁰

The question is: is aging the cause of a perceived lack of motivation or is it the job itself? Professors, writers, lawyers, doctors, judges, and many others remain motivated and are high achievers throughout their lives perhaps in part because they control their jobs and their perceptions of their value to the job. For older employees, particularly in large companies, supervisors or the corporate climate may send signals which communicate that

Meta-Analysis of Age Differences vs. Job Performance," 71 *Journal of Applied Psychology* 33-38 (1986).

⁴ Ken Dychtwald, *Age Wave* 41 (1989); Monroe Berkowitz, "Functioning Ability and Job Performance as Workers Age," in *The Older Worker*, 87, 106-07 (Michael E. Borus et al. eds., 1988).

⁵ AARP, *Workers Over 50: Old Myths, New Realities* 10 (1986).

⁶ *Id.* at 11.

⁷ *Id.*

⁸ P.K. Robinson, "Age, Health and Job Performance," in *Age, Health, & Employment*, 71, 150-51 (1986); U.S. Dept. of Health and Human Services, *Older Workers: Myths and Realities* (1984); R. L. Clark, *Aging and Labor Force Participation in Aging and Technological Advances*, 52 (1984); K. R. Brousseau, "After Age Forty: Employment Patterns and Practices in the United States," in *After Forty: The Time for Achievement*, 171 (1981).

⁹ Doering et al., *The Aging Worker*, 60, 80 (1983); National Alliance of Business, *Invest in Experience: New Directions for an Aging Workforce*, 10 (1985); P.K. Robinson, "Age, Health, and Job Performance," in *Age, Health, & Employment*, 70 (1986).

¹⁰ AARP, *Workers Over 50: Old Myths, New Realities* (1986).

older employees are of decreasing value to the company.

In addition, negative stereotypes that pervade a corporate culture may actually inhibit older workers' abilities to meet their supervisors' expectations.¹¹ If older employees are expected to be less ambitious, unwilling to learn, and unadaptable, they may become so as a result of a self-fulfilling prophecy. On the other hand, when older employees are intellectually stimulated and challenged on the job, it is more likely the employees (old and young) will be motivated to continue their employment.¹²

Work and Retirement

Despite the perception that older workers are interested in retiring as soon as possible, the fact is that many older persons want and need to work. Labor force participation rates for older workers have been increasing slowly and steadily since 1985.¹³

THE U.S. AGE DISCRIMINATION IN EMPLOYMENT ACT

History of the ADEA

The United States' Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-635 was enacted on December 15, 1967 and became effective June 12, 1968. Three years earlier, amendments to add age as a protected category under Title VII of the Civil Rights Act of 1964 (which prohibits employment discrimination based on race, gender, religion and national origin) were rejected. Several reasons have been offered for excluding age from Title VII. One, Congress worried that it lacked the information necessary to enact age discrimination legislation at the time. Second, many legislators feared that adding a prohibition against age discrimination would overload the Civil Rights bill and lead to its defeat. Finally, members of Congress simply did not understand or believe the magnitude of the age discrimination problem in 1964.

However, as a result of the 1964 Civil Rights Act, Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." Section 715 of the Civil Right

¹¹ B. Hassel & P. Perrew, "An Examination of the Relationship of Age Discrimination to Employee Psychological States," *Journal of Managerial Issues* (1981).

¹² Dychtwald, at 174.

¹³ Sara E. Rix, *Update on the Older Worker: 2001*, AARP Public Policy Institute (April 2002).

Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 265 (1964). The Secretary's report confirmed that age discrimination in employment was a pervasive and debilitating problem, particularly insofar as hiring practices were concerned. In 1965, approximately half of all private job openings were barred to applicants over fifty-five; a quarter were closed to applicants over forty-five. 113 Cong. Rec. 1089-90 (Jan. 23, 1967). The Secretary closed by noting that age discrimination was arbitrary and that it was also harmful to the national economy. The Report explained that age discrimination robbed the country of valuable workers and increased government costs in terms of unemployment and social security benefits and concluded that legislation was needed to address the problem.

Congress modeled the ADEA to generally follow the prohibitions of Title VII of the Civil Rights Act of 1964 and the procedures and remedies of the Fair Labor Standards Act (FLSA). Congress delineated three broad purposes of the ADEA. They are (1) to promote the employment of older persons based on their ability rather than age; (2) to prohibit arbitrary age discrimination in employment; and (3) to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b).

Who is Protected?

When originally enacted, the ADEA protected employees ages 40 to 65. In 1978, Congress extended the Act's protections to employees age 65-70. As of January 1, 1987, the age 70 cap was lifted so that the ADEA protects most employees age 40 and older.

The ADEA defines "employee" as an "individual employed by an employer," 29 U.S.C. § 630(f), including federal, 29 U.S.C. § 633a, state and local government employees. The ADEA was amended in 1984 to protect U.S. citizens working for U.S. employers overseas or their subsidiaries. 29 U.S.C. § 630(f).

Who Must Comply?

The ADEA applies to private employers with 20 or more employees in twenty consecutive weeks. 29 U.S.C. § 630(b). In addition, the federal government, 29 U.S.C. § 633a, and state and local government employers must comply with the ADEA. 29 U.S.C. § 630(b). Labor organizations or unions with 20 or more members may not exclude or expel members or refuse to refer members for hire based on age. 29 U.S.C. § 630(d)(e). And, employment agencies may not fail or refuse to refer an applicant based on age. 29 U.S.C. § 630(c). In addition, employment agencies may be covered "employers" under the ADEA if they have the requisite 20 employees.

Exceptions to Coverage

Independent contractors are not covered by the ADEA because they are not "employees." Bona fide partners in a partnership are also not considered "employees" under the ADEA. Elected officials and military personnel are not protected by the

ADEA. In addition, the ADEA does not protect non-U.S. citizens who are working abroad or applying for employment to be performed outside of the United States.

EMPLOYMENT ACTIONS PROHIBITED BY THE ADEA

It is unlawful under the ADEA to “fail to hire or to discharge any individual or otherwise discriminate with respect to the terms, compensation, conditions, or privileges of employment because of such individual’s age. 29 U.S.C. § 623(a)(1). It is also unlawful to “limit, segregate, or classify employees in any way which would tend to deprive an individual of employment opportunities or otherwise adversely affect the individual’s status as an employee because of such individual’s age.” 29 U.S.C. § 623(a)(2). In addition, employers may not reduce the wage rate of any employee in order to comply with the ADEA. 29 U.S.C. § 623(a)(3). Retaliation is prohibited against any individual who has opposed any practice made unlawful by the act or has participated in an ADEA proceeding. 29 U.S.C. § 623(d).

Individuals protected by the ADEA cannot be denied the opportunity to participate in an employer’s benefit plans because of their age. Nor may an employer reduce benefits based on age, unless the cost of providing the benefits increases with increasing age. In that case, in order to comply with the ADEA, the employer must expend the same cost in providing the benefits to older workers as it does for younger workers. The ADEA prohibits advertisements limiting hiring to certain ages, such as “young college graduate.” 29 U.S.C. § 623(e); 29 C.F.R. § 1625.4(a).

Exceptions to the ADEA

There are several exceptions to the ADEA’s broad prohibitions. If an employer can prove that an exception applies, the employer’s actions will not violate the ADEA. However, because the ADEA is a remedial and humanitarian statute, courts have ruled that its exceptions are to be construed narrowly.

1. Bona fide occupational qualification (BFOQ), 29 U.S.C. § 623(f)(1)

This exception has been used to justify mandatory retirement or maximum hiring ages for various public safety jobs. However, justifying a BFOQ exception is difficult for an employer. To claim successfully that an age limit is based on a BFOQ for that job, the employer must be able to prove that the age limit is necessary for the performance of the job. (An example is the job of a clothing model for a teen magazine). The employer can prove the necessity of the age limit by demonstrating **either** that:

- a. There is a substantial basis for believing that all or nearly all people who are excluded by the age limit cannot perform the job; or
- b. It is impossible or highly impractical for the employer to individually test employees to determine if each has the necessary qualifications.

2. Reasonable Factor Other Than Age, 29 U.S.C. § 623(f)(1)

The ADEA permits employment actions based on a “reasonable factor other than age.” To be lawful, the factor:

- a. Must be applied equally. For example, if older workers are disqualified from employment because the position requires an educational degree, then younger workers without the requisite degree must also be disqualified.
- b. Cannot, in any way, include age. For example, eligibility for early retirement under Social Security includes a minimum age requirement. Therefore, Social Security eligibility cannot be used as a factor in deciding which employees will be laid off.
- c. Must be job-related. For example, basing a hiring decision on the ages of an applicant’s dependent children would not be a reasonable basis on which to exclude an older worker from employment.

3. The Equal Benefit or Equal Cost Rule, 29 U.S.C. § 623(f)(2)(B)

Individuals protected by the ADEA cannot be denied the opportunity to participate in an employer’s benefit plans because of their age. Nor can an employer reduce benefits based on age unless the cost of the benefit increases with age and the employer incurs the same cost in providing the benefit to older workers as it does to provide it to younger workers. This is called the “equal benefit or equal cost rule.”

4. Seniority Systems, 29 U.S.C. § 623(f)(2)(A)

Employers may observe the terms of a bona fide seniority system as long as the system is not an attempt to evade the purposes of the ADEA. In addition, the system may not require or permit the involuntary retirement of any employee based on age. Nor can such a system be an excuse for failing to hire an older person.

5. Permissible Mandatory Retirement

While mandatory retirement is prohibited for most employees in the United States, there are a number of exceptions to this general rule:

- a. Bona fide executives or high policymaking employees may be mandatorily retired at age 65 if:
 - they are entitled to an annual retirement benefit of at least \$44,000 provided solely by this employer, and,

- the employee has served in the position for at least 2 years immediately prior to the proposed retirement date. 29 U.S.C. § 631(c)(1)(2).
- b. State and local firefighters and law enforcement officers may be subject to mandatory retirement and maximum hiring provisions, 29 U.S.C. § 623(j), pursuant to:
 - state and local laws in effect on March 3, 1983;
 - a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of the ADEA;
 - c. Air traffic controllers are subject to mandatory retirement at age 56. 5 U.S.C. §§ 8335(a) and 8425(a).
 - d. Federal firefighters are subject to mandatory retirement at age 57. 5 U.S.C. §§ 8335(b) and 8425(b).
 - e. Federal law enforcement officers are subject to mandatory retirement at age 57. 5 U.S.C. §§ 8335(b) and 8425(b).

6. Miscellaneous Exceptions

For overseas employees, the ADEA permits discrimination if the employer can prove that compliance with the ADEA would violate the laws of the country in which the workplace is located. 29 U.S.C. § 623(f)(1). The ADEA permits discharges for good cause. 29 U.S.C. § 623(f)(3).

PROCEDURES FOR PURSUING AGE DISCRIMINATION CLAIMS

A charge of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) and the state fair employment agency. The charge must be filed within 180 days of the date of discrimination or within 300 days of the discrimination in states with a law prohibiting age discrimination and an agency to enforce that law. 29 U.S.C. § 626(d). Such states are designated as "referral states" and are listed in the EEOC's regulations at 29 C.F.R. § 1626.9.

The steps that federal employees must take to protect their rights under the ADEA are quite different from those required of employees in the private sector. Federal employees or applicants who believe they have been discriminated against have the following two options:

1. File administrative complaint with the offending agency and pursue administrative remedies.

2. Completely bypass the administrative process by filing a notice of intent to file suit with the EEOC within 180 days of the discriminatory action. The individual must wait at least 30 days after filing the notice before filing suit.

In age discrimination suits against the federal government, complainants are not entitled to jury trials or liquidated damages. In addition, none of the exemptions or defenses in other provisions of the ADEA apply to the federal government. 29 U.S.C. § 633a(f).

Litigation

An ADEA lawsuit may be filed at any time from 60 days after the charge of discrimination has been filed, 29 U.S.C. § 626(b), until 90 days after the charging party received notice that the EEOC has terminated its proceedings. 29 U.S.C. § 626(e). Under ADEA § 7(c)(1), 29 U.S.C. § 626(c)(1), the right of an individual to file an ADEA suit “terminate[s] upon the commencement of an action by the [EEOC] to enforce the right of such person.”

Employees, except federal employees, have the right to a jury trial. 29 U.S.C. § 626(c)(2). Juries traditionally are sympathetic to age discrimination victims and less sympathetic to large corporations. So, if an age discrimination case is not dismissed by the judge, and “goes to the jury,” there is a good chance that the older worker(s) will prevail and be awarded damages.

In most jurisdictions, it takes almost two years to get to trial after filing suit. The trial of an average ADEA case usually lasts one week. Ninety percent of lawsuits do not go to trial. At least half are dismissed by the judge as a result of motions for summary judgment. The judge, after reviewing affidavits, depositions, and applicable law, frequently decides that no reasonable jury could rule in favor of the employee. The rest of the cases are settled by negotiations between the parties or after mediation.

Representative actions under the ADEA are governed by the standards for opt-ins under Rule 16(b) of the Fair Labor Standards Act. Unlike class members in Rule 23 actions who are automatically bound by the judgment unless they opt out, to be a party in an ADEA representative action, potential plaintiffs must affirmatively opt into the suit by filing a written consent with the court.

Waivers and Releases of ADEA Rights and Claims

Employers frequently use release agreements to obtain waivers of rights and claims under the ADEA from older employees. Typically, employers require employees to sign a release form or agreement when they receive severance benefits after being terminated, or when they accept an early retirement incentive.

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to provide a set of strict requirements that must be met for a release of ADEA rights or claims to be valid. See 29 U.S.C. § 626(f). To meet the statute's "knowing and voluntary" standard, a waiver must satisfy **all** of the following conditions:

1. The waiver must be part of an agreement that is written in plain English;
2. The waiver must specifically refer to rights or claims arising under the ADEA;
3. The employee may not be asked to waive rights or claims that arise after the waiver is signed;
4. The employer must offer consideration (e.g. money or other benefits) for the waiver that exceeds what the employee would already be entitled to under the employer's existing benefits programs;
5. The employee must be advised in writing to consult with an attorney prior to signing the waiver;
6. The employee must be given at least 21 days to consider the agreement before signing it. But, if the waiver is part of an exit incentive program, employees must be given at least 45 days to consider and sign;
7. The employee must be given at least 7 days to revoke the agreement after signing it.

If the individual is asked to sign a waiver as part of the settlement of charges filed with the EEOC or a lawsuit, the knowing and voluntary criteria (1-5 above) apply. However, the employee is allowed only a "reasonable period of time" to consider the agreement, as the 21/45 day rule does not apply. No release or settlement may affect the EEOC's enforcement responsibilities or interfere with an individual's right to file a charge or participate in an EEOC investigation or proceeding.

PROVING AGE DISCRIMINATION UNDER THE ADEA

There are two principal theories for proving age discrimination in employment. Under the disparate treatment theory, the individual alleges that he or she was treated differently because of age. Disparate treatment cases can be established by direct or indirect evidence. In a disparate treatment case, the employee must prove that the employer intended to discriminate on the basis of age.

Under the disparate impact theory, an employer's facially neutral policy or practice may be unlawful, even absent a showing of discriminatory intent, merely because it has a significant adverse impact upon the protected group. Several U.S. appellate courts have held that the disparate impact theory is unavailable to individuals suing under the ADEA. In late 2001, the U.S. Supreme Court announced that it would

decide the issue of whether the disparate impact theory is available to age discrimination victims, but subsequently changed its mind and dismissed the case. See *Adams v. Florida Power Corp.*, 122 S.Ct. 1290 (2002).

REMEDIES

The ADEA seeks to provide "make-whole" relief (i.e., the goal is to restore the discrimination victim to the situation he would have occupied if the wrong had not been committed), including back pay, lost benefits, reinstatement or front pay. Back pay is the principal legal remedy available under the ADEA. Back pay includes the difference between the amount of salary and fringe benefits the plaintiff would have received in the absence of discrimination less any amounts earned in the interim. Back pay includes: lost wages, raises, pension benefit contributions, life insurance premiums, and health insurance.

If the employee can prove that the employer "willfully" violated the ADEA, he/she is entitled to liquidated damages, i.e., the back pay award is doubled. The Supreme Court has ruled that "willful" should be interpreted as "knowing or in reckless disregard" of the ADEA's prohibitions. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Attorneys' fees are mandatory to prevailing plaintiffs. 29 U.S.C. § 216(b) incorporated by § 7(b) of the ADEA, 29 U.S.C. § 626(b). The attorney fee-shifting provision does not apply, however, in administrative proceedings.

Equitable remedies available under the ADEA include injunctive relief to prohibit future discrimination; reinstatement, instatement, and other relief. In addition, front pay - future wages and benefits the employee would have received had the discrimination not occurred - is available to prevailing plaintiffs under the ADEA.

Unlike under Title VII and the Americans with Disabilities Act (ADA), neither compensatory nor punitive damages are available under the ADEA. Finally, monetary damages and settlements pursuant to the ADEA are income and, thus, fully taxable. In addition, the IRS treats attorney fees recovered as income to plaintiffs and to the attorney.

STATE AGE DISCRIMINATION LAWS IN THE UNITED STATES

The United States also has fifty state laws that prohibit age discrimination in employment. Some state laws provide even greater protection than the federal ADEA does. For example, while the national statute protects individuals age 40 and older, many of the state laws prohibit discrimination at any age. In addition, the majority of these laws cover employers with fewer than 20 employees. Many provide broader relief than the ADEA, including compensatory and punitive damages.

HAS THE ADEA BEEN EFFECTIVE IN ELIMINATING AGE DISCRIMINATION FROM THE U.S. WORKFORCE?

Yes, and no. The most egregious forms of discrimination are now prohibited, and thus almost nonexistent. However, employers continue to engage in more subtle and covert discrimination. The more subtle and sophisticated forms of age discrimination suggest that while employers may overtly attempt to comply with the ADEA's requirements, stereotypes about aging continue to taint their practices. However, while age discrimination still plagues the U.S. labor force, the legal rights and remedies of older workers would be drastically decreased without the protections of the ADEA.

How could the ADEA be made more effective in combating age discrimination?

One problem that plagues the ADEA is lack of effective enforcement by the federal government. In Fiscal Year 2001, 17,405 age discrimination charges were filed, but the EEOC filed only 31 ADEA suits. Because of the extremely low percentage of cases in which the EEOC litigates, as a practical matter, enforcement of the ADEA falls into the hands of private individuals. However, the cost of pursuing a private lawsuit combined with unreasonably high evidentiary burdens placed on age discrimination victims by federal courts, discourages many individuals from challenging unlawful age discrimination.

Perhaps the most significant problem with the United States' age discrimination policy is that age discrimination is perceived as different from other forms of discrimination, particularly race and gender discrimination. This stems from the decision by Congress in 1964 to not include age as a protected category under Title VII of the Civil Rights Act, and then to enact a separate statute prohibiting age discrimination in 1967 as opposed to amending Title VII to add age as a protected category.

Americans consider freedom from race and gender discrimination to be civil rights guaranteed to all individuals. Any infringement of these rights is denounced and met with demands for immediate redress. Yet, freedom from age discrimination is commonly perceived as "something less" than a civil right. While race discrimination invokes malevolent prejudices, age discrimination is based on an accepted perception that aging inevitably affects ability. With increasing frequency age discrimination is characterized as an economic issue, rather than as a question of fundamental civil rights.

Short of eliminating the ADEA, and adding age as a protected category under Title VII, the ADEA could be significantly improved. The statute should be amended to make it clear that age discrimination victims may use the disparate impact theory to establish their claims and age discrimination victims should be able to seek compensatory and punitive damages.