Age Discrimination and the Changing Demographics of the Workforce

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Learning Objectives

• What are the basics of the Age Discrimination in Employment Act (ADEA)?
• What do you need to know about state laws?
• What are some of the emerging issues in age discrimination law?
• What is the case for including age in all diversity trainings and briefings?
• What are the components of effective age diversity training?
Why, Besides the Law, Should Your Organization Make Age Equity a Priority?

A. The Aging Workforce
   • Half of the working population is age 40+.

B. The Potential Labor Shortage
   • Fewer potential workers between the ages of 16 and 24 are replacing retiring workers.

C. 50+ Workers Want to Work Longer
   • AARP research shows that nearly 80 percent of baby boomers expect and want to work in retirement.

D. Evidence that 50+ Workers Excel in the Workplace
Who is protected under the ADEA?

- Employees and applicants for employment age 40 and older
- State and local employees
- Federal employees
- Former employees and retirees
  - *Erie County Retirees Assoc. v. County of Erie*, 220 F.3d 193 (3d Cir. 2000) (employer may not provide inferior health benefits to retirees age 65 and older)
ADEA Basics

Who must comply?

- Employers with 20 or more employees
- Labor organizations with 25 or more members
- Employment agencies – both as agencies and as employers (if more than 20 employees)
- State and local governments
- Federal government
True or false?

- A work environment with offensive age related comments or jokes may be considered discriminatory.
Poll: Age Bias Basics

True of false?

- If a 30-year-old supervisor disciplines a 50-year-old worker who comes in late to work, the worker has grounds to file an age bias suit.
Poll: Age Bias Basics

True or false?

• If an employer disciplines a 50-year-old worker for insubordination, and the worker responds by filing an age discrimination charge with the EEOC, it is lawful for the employer to respond by firing the worker.
ADEA Basics

What is prohibited under the ADEA?

Unequal treatment in:

- Hiring
- Terminations
- Compensation and benefits
- All other terms and conditions of employment
ADEA Basics

What is prohibited?

Retaliation

- *Flannery v. Recording Industry Ass’n of Am.*, 354 F.3d 632 (7th Cir. 2004) (retaliatory to withdraw offer of a consulting relationship after employee filed an EEOC charge)
- Filing a counterclaim may constitute retaliation (i.e., defamation or criminal prosecution)

Harassment

- Intentional discrimination because of age
- Pervasive and regular
- Has detrimental effects that would be suffered by a reasonable person of same age in same position
ADEA Basics

Remedies:

• Injunctive Relief
• Back pay (including benefits)
• Front pay (in lieu of reinstatement)
• Liquidated (double) damages when discrimination is willful (knowing or reckless disregard of the ADEA)
• Attorneys’ fees and costs
Poll: Age Bias Basics

True or false?

• It is lawful to refuse to hire an older worker if they are “overqualified” for the position.
State Age Discrimination Laws

- Every state has its own law prohibiting age discrimination in employment.
- The ADEA provides a “floor” of coverage - not a “ceiling.” Many states provide more comprehensive coverage than the ADEA.

Also:
- Differences in coverage
- Substantive law differences
- Differences in available remedies
Poll: Age Bias Basics

True or false?

• It is lawful to ask an applicant how old they are in a job interview.
Poll: Age Bias Basics

True or false?

- It is lawful to refuse to hire a 27-year-old because you don’t think they are mature enough for the position.
Hiring and Recruiting Issues

- Advertising for employment
- The employment application
- Interviewing applicants
- The “overqualified applicant”
- Full-time vs. Part-time
Emerging Issues in Age Discrimination Law

Employee Benefits
Workforce Planning
Disparate Impact
Poll: Age Bias Basics

True or false?

• It is lawful to provide less life insurance to a 55-year-old employee than to a 30-year-old employee.
Emerging Issues in Age Discrimination Law: Employee Benefits

The Equal Cost or Equal Benefit Rule

Retiree Health Benefits
- *Erie County Retirees Assoc. v. Erie County*
- The EEOC’s proposed regulation
- *AARP v. EEOC*

Cash Balance Plans
- What are they?
- Legal Issues
Emerging Issues in Age Discrimination Law: Workforce Planning

Early Retirement Incentive Plans

- Voluntary
- Consistent with the relevant purpose or purposes of the ADEA

Consider Alternatives to Layoffs or a Reduction-in-Force

- Reduced hours
- Pay cuts or freezes
- Hiring freeze
- Use of attrition
Emerging Issues in Age Discrimination Law: Workforce Planning

Reductions-in-Force

- May not target older workers
- Establish a standardized and objective set of criteria for layoffs
- Conduct a statistical review of the impact of termination decisions before finalizing
Waivers or Releases: What are the Requirements?

- Must be written in plain English
- Must specifically refer to the employee’s rights or claims arising under the ADEA
- May not require the employee to waive rights or claims that may arise after the waiver is signed
- Must advise the employee (in writing) to consult with an attorney before signing
- The waiver may only be in exchange for money or other benefits that exceed those to which the employee is already entitled.
Waivers or Releases: What are the Requirements?

• The employee must have at least 21 days to consider the waiver before signing (45 days if the waiver is offered to a “group” of employees – more than one).

• In a group situation, the employer must provide information describing which employees are eligible for or excluded from the program, including their job titles and age.

• The employee must have the right to revoke the waiver within 7 days after signing it.
Emerging Issues in Age Discrimination Law: Disparate Impact

Overview

What is *Disparate Impact*?

Examples

What Does it Matter?

- Avoiding overt bias is not enough
- Disparate impact cases are BIG cases AND may be COSTLY
Disparate Impact Claims - Legal Issues:

Origins in Race and Sex Cases

Smith v. City of Jackson, 544 U.S. 228 (2005)

Elements of a Disparate Impact Claim
Emerging Issues in Age Discrimination Law: Disparate Impact

Disparate Impact Claims: How to Respond?

Further Clarity Coming?

- EEOC Regulations (September 2006)
- Meacham v. Knolls Atomic Power Laboratory (2d Cir.)
Emerging Issues in Age Discrimination Law: Disparate Impact

Best Practices: How to Assure Policies are “Reasonable”

• Take a broad view of Smith and prevent legal claims
• Examine impact of major neutral policies on older workers
• Ensure policies are job-related and serve key business goals
• Try other means to same end with less harm to older workers
The Case for Including Age in All Diversity Trainings and Briefings

- Demographics (an aging workforce) and preferences (older workers want and need to work longer)
- The persistence of ageism – the one remaining acceptable prejudice?
Ageism

• What is it?
• What are some examples?
• What can be done to combat it?
Components of an Effective Age Diversity Training

- Recognizing and acknowledging unfounded assumptions and stereotypes about older workers
- Connection between age and disability discrimination
- Sharing evidence that older workers excel in the workplace
Age Diversity in Employment: The Basics

- **Recruit and hire** based on the skills and abilities needed to do the job.

- **Promote** based on the ability, or demonstrated potential, to do the job.

- Encourage all employees to take advantage of **training** opportunities.

- Base **termination** decisions on objective, job-related criteria.
Thank you for joining us today!

For more information about best practices for managing an aging workforce, go to www.aarp.org/employerresourcecenter.