



early retirement
flexible schedules promotion
health benefits age-neutral
age discrimination
age equity workers age 40 and over
stereotyping age-bias
EEOC

Workers
50+

Age Discrimination: *What Employers Need to Know*

ADEA working conditions
post-boom boom
social trends compensation
retirement
boomers
employee benefits health care benefits
changing careers
working conditions



Topics include:

- Age discrimination laws
- Why laws against age discrimination exist
- Why employers should focus on age equity in the workplace now
- What happens when a charge is filed with the EEOC or a state fair employment agency
- How to prevent age discrimination and take advantage of what a mature workforce brings to American business

Age Discrimination: What Employers Need to Know

The American labor market has passed a barely noticed statistical landmark: the median age of working Americans—half the working population—is 40 or older, according to the Bureau of Labor Statistics.

The significance of this benchmark for employers is that about half of America's private sector workforce is now covered by the protections of the Age Discrimination in Employment Act.

At a time when the workforce is both graying and growing more slowly than in the past, savvy employers view this as a wake-up call and an inspiration to redouble their efforts to retain and attract the capable, qualified workers they need for business success in the coming decades.

In simple English, age discrimination in employment means setting arbitrary age limits for hiring, promotion, discharge, compensation, working conditions and benefits, regardless of an individual's actual or potential for job performance. It also means establishing and implementing practices and policies that work to the disadvantage of older employees or potential employees.

Some age discrimination is willful, intentional, and blatantly unfair. It reflects reliance

on rank bias or unfounded stereotypes about older workers. Other unlawful age discrimination is less blatant but equally harmful to older workers. Although the line between what's legal and what's not is sometimes fuzzy, prudent employers institute personnel practices that value the skills and contributions of individual employees, and do not rely on assumptions about what older workers "can" or "cannot" do.

AARP has prepared this publication to provide employers with an understanding of age discrimination laws, and to encourage employers to promote age equity and thus, to prevent age discrimination disputes from arising. AARP hopes not only to assist employers to comply with the law but also to foster practices and policies that will help employers maintain a talented workforce and generate business productivity that are so crucial to the future of our economy, our society, and our country.



Age Discrimination Laws

Both federal and state laws prohibit age discrimination in employment. Here's how they work.

The Age Discrimination in Employment Act (ADEA)

Employees and job applicants who are 40 years or older are protected from age discrimination by the federal Age Discrimination in Employment Act.

Who is Protected: The ADEA, passed in 1967, makes it illegal for employers, employment agencies, and the federal government to discriminate against employees and job applicants who are 40 or older and work for an employer with at least 20 employees, including state and local governments. It also prohibits age discrimination by labor organizations, such as unions, that have at least 25 members.

Basic Protections: ADEA makes the following practices unlawful.

Employers with 20 or more employees may not:

- Discriminate against workers age 40 and older in hiring, firing, compensation, benefits, terms, conditions or any other aspect of employment, because of their age;
- Retaliate against an individual who complains about age discrimination or helps the government investigate an age discrimination charge; or

- Implement age-neutral policies that have a significant disproportionate impact on older workers that is not justified by the reasonable objectives of the employer and reasonable steps by the employer to carry out such purposes.

Employment agencies serving an employer covered by the ADEA may not refuse to refer or refrain from referring workers age 40 and older.

The federal government must ensure that all personnel actions affecting federal employees and job applicants are free of age discrimination.

Labor organizations, such as unions, with 25 or more members, may not:

- Discriminate against individuals age 40 and older in membership activities;
- Cause or attempt to cause an employer to discriminate against any individual based on age; or

- Retaliate against an individual for complaining about age discrimination or for helping the government investigate an age discrimination charge.

Employment agencies and labor organizations with more than 20 employees are also covered by the ADEA in their capacity as employers.

Employee Remedies: The ADEA allows an employee or job applicant who believes they have experienced age discrimination to file a charge against an employer, employment agency, union, or government agency. Charges are filed with the Equal Employment Opportunity Commission (EEOC), the federal government agency that is responsible for investigating the charge; determining if the charges are valid and if so, seeking a resolution by mediation or court action.

An employee who wishes to file a charge must do so within 180 days of the alleged discriminatory action or when he or she first became aware of it, whichever occurred first. (If the employee's state has its own age discrimination law and an agency to enforce it, the employee may have up to 300 days to file with the EEOC.)

State Age Discrimination Laws

Every state has its own law against age discrimination. While these laws generally are similar in intent to the ADEA, they may have important differences—for example, they may protect employees of different ages or prohibit age discrimination by employers with fewer than 20 employees. Some state laws protect workers in different age ranges, including people who are younger than age 40. (The laws are especially important to state employees, who, as a result of a 2001 Supreme Court decision, are not allowed to seek lost wages or other money damages under the ADEA.)

A separate charge of discrimination under state law usually must be filed with a state agency responsible for enforcing state fair employment law. The timeline for filing a charge with a state fair employment agency may be shorter than the deadline for filing a charge with the federal EEOC. Many states also have other procedural requirements that are inapplicable to filing a charge with the EEOC or a complaint with a federal court.

Exceptions to the ADEA

In a few very narrow cases, ADEA allows employment-related decisions to be made based on age. Here are examples:

Bona Fide Occupational Qualification (BFOQ)

These are cases in which an employer must be able to prove that an age limit is necessary for the job. An example might be the case of a model: An employer would not have to hire a 60-year-old as a model or an actor in a television ad for clothing for teenagers.

Employee Benefit Plans

An employer may not deny individuals who are protected by the ADEA the opportunity to participate in the employer's benefit plan because of their age. In addition, an employer cannot reduce benefits based on age, unless the cost of providing the benefits to older workers is the same as for younger workers; the plan is insured or based on insurance methods; and the increasing age of the insured person will result in increasing costs.

That is, an employer may reduce an employee's benefits based on his or her age if the cost of the benefit increases with the age of the employee and as long as the cost of the benefits provided to the older worker is not less than that for a younger worker. This is called the equal cost or equal benefit rule.

Mandatory Retirement of Executives and High-Level Policymaking Employees

An employer may require employees to retire if they are at least 65 years old, are entitled to an annual retirement benefit (such as a pension) of at least \$44,000, and have been in an executive or high policy-making position for at least two years prior to the retirement date.

Mandatory Retirement of Public Safety Officers and Early Retirement Incentives for Tenured Faculty

State and local governments are permitted to establish maximum hiring ages and mandatory retirement ages for public safety personnel based on their age. Higher education institutions may not force tenured faculty to retire at a certain age, but they are allowed to offer these faculty members early retirement incentive plans that reduce or eliminate benefits based on age.



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Why There Are Laws Prohibiting Age Discrimination

Age stereotyping—attributing characteristics to people based on their age—remains a serious problem in our society generally and in the workplace in particular. Stereotyping surfaces in many different ways, from a supervisor’s blunt suggestion that “now that you’re 60, you should think about retiring,” to the more subtle, unspoken assumption that mature workers are less competent or less energetic than their younger colleagues.

Employers who utilize such stereotypes to make decisions about individual employees, or in official policies on hiring, firing, job assignments, and employee benefits, are violating the ADEA.

Although the ADEA became federal law back in 1967, employees and older jobseekers still view age discrimination as a problem. Each year within the decade from 1994 to 2004, 15,000 to 20,000 age discrimination charges were filed with the federal government. And in response to a 2004 AARP survey, more than two-thirds of workers age 45 or older—in the prime of their working years—said they have concerns that “age discrimination remains a major barrier to their advancement and well-being in the workplace.”

Age discrimination is harmful not only to the individuals who experience it. In 2004 alone, the cost of negotiated settlements of federal age discrimination complaints totaled \$69 million.

Furthermore, age discrimination overlooks the talent, skills, and experience that mature workers possess, which American business needs if it is to remain vital and competitive in this global economy.

Why Employers Need to Focus on the Issue of Age Equity Now

Fast-developing demographic and social trends suggest that the truest test of employers' ability to operate legally under discrimination laws may be yet to come. These trends include the aging of the workforce, a projected labor shortage, and the desire of baby boomers to work longer than their predecessors, and on different terms. These trends are also reflected in the emergence of new legal issues related to age discrimination law that employers need to take into account in recruiting, job assignments, and employee benefits policies.

The Aging Workforce

In 1982, the median age of the labor force was 34.6, compared to the 40-plus of today. Increasingly, the U.S. labor pool will consist of people who are covered by the ADEA. The highest growth rate in the next decade will be among workers between the ages of 55 and 64, an age group living longer and healthier, and thus able to work longer than its predecessors.

The Coming Labor Shortage

The post-baby boom generations are smaller than the wave of population born from 1946 to 1964. The U.S. Department of Labor has predicted that starting around 2010, the growth in

the labor force will slow to .4 percent a year, compared to 1.6 percent per year between 1950 and 2000. While experts differ on the exact dimensions and nature of the potential shortage, most agree that there will be more jobs than people to fill them. Employers who want to make up for this gap to maintain productivity must invest in retaining and attracting experienced workers who are current in their field and loyal to their employer.

Boomers Want to Work Longer

AARP research shows that nearly 80 percent of baby boomers expect and want to work in retirement. The top two reasons for remaining in the workforce are money and health insurance. Some envision changing careers or starting a small business. The numbers probably understate the true picture. As more people near retirement age and realize the inadequacy of their financial preparedness, more are likely to choose continued employment.

Boomers Want Flexible Working Conditions

Experienced workers bring talent, perspective and loyalty to their current job or to a new employer. But to attract and keep these employees, employers must listen to and act on another message: boomers want what

workers of all ages are increasingly demanding—more flexibility and autonomy, work schedules that allow for part-time or other flexible schedules and a better work-life balance, as well as access to training, benefits and the respect of their colleagues and employers. Just as boomer women led the way two or three decades ago in pushing for more accommodation for working mothers, older boomers are pressing for conditions and benefits that can be beneficial to all workers.

New Legal Issues are Emerging

Social and economic trends and technology have brought workplace changes that have repercussions in age discrimination law. The soaring cost of health insurance, for example, has led employers to make cuts in coverage for their employees and has raised new questions about how to interpret the relationship of the ADEA to employers' policies on health care benefits.

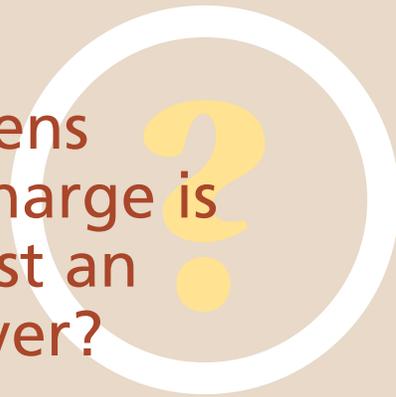
In light of these demographic, workplace, and legal trends, the most savvy employers are approaching the future not only by complying with the letter of age discrimination law but also by instituting policies and procedures designed to meet the needs of this newly defined workforce generating the most value for their enterprise from these workers' experience and skills.

Capturing the business benefits of implementing new policies and practices for a changing workforce also requires that employers monitor the results of instituting these efforts in terms of their impact on older workers. Under the ADEA, even age-neutral policies and practices may violate federal law if they have a significant disproportionate impact on older workers that is not justified by reasonable business objectives of and conduct by the employer. Generally, this will require an employer to regularly collect and assess data on workplace conditions as they affect older and younger workers.

The U.S. Department of Labor has predicted that starting around 2010, the growth in the labor force will slow to .4 percent a year, compared to 1.6 percent per year between 1950 and 2000.



What happens when a charge is filed against an employer?



When an employee files a charge of age discrimination, the EEOC notifies the employer. The EEOC has several different options for proceeding, including dismissal if the case does not appear strong or an investigation depending on whether the case has merit. If the agency believes that evidence of discrimination is strong, it may undertake a “priority investigation” that might include requesting documents, testimony and interviews from the employer and employee(s).

At any time, the parties may agree to resolve the charges through mediation, conciliation, or a settlement. The EEOC may suggest that the case go to mediation, an informal process in which a neutral party assists with negotiating a voluntary resolution of the charge. Under this scenario, the mediator can neither resolve the charge nor require implementation of the decision.

EEOC can attempt to resolve the case through conciliation, where the employer is persuaded to voluntarily eliminate and remedy the discrimination. This alternative may mitigate the ambiguity and costs associated with litigation. If mediation and conciliation do not work, EEOC can file a lawsuit against the employer. At any time, the EEOC may also decide that further examination will not result in a finding of a violation of the law, and terminate the investigation.

At any time at least 60 days after the charge has been filed, an employee may file a lawsuit and have access to a jury trial. Litigation can be a time-consuming and expensive process for both parties. If the lawsuit is decided in favor of the employee, the court has the right to require the employer to provide back pay, wages and benefits the court deems that the employee lost as a result of discrimination; reinstatement to a job; and/or front pay, which is future wages and benefits the employee would have received had the discrimination not occurred. An employer who loses a case may also have to pay the employee’s attorney’s fees.

How to Prevent Age Discrimination and Maximize the Benefits of a Mature Workforce

The best overall policy for employers is to make age-neutral decisions on hiring, firing, work assignments and benefits, and to base these decisions on how well an individual's abilities and qualifications match criteria set for the job.

This means abandoning assumptions such as mature workers aren't interested in training and are less engaged the closer they get to retirement.

To prevent age discrimination throughout the enterprise, employers should have an explicit, over-arching policy stating that discrimination will not be tolerated. Employers should communicate that policy to their managers, supervisors, human resources personnel and any other staff who are involved in making decisions about employees' work conditions or benefits, or company policies on these issues.

At least as important as written, explicit policies is the commitment to creating a climate that reflects what mature workers told AARP in a recent survey that they are looking for in a job:

- positive work environment
- respect from their co-workers

- opportunities to use their talents
- opportunities to use their skills to do something worthwhile
- learn something new
- help others
- do what they "have always wanted to do"

Employers can develop a better sense of how to respond to such concerns in their workplace by using techniques such as focus groups of employees in different age groups—for example, age 40-49, 50-64 and 65+—to discuss their perceptions of the organization, what they want in a job and how to market jobs to them. Employers might also schedule a regular review of their policies and practices to identify any policies or practices that are age-biased or that reflect negative stereotypes, or that otherwise have an unreasonable adverse impact on older workers.

Here are some additional examples of how employers can respond to the expectations of mature workers as well as prevent the occurrence of age discrimination in hiring, on the job and in employee benefit policies.

Hiring

- Train human resources personnel in interviewing techniques that elicit the skills and other qualifications that experienced workers bring to a job. Want ads and other recruitment materials should not specify an age requirement for the position. An interviewer may legally request the applicant's birth date to facilitate a background check, but this should only be requested if actually needed.
- Create an advisory committee of older workers to assess the recruitment process.
- Offer competitive salary, retirement, and health care benefits. When an AARP survey asked experienced workers to describe their ideal job, the majority cited good retirement savings and health benefits as very important factors.

On the Job

- Create opportunities for flexible schedules and other work arrangements—such as part-time positions, which are especially attractive to older workers. Seek input from employees or applicants on what types of schedules and working conditions they would like to have.
- When offering training or other personal development opportunities to employees, ask for volunteers. Don't assume that older workers lack the motivation or the ability to keep their skills current.

- Do not assume that just because an employee or applicant is a certain age that he or she plans to retire soon. Failing to offer an employee a promotion just because you expect him to retire soon is against the law. Conversely, demonstrating by promotions and other rewards that you value the skills and contributions of older workers as much as those of younger ones will motivate employees to do their best and remain loyal to the employer.
- If you are forced to downsize, do not automatically assume you should start with higher-paid employees. It is against the law to target older employees for involuntary layoffs or move them to a different department or division where they are more likely to be laid off. Besides, once you have analyzed the situation, you may realize that older workers' experience and knowledge of the business may actually make them more valuable. Use caution to ensure the downsizing does not target only your older workforce (i.e., higher-salaried workers may represent many of your older workers).
- ADEA allows employers to request employees who accept early retirement incentives to sign a waiver releasing all potential claims against the employer under ADEA. Employers who choose to do this should take care that they follow the seven requirements for requesting such a document (*Look under "Waivers and Release Agreements" on page 13*).
- A variety of issues are raised by the fact that as employees age, it becomes more likely that they have one or more conditions (whether actual, perceived or a matter of record) that qualify for a redesign of their workplace or render them disabled

under the federal Americans with Disabilities Act and/or other federal or state fair employment laws. If an employer ignores the request for adjustments allowing the employee to remain productive, these may be the basis for claims of discrimination (intentional or unintentional) on the basis of disability.

Employee Benefits

- Employers are not required by law to provide health insurance to their employees (or retirees). But employers that offer health care benefits may not discriminate against older workers (or retirees) by refus-

ing to cover them, or by reducing their benefits because of their age. (The federal EEOC has proposed an exception to the ADEA permitting employers to limit, or eliminate altogether, health care benefits for retirees when they reach 65—Medicare age. AARP has challenged this proposal, and its status will be determined by the federal courts.) However, the ADEA does allow employers to reduce benefits of older workers as long as they spend the same amount of money on these employees as they do on younger ones. However, the cost of the benefit must increase with increasing age.

Waivers and Release Agreements

If an employer decides to terminate an employee and either offers severance pay or makes an offer of early retirement, the law allows you to ask the employee to sign a release waiving his rights and claims under the ADEA.

However, the law is very specific about the procedure that must be followed, consistent with general legal requirements that waivers and releases be known and voluntary, and compels employers to comply with the following requirements:

- The waiver must be part of an agreement written in plain language.
- It must specifically refer to rights or claims arising under the ADEA.
- The employee may not waive rights or claims that may arise after the date that the waiver is signed.
- The employee may waive rights or claims only in exchange for money or other benefits that exceed those to which he or she is already entitled.
- The employee must be advised in writing to consult with an attorney before signing the agreement.
- You must give the employee 21 days to consider the agreement before he or she signs it (or 45 days if the employee is terminated in a group layoff).
- The employee must have the right to revoke the agreement within 7 days after signing it.

- Explore ways to offer health insurance to those who are under 65 and do not qualify for Medicare, but are phasing into retirement by working part-time. For those eligible for Medicare, provide additional health benefits so that overall, workers over age 65 have equivalent coverage.
- Employers who offer pension and retirement account benefits may not use age as a basis for reducing or terminating the benefits. For example, it is illegal to set a policy for matching 4 percent of a 40-year-old employee's 401(k) contribution, but only 3 percent of a 50-year-old's contribution.
- Offer valuable employees an incentive to work for you by creating programs or policies that address the life circumstances of experienced workers, such as eldercare benefits to help with care of a spouse or parent, or accommodations to physical conditions, such as vision problems.
- Offer options for phased retirement, which allows older workers to move into retirement gradually, by working on a reduced schedule, or possibly in a different job.

Failing to offer an employee a promotion just because you expect him or her to retire soon is against the law.



Age Equity in Employment

The baby boomers are a history-making generation, on the verge of prompting historic changes in the workplace as they already have in so many other aspects of American life.

As the boomers approach what has been considered the traditional retirement age, they say that they want to work longer and to have greater flexibility and authority in shaping their own work schedules and balancing their work and personal lives. This offers employers, who face a potential worker shortage in coming decades, an opportunity to create workplaces that, instead of penalizing older workers for their age and experience, both recognize and reward them.

Employers who invest the time, energy and creativity to motivate experienced workers to stay in the job market will find that they have made a win-win-win decision—for the employer, the worker, and the American economy as it competes in the global marketplace.

For More Information

Evolving Age Discrimination Issues

Along with demographic, workplace and technological conditions, age discrimination law continues to evolve. The following summaries illustrate some of the age discrimi-

nation issues that have been raised in the courts in recent years.

Retiree Health Benefits

In a 2000 case, *Erie County Retirees Association v. Erie County, Pennsylvania*, the U.S. Court of Appeals for the Third Circuit ruled that the county violated the ADEA by offering better health benefits for retirees under age 65 than for Medicare-eligible retirees. (The EEOC itself sought such a ruling to implement Congress' intent in enacting the ADEA). In 2004, the EEOC reversed course 180 degrees and announced its intent to issue a regulation that would reverse the Erie decision. The regulation would allow employers to abandon retirees' health coverage altogether when the retirees become eligible for Medicare at age 65, and bar retirees who lose coverage from challenging their former employer's actions—even if an employer provides under-65 retirees health benefits exceeding the level of coverage Medicare provides for those 65 and over.

AARP believes that this policy is illegal under the ADEA, and successfully challenged

the 2004 EEOC rule. In March 2005, a federal district court in Pennsylvania held the rule to be unlawful. In September 2005, however, the district court reversed itself and upheld the EEOC rule based on a June 2005 U.S. Supreme Court decision *Brand X*. AARP has appealed this ruling and the district court has ordered that EEOC's new rule not go into effect as long as this court battle is under way. Hence, EEOC's prior rule, which is consistent with the Erie County decision, remains in effect. AARP believes that unless and until the district court's second decision is sustained by the courts, employers should follow the Erie decision.

Disparate Impact

Historically, most age discrimination cases have been decided based on evidence—such as verbal or written statements—that the employer intentionally created or implemented discriminatory policies.

For decades, however, some age bias cases have raised the issue whether certain employer policies may be determined to be discriminatory, even if there is no evidence that the discrimination was intentional. These cases usually involve large numbers of employees, and contentions that the impact of an employer policy—neutral on the surface in regard to age—falls more heavily on older workers than on younger ones without a sound business rationale.

In one major case (under Michigan anti-discrimination law), employees of the Ford Motor Company alleged that the company's system of ranking employees in their performance review system made workers over 40 years old much more vulnerable than their younger colleagues to being terminated or not get

salary increases. Ford ended up paying \$10.6 million in a settlement with older workers who had brought the suit.

In another recent disparate impact case, brought under the federal ADEA, *Smith v. City of Jackson*, officers and dispatchers of the Jackson, Mississippi police department, all 40 years and older, challenged a city pay system that granted higher percentage salary increases to workers with five or fewer years on the job. Nearly all the workers who qualified for the larger increases were under the age of 40.

In March 2005, the U.S. Supreme Court ruled that workers over 40 years old could sue under the ADEA when an employer's action has a "disparate impact" on their age group and the employer's action was not "reasonable." The decision means that even if there is no "smoking gun" such as discriminatory statements by an employer, employees may pursue legal action by using statistics and other evidence to show that a broad policy—such as layoffs—has an unfair discriminatory impact on workers who are 40 or older. (The Court accepted the city's argument that the salary policy was legal because it was "reasonable" for the city to offer larger percentage raises to workers with less seniority in order to compete with the salaries offered to such workers by other nearby jurisdictions. Employers can expect future litigation to better define the term "reasonable" in "disparate impact" cases now moving through the courts.)

Cash Balance Plans

In recent years, many employers have discontinued their traditional "defined benefit" pension plans, which provided employees with a predictable, regular retirement income

based on a formula encompassing their years of service and in many cases, their final salary or wages.

In addition to or instead of the popular 401(k) retirement accounts, many employers have instituted “cash balance” plans, which portray a participant's benefit as a lump sum amount that increases over time, and, in practice, pay most benefits in the form of lump sums. The shift to cash balance plans has prompted lawsuits by employees who allege that the new plans discriminate against older workers by reducing the size of their future retirement benefit. The most prominent court case involves IBM, which in 2004 agreed in a settlement to pay \$320 million to more than 130,000 employees who sued the company, contending that the company's cash balance plan discriminated against older workers. At the time this publication was written, litigation was pending on the legality of IBM's cash balance plan, and Congress was debating whether to pass legislation to clarify the legal status of such plans. AARP believes that the law should be clarified to ensure that older workers are protected when any pension plan changes to a cash balance plan.

Additional Resources

Age Discrimination in the American Workplace: Old at a Young Age

This book by Raymond F. Gregory (Rutgers University Press, New Brunswick, New Jersey, 2001) discusses age discrimination issues including early retirement plans, promotions, demotions and transfers, and analyzes how courts have dealt with these matters.

AARP's Employer Resource Center

www.aarp.org/money/careers/employer_resourcecenter: The AARP website contains a wealth of information to assist employers in preventing age discrimination and to aid older workers in understanding their rights. It also includes “best practices” and tips on issues such as recruitment and creating workplaces that are attractive to older workers.

Equal Employment Opportunity Commission

www.eeoc.gov: Here you can read the text and regulations of the Age Discrimination in Employment Act, as well as information on litigation, enforcement procedures, and statistics on age discrimination charges and their resolution.

Staying Ahead of the Curve 2004: Employer Best Practices for Mature Workers

A study conducted for AARP by Mercer Human Resources Consulting, describes best practices of employers honored as “AARP Best Employers for Workers Over 50.”

Staying Ahead of the Curve 2003: The AARP Working in Retirement Study

A survey of what “working retirees” say they are looking for in a job.



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www.aarp.org/employerresourcecenter

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