

Age Discrimination in the Workplace

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Age Discrimination In Employment Act of 1967 (ADEA)

- Protects individuals who are 40 years of age or older from employment discrimination based on age
- Age discrimination involves treating someone less favorably because of age
- Only forbids age discrimination against people who are age 40 or older
- Applies to employees and applicants
- Applies to employers with 20 or more employees, including state and local governments, employment agencies, labor organizations, and the federal government

Age Discrimination and Work Situations

- The law forbids discrimination when it comes to any aspect of employment, including
 - Hiring
 - Firing
 - Pay
 - Job assignments
 - Promotions
 - Layoff
 - Training
 - Fringe benefits
 - Any other term or condition of employment.

Age Harassment

- It is unlawful to harass a person because of age
- Harassment can include, for example, offensive remarks about a person's age
- Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer

ADEA Coverage and Proof

- An employer or covered entity may favor an older worker over a younger worker, even if both are age 40 or older
- Discrimination can occur when the victim and the person who inflicted the discrimination are both over 40
- Age must be the “but for” cause of the discrimination

Retaliation Prohibited

- It is unlawful to retaliate against an individual for:
 - opposing employment practices that discriminate based on age
 - for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA

Employment Policies and Practices

- Employers cannot adopt discriminatory age-based policies
 - Maximum age for hire, recent college graduate
 - Mandatory retirement (few exceptions)
- An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older (disparate impact) and is not based on a reasonable factor other than age (RFOA)

Reasonable Factor Other Than Age

- ADEA authorizes recovery for disparate impact claims if effect of neutral policy or practice results in discrimination
- Practices that have an age based disparate impact are permissible if based on “reasonable factors other than age”
- Business necessity test used in other statutes is inapplicable to the ADEA
- RFOA provision is an affirmative defense that the employer must prove

EEOC Rule – Reasonable Factor Other than Age

Non-exhaustive list of five relevant considerations to deciding whether a practice is a RFOA

- Relation to business purpose
- Extent to which the employer defined the factor, applied it fairly, and gave guidance to supervisors
- Extent to which employer limited discretion of supervisors
- Extent to which employer assessed adverse impact on older workers
- Degree of harm to older workers and the steps the employer took to reduce it

Job Notices and Advertisements

- The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements
- A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a “bona fide occupational qualification” (BFOQ) reasonably necessary to the normal operation of the business

Pre-Employment Inquiries

- The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth
- However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA
- If the information is needed for a lawful purpose, it can be obtained after the employee is hired

Benefits under the ADEA

- The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees
- Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs might create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is no less than the cost of providing benefits to younger workers
- Employers are permitted to coordinate retiree health benefit plans with eligibility for Medicare or a comparable state-sponsored health benefit.

Waivers of ADEA Rights

- An employer may ask an employee to waive rights or claims under the ADEA
- Among other requirements, a valid ADEA waiver must:
 - be in writing and be understandable;
 - specifically refer to ADEA rights or claims;
 - not waive rights or claims that may arise in the future;
 - be in exchange for valuable consideration in addition to anything of value to which the individual already is entitled;
 - advise the individual in writing to consult an attorney before signing the waiver; and
 - provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

ADEA Damages

- Back pay, back benefits
- Front Pay
- Reinstatement, Instatement, Promotion
- In cases involving intentional age discrimination victims may be entitled to "liquidated damages"
- Liquidated damages may be awarded to punish a malicious or reckless act of discrimination. The amount of liquidated damages that may be awarded is equal to the amount of back pay awarded the victim

ADEA Statistics – Fiscal Year 2012

- 23% of EEOC charges included an ADEA allegation
- 64% of ADEA charges contain a discharge claim
- 14.8% of ADEA charges are classified as merit resolutions (compare to 20.3% merit overall)
- \$91.6 million recovered for victims

Questions?

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