



>> Age Discrimination

The Age Discrimination in Employment Act (ADEA) protects individuals, age 40 and older, from discrimination in the workplace. Much like Title VII and ADA, the ADEA is intended to provide equal opportunity in employment regardless of their age. The issue of an employee's age is usually most prevalent during the hiring process and when reducing the workforce (or forced early retirement).

When advertising a job opening, employers may violate the provisions of the ADEA by using such terms as "younger persons wanted", "girl", "boy" or "excellent first job". Even statements of "recent college grad" could send up a red flag. The ADEA makes it unlawful, unless a specific exemption applies (such as age requirements for law enforcement and fire personnel) for an employer to utilize job advertising that discriminates on account of age against persons because of their age.

The next contact with a prospective employee is at the application stage. Employers need to be sensitive about not asking unnecessary questions that reveal age. The Act states:

A request on the part of an employer for information such as "date of birth" or "state age" on an application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise discriminate based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act (29 CFR 1625.5).

When deciding to promote an employee, the decision should always be made on merit alone. Age should never be a factor. It is always best to communicate and document business decisions and discussions in case the decision is ever called into question.

The same is true about letting an employee go. The decision should always be based on performance in the workplace and not factored based on age. Clearly communicating with an employee helps avoid misunderstandings. If an employer sees an employee's performance declining, they should discuss it with them to give the employee a chance to improve. Then, if the employee continues to demonstrate poor performance, they will not be shocked if it is necessary that they are fired. There will be no misunderstanding as to the employer's reasoning.

Another issue that arises in the workplace with regard to age is when companies reduce their workforce. Employers should always think through their decision carefully and decide on the criteria (performance, experience, knowledge, closing one whole division) that will be used to evaluate who will be cut. If that criteria results in a disproportionate number of older employees being fired then less discriminatory methods should be considered. If using performance evaluations, it is wise to take into consideration a whole history of evaluations rather than just the latest one. A court may be suspicious if someone had 10 straight evaluations with an "excellent" rating and then a "poor" rating just before the layoff. It could be an attempt to disguise an age-based action.

The Older Workers Benefit Protection Act of 1990 (OWBPA) which 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 would 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 the same as the cost of providing benefits to younger workers.

In recent years, companies have started to fear a lawsuit when they let go of employees in a protected class so they have begun offering terminated employees extra cash or benefits in exchange for a signed waiver saying that the employee won't sue. While this is within an employer's rights, the ADEA, as amended by OWBPA, sets specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid.