



Age Discrimination

Who, What, Why . . .

Who does it apply to: The Age Discrimination in Employment Act (“ADEA”) applies to virtually all employers with 20 or more employees in 20 or more calendar weeks in the current or preceding year. Be careful how you count, though. Businesses under 20 employees may be covered if they are connected to other businesses by interrelated operations, shared bank accounts, common recordkeeping, overlapping ownership, or centralized control of the human resources function.

Who is protected: Applicants and employees 40 and older. Interestingly, the ADEA does not care about those 39 or younger. Employers are free to prefer employees 40 and older over younger workers. Although age discrimination can still occur between employees over 40, an age difference of less than 10 years is usually not considered significant enough to warrant a remedy. The law also protects U.S. citizens working abroad for U.S. controlled companies in most circumstances. And, finally, if you have a contractor working for you who is mischaracterized (see the Independent Contractor v. Employee EH edition) they may be able to bring a claim.

Who is not protected: (1) True independent contractors, and (2) business executives over the age of 65 who have spent the last two years in a “policy making” position and are entitled to a non-forfeitable annual retirement benefit meeting certain criteria. The executive exception is very technical and is not intended for middle management. See your employment counsel about this exception.

What constitutes a violation: There are two kinds of violations – direct mistreatment and disparate impact. Direct mistreatment is straightforward. If an employer affirmatively mistreats an employee because of his or her age by failing to hire, firing, demoting, promoting younger employees, or any other type of significant slight someone might dream up, it can be actionable as age discrimination. Disparate impact is more subtle. If an employer creates a policy that is neutral or non-discriminatory on its face, that policy might have a consequence of negatively impacting older workers more significantly than others. For example, if an employer institutes a policy that employees who wear reading glasses must be let go, the policy itself does not seem discriminatory because it may affect older and younger people. That said, 90-some percent of people have to start wearing reading glasses by age 40. This facially neutral rule

has a disparate impact against workers over 40 and may be actionable.

What if my employee violates without consent: Choose carefully who you place in charge. Employees placed in positions of authority with the power to control the circumstances of other employees are not personally liable. Their liability is placed with the employer even if the employee acts without authority. The same is true of independent contractors (whether properly characterized or not) placed in positions of authority over employees.

Are there circumstances where I can exclude older workers: There are some jobs that older workers simply cannot or should not do. This is recognized under the ADEA. If an employer has a Bona Fide Occupational Qualification (“BFOQ”) that requires workers above certain ages to be excluded, it will not violate the law. To have a BFOQ, the employer must demonstrate a factual basis that provides a basis to believe that all or substantially all older persons are unable to perform the job safely and efficiently. Employers must be careful with BFOQs. They are often challenged and rarely hold up unless there is strong evidence that all older workers can’t do the job.

Common Situations:

But I just got here: David just bought all of the assets of Hal’s Hot Links. To keep the business running smoothly, he bought the name and hired several of the employees Hal let go at the time of sale. A few weeks into his new business, David receives an EEOC charge of age discrimination for things that happened to an employee David hired that used to work for Hal. The employee complains of things that happened back when Hal had the business. Why is David involved? There is a concept of “successor liability” under the ADEA. If there is continuity of operations and workforce, notice to the new owner, and no chance for the employee to recover from Hal (who has run off to Aruba with his young girlfriend), David might have some responsibility. The rules here are complicated. Check with your employment counsel about these issues. The message here is to be careful when making an “assets only” purchase of another business. That might not be enough to protect you.

The law of supply and demand: The Springfield Police Department does a pretty good job of keeping its employee pay

rates separated by rank and department, but the nearby town of Highland Park has started paying new recruits what Springfield pays its sergeants. In need of new officers, but unable to raise the payroll of all of its officers, Springfield raises the pay for new recruits to match Highland Park. This angers several of Springfield's sergeants who are all over 40. Many file claims against Springfield. Have they got a point? No. It is not a violation of the ADEA to pay workers what they are worth in the workplace. Springfield has to do something to compete. That said, Springfield better keep good records of its reasons and what is happening over in Highland Park to prove its position.

It's time to retire, pops: Sarah's Widget Works has finally run its competitor, Bill's Big Bad Widgets, out of business. Several of Bill's most talented employees have come by to apply for a job with Sarah. Sarah has a full complement of staff, but several are getting up into their 60s. Sarah calls in each 60+ employee and asks about their retirement plans. Each indicates they are thinking of working another 2 or 3 years. Sarah decides to offer an early retirement package to eligible employees over 55 to see if any of her older workers will choose to retire early. Has Sarah gone off the deep end? Not yet. It is not illegal to ask an employee about his or her retirement plans, but Sarah should be careful not to let the employees take it wrong. It also is not illegal to offer a neutral early retirement program to all eligible employees. If some of Sarah's employees take it, she will have room to bring in Bill's talent as long as she does not discriminate against Bill's older workers.

Classified ads: Mikey runs the local motorcycle shop and needs someone to come in to do part-time stocking work. Hoping to help a kid at the local college, Mikey runs an ad in the school paper looking for a "college student" for help stocking shelves. While it seems harmless enough, has Mikey broken the law? In an edition devoted to the ADEA, I suppose you'll think so.

You're right. Mikey has committed two sins. First, he advertised for help only in the college newspaper. Employers have to draw their prospects from neutral environments open to all workers. Only the local college students read the school paper and while there may be some non-traditional older students, the ad is primarily aimed at young people. Second, Mikey asked for a college student. Employers must avoid terms like "college student", "boy", "girl", "young", "25 to 30", and "recent college graduate". These can violate the law. Of course, remembering that the ADEA does allow discrimination in favor of older workers, there is nothing wrong with advertising for a "retiree" or someone "50 to 60".

What should I do:

Good: Count up your workers every six months to know if the law applies to you. Once you are over 20, institute an anti-discrimination and anti-harassment policy for all protected groups (and including "older" workers over 40).

Better: In addition to developing a policy, control who is permitted to interview candidates to be sure they are aware of the concerns of age and other discrimination. Be conscientious about advertising positions to be sure all age groups are targeted and that words referring to young people are left out. If you let go an older worker you are concerned may make a claim, try to replace them with a worker of similar age to reduce the effectiveness of a possible claim.

Best: In addition to the items above, create job descriptions for each position. Use the job descriptions to prepare advertisements for positions, to ask objective interview questions, and to create a uniform and objective performance review system to avoid accidentally discriminating against someone.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**