

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

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I. BACKGROUND ISSUES.

A. Nature of Age Discrimination Problem. Issue - what are the reasons for providing legal protection against discrimination to older workers as a class?

B. General Issues.

1. Coverage issues. The ADEA covers almost all except the very small private employers and state and federal government entities. It applies comprehensively to all types of personnel actions taken by an covered employer.

2. Age limits on coverage. Under the ADEA, as amended, employees 40 years of age and older are a "protected class," that is, are protected from discrimination.

3. "Agent" liability. An employer and its agents, as defined under the ADEA, can be liable for violating the Act. Under some circumstances, an employee may be considered an agent and may be personally liable.

4. Discrimination within the protected group. An issue which has been litigated is whether age discrimination can occur if an employee in the protected class is replaced by an individual who is younger but who is also 40 or above? The United States Supreme Court has recently said yes.

II. EMPLOYMENT PRACTICES.

A. Prohibited practices.

1. Pre-employment activities. The use of age brackets in soliciting applicants for a position may well amount to an obvious ADEA violation. Certain "trigger words" are also regarded as impermissible. Requests for an applicant's age is a suspect practice.

2. Hiring and promotion practices.

a. A "diversion" - proving age discrimination. A case under the ADEA is typically proven in one of two ways. There may be direct evidence of discriminatory intent, such as where an official of the employer makes a statement indicating a bias against older workers. In the absence of such direct evidence, circumstantial evidence may be utilized, that is, the establishment of such facts as would support an inference that discrimination occurred. The four part McDonnell-Douglas test is used by plaintiffs to prove a case by circumstantial evidence.

b. Hiring and promotion cases. A fertile ground for ADEA charges has been hiring and promotion decisions in which protected class members have alleged that they were discriminatorily passed over in favor of younger individuals.

c. Lessons and observations. Those who have responsibilities in hiring and promoting employees should be careful not to bring any age-biases to these processes. All ads and solicitation materials must be screened to avoid language that would evince a discriminatory attitude. All decisions must be justifiable based on applicant or employee qualifications.

3. Discharges.

a. General rules. The same general principles apply to employee terminations as discussed above in the context of hiring.

b. Layoffs or reductions-in-force. Layoffs and RIFs involving a disproportionate number of older employees may provide the basis for an ADEA suit.

c. Constructive discharge. An employee who voluntarily quits his/her job cannot thereafter sue for age discrimination. However, if the employer makes the employee's working conditions so intolerable that a reasonable person would resign, the employer will be considered to have "constructively discharged" the worker. An employee who has been constructively discharged is permitted to bring an ADEA claim.

d. Lessons and comments. The best defense against an ADEA claim brought by a terminated employee is the existence of clear performance-based reasons for the action. Employers should avoid attempts to coerce an older employee into resigning or retiring by taking adverse actions designed to lead to that result.

4. Employee salary and benefits.

a. Wage differences. Age-based differentials in pay which disadvantage a protected class member are illegal.

b. General benefits. Under the Older Worker Benefit Protection Act (OWBPA), which amended the ADEA in 1990, employers may not discriminate against older workers in benefits provided under employee benefit plans. However, unequal benefits for older workers will not run afoul of the ADEA as long as the employer's cost is the same as greater benefits provided to younger workers.

c. Voluntary early retirement plans. Early retirement plans which include some incentives to induce older workers to retire are permissible under the OWBPA if certain conditions are met.

6. Other types of ADEA violations.

a. Hostile environment. An employer that allows the workplace environment to become hostile or offensive to older employees may be held to have committed illegal age discrimination.

b. Retaliation. Adverse action taken by an employer against an employee in response to the employee's filing of an ADEA claim or other protected activity is prohibited by the Act.

III. PERMITTED PRACTICES AND DEFENSES.

A. General. An employer has several possible defenses which may be raised against an ADEA claim.

B. Bona Fide Occupational Qualification (BFOQ). In very limited circumstances, an employer may be able to establish a maximum age for hire requirement or a mandatory retirement requirement, if necessary to the business. This bona fide occupational qualification defense is only rarely allowed.

C. Reasonable Factor Other Than Age/Good Cause. A more common defense expressly recognized by the statute is a reasonable factor other than age (RFOTA). The ADEA also acknowledges that an employer who discharges an employee for good cause can assert that "cause" as a defense to an age-bias claim.

1. **Job performance/conduct.** Any genuine job-related deficiency or misconduct can qualify as a RFOTA or good cause.

2. **Economic reasons.** The need to implement cost-saving measures, resulting in some layoffs due to elimination of positions, reorganizations, etc. is often advanced as a RFOTA. Whether cost will be recognized as a valid defense to a ADEA claim brought by older, laid-off employee may well depend on how the selection of employees to be terminated was made.

D. Age as partial factor.

IV. ENFORCEMENT ISSUES.

A. Dual Enforcement Scheme.

1. **Equal Employment Opportunity Commission action.** The EEOC can initiate an investigation on its own or it may investigate in response to an employee's complaint. EEOC action may include settlement, dismissal, or the filing of suit against an offending employer.

2. **Employee civil action.** An employee may bring a lawsuit against his/her employer, either alone or together with other employees in a class action. The claim must first be submitted to the EEOC to allow possible settlement, however. The employee has a right to a jury trial on most ADEA claims.

3. **Statute of limitations.** Generally, an action must be brought within two years, unless the ADEA violation was intentional in which case the allowable period is three years.

4. **Remedies.** A variety of remedies are available to make the victim of age-discrimination "whole," including back pay, front pay, attorneys' fees, court-ordered hiring, reinstatement, promotion, etc. If the violation was willful, the back pay amount is doubled.

B. The 1990's and ADEA Actions. ADEA claims are on the increase, as more and more older employees are taking their employers to court alleging unequal treatment because of age.

