Avoiding Age Discrimination

Steering Clear of "Disparate Impact"

by Kathryn M. Vanden Berk

Age discrimination made the news in late March 2005 when the U.S. Supreme Court ruled that an employer illegally discriminated against older workers even though there was no intention to do so.

In *Smith v. City of Jackson*[1], the court ruled that a city's employment decisions may be discriminatory if it disproportionately affects older workers, even if they are not directly based on age.

The *Smith* decision establishes "disparate impact" as a new standard for discrimination under the Age Discrimination in Employment Act (ADEA).[2] Before *Smith*, employers could be successfully sued for age discrimination under ADEA only if the employee could prove "disparate treatment."

The two approaches to discrimination are very different. Disparate treatment looks to whether an employer *intended* to discriminate against older workers. Disparate impact looks to the *consequences* of policies or practices that on the surface are age-neutral. It is much easier to prove consequences than intent.

The result of the *Smith* decision could be significant particularly at this moment in time. The Baby Boomer generation is aging, and by coincidence the youngest Baby Boomer will qualify this year (at age 40) for protection under the ADEA. Baby Boomers constitute a huge presence in the workforce, as their 65 million working members now make up half of the active civilian labor force[3] in the United States.

Age discrimination complaints are already numerous. EEOC reports that of all the discrimination charges filed with it in 2004—which is before *Smith* was decided—age discrimination accounted for 22.5 percent. This percentage is likely to increase with the double-whammy of an aging Baby Boomer population and the disparate impact standard now becoming available to plaintiffs.

Exceptions to ADEA

You are still allowed to make business decisions even if they do impact older workers. Your best guidelines to follow are those that you already follow when dealing with job applicants or workers who are members of protected groups. For example, the ADEA generally does not prohibit employment decisions based upon:

1. Good Cause. You can discipline or terminate an employee who is 40 or older for performance problems or for violating your conduct policies as long as you treat them consistently with other similar employees.
2. Reasonable Factors Other than Age (ROFAs). You can establish job criteria that differentiate between employees based on factors other than age. So, for example, you may adopt a salary plan that treats younger workers more favorably if you need to improve entry-level wages in order to be competitive in your geographic area.[4]
3. Bona Fide Occupational Qualifications (BFOQ). You may impose age restrictions if they are reasonably necessary to the normal operation of your business. The BFOQ exception is limited in scope and narrowly interpreted, and few employers have been successful in defending age restrictions using the BFOQ exemption. Be cautious in relying on this exception too heavily.
4. Bona Fide Seniority Systems or Employee Benefit Plans. The terms of a bona fide seniority system or bona fide employee benefit plan may be implemented so long as the system or plan (a) is not a subterfuge to evade the ADEA; and (b) does not require or permit the involuntary retirement of individuals age 40 or older.[5] For example, you may offer early retirement benefits that differentiate between older and younger employees under certain, limited conditions.
5. Mandatory Retirement for High-Ranking Employees. You may require the retirement of certain high-ranking executives. The executive must be (a) at least 65 years of age; (b) employed in a bona fide executive or high policymaking position for the two-year period immediately before retirement; and (c) entitled to an immediate non-forfeitable annual retirement benefit from an employer pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, which equals in the aggregate at least $44,000 per year.[6]

Be aware that many states have their own age discrimination laws that may impact any of the above exceptions. Local federal and state court decisions may also impact age-related issues at your agency.

Be Proactive

Quite clearly, you must be prepared to support every decision that adversely affects older workers. Not surprisingly, using "best employment practices" is your safest policy. I suggest taking the following steps:

DISCRIMINATION CLAIMS

Avoid Age Discrimination Claims During Employment Interviews

The ADEA prohibits employers with 20 or more employees from discriminating in employment against individuals who are age 40 and older.

Review and Update the Job Description. Clearly state skill sets, physical requirements, and job-related demands in objective (measurable) terms. Don't ask an applicant if age will prevent him/her from doing the job.

Don't Ask Questions About Age. The ADEA does not specifically prohibit you from asking an applicant's age or date of birth, but why risk being misinterpreted? Any request on your part for age information will be closely scrutinized.

Avoid Age-Related Buzzwords. Don't tell applicants—especially an obviously older one—that you are looking for "young blood," "new ideas," or "youthful energy." These buzzwords could be used as evidence of a climate of age discrimination.

Avoid Age-Related Stereotypes. Don't assume that a young, apparently healthy person will not use medical benefits, or that an older applicant will use them. Don't ask an applicant salary or benefit questions based on what he/she needs "at this stage in your life."

Don't Joke About Age! Don't try to ease conversation with an older job applicant by joking about age, and be careful about stray remarks. People who bring age-related lawsuits against employers often refer to remarks or jokes not even related to the job interview—a comment directed at a colleague walking by, for example.

1. Update Job Descriptions and Employment Policies. Analyze your job descriptions and personnel policies to ensure they are age-neutral. If a job description or policy is adopted that will favor one age group over another, be sure to document the business reasons for that.
2. Modify Job Notices. The ADEA makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements.
3. Be Consistent. Don't get caught making inconsistent decisions. If you deviate from approved policy, be sure you have a business-related reason to justify the deviation.
4. Document Decisions. Document the reasons for hiring, promotion, compensation, discipline, and termination. Be sure that each employee's personnel file contains documentation to support any adverse action, such as performance appraisals and counseling memos.
5. Give Older Workers Additional Time to Waive Rights. The Older Workers Benefit Protection Act of 1990 (OWBPA) establishes specific criteria that must be met if a terminated older employee signs a waiver of his/her right to sue as part of a severance agreement. A severance agreement that does meet them can be nullified.[7]

Because the disparate impact test has been with us for many years in other discrimination arenas[8], we are not starting with a clear slate. Many courts have applied the theory to cases alleging discrimination based on race, sex, and other protected classifications. However, given the importance of the age issue, we can expect a bit of volatility as courts explore the limits of what constitutes legal behavior where age is concerned. If you use good business practice and common sense, you can limit your exposure on this issue.▲

Endnotes

1 2005 U.S. LEXIS 2931,125 S.Ct. 1536; 161 L.Ed. 2d 410 (2005). Thirty officers and dispatchers in the Jackson, Mississippi police department, all at least 40 years old, sued the city, challenging a 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 age 40. On March 30, 2005 the 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." Significantly, the employees are not required to prove that the employer intended to discriminate against older workers in a disparate impact case.

2 The ADEA is codified at 29 U.S.C. §§621-634. It prohibits employers with 20 or more employees from discriminating in employment against individuals who are age 40 and older. The Act is administered by the Equal Employment Opportunity Commission (EEOC). Aggrieved employees are required to file a charge with the agency, and the agency must be given time to attempt conciliation before a complainant may bring a private suit. For private plaintiffs, back pay and reinstatement or nondiscriminatory placement are among the remedies permitted by the Act. Agency enforcement action may lead to the termination of funding.

3 According to the Bureau of Labor Statistics.

4 In *Smith v. City of Jackson*, the Supreme Court determined that the employer's pay practice giving employees with less seniority (who were typically under 40) bigger raises was lawful even though workers with more seniority (typically over 40) got smaller raises. The pay plan was based on a reasonable factor other than age—the need to raise lower echelon employees' salaries to make them comparable to the salaries of surrounding police forces.

5 29 U.S.C. §§623(f)(2) and 631(c)(1).

6 29 U.S.C. §631(c)(1).

7 29 U.S.C. §§621 et seq. The ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver of the right to sue to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver: (1) must be in writing and be understandable; (2) must specifically refer to ADEA rights or claims; (3) may not waive rights or claims that may arise in the future; (4) must be in exchange for valuable consideration; (5) must advise the individual in writing to consult an attorney before signing the waiver; and (6) must provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

8 The "disparate-impact" theory of recovery was established 1971 in *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971).

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