Steps to Solve the Retirement Blues

Don't forget the important details and laws

by Kathryn M. Vanden Berk

Use the tools that are already available and think creatively about how you use them

Your staff is aging, you're concerned about loss of productivity, and your benefit costs are already staggering. You may even be considering how to prepare for your own retirement. In short, you would like to find a magic button that will solve your retirement blues.

This article may not answer all your questions, but at least it will help you assess your options.

Mandatory Retirement Details

Since 1986, the Age Discrimination in Employment Act (ADEA)[1] has eliminated mandatory retirement for most types of employees. States, for the most part, have followed the ADEA and prohibit forced retirement as well. However, there are two types of mandated retirement that are allowed: (1) retiring high-level executives, and (2) where there are bona fide occupational considerations.

High-level executives. You may impose a mandatory retirement age of 65 on (1) bona fide executive or those in high policymaking positions (when they are in the position for the two-year period immediately before retirement) who are, (2) entitled to an immediate nonforfeitable annual retirement of at least $44,000 per year.[2]

Because this is an exception to the ADEA, it is narrowly interpreted. The burden is on you as the employer to prove that all elements are met. You will not be allowed, for example, to require retirement for middle managers no matter how great their retirement income. This is strictly limited to the top executive group.

Bona Fide Occupational Qualification (BFOQ). Where safety issues are involved and you can show that age materially affects an employee's job performance, you may impose a mandatory retirement age. This is becoming a very high standard to meet; however, as many professionals—such as pilots, police officers, and firefighters—have proved, age is not always an indicator of ability. In order to impose a BFOQ regarding age, you must be prepared to show that substantially all older employees are similarly affected and that there is no alternative way, other than basing the decision on age, to manage this issue.[3]

Retirement Tools Can Assist

If mandated retirement is not allowed, how can you establish a flexible retirement program that will help manage those older workers who need to be considering retirement? Basically, you need to use the tools that are already available to you, and you need to think creatively about how you use them. Here are some suggestions.

Early retirement incentives. The easiest way to coax staff into accepting retirement is to introduce an early retirement program with incentives. A typical severance package will include continuation of salary and other benefits (especially health care insurance) to a specified date, after which their regular retirement programs will kick in.

[Author's note: A severance package can be part of the strategy in any of the following initiatives. Such packages ease the pain of leaving the organization and at the same time protect the organization from future lawsuits by obtaining an employee's release of legal claims. Be sure to follow the ADEA rules when making severance offers to older workers.[4]]

Performance evaluation. Make sure that you are evaluating your employees on a regular basis and that you are taking action when their work does not meet expectations. If you have older workers who are no longer able to meet the needs of the job, state this in their evaluations so you can either establish plans to improve their performance or move them into a termination path. This may seem heartless when employees have been with you for decades, but it is just as heartless to treat them shabbily in the hope that they'll "get the message."

On the other hand, if an older employee is performing well, then that employee should be allowed to continue working until his/her work no longer makes the grade. Effectiveness studies have often shown that some people are capable and efficient in their work lives well into their 70s and even their 80s. If you have such a person on your work force, it can be a boon to everyone to know that you honor their continued good service.

Compensation. Be sure that your compensation system accurately reflects what each position is worth. If you have not capped your wage grades so that employees within each grade "max out" at some point, you should evaluate the compensation program.

Long-term employees who have enjoyed merit raises over the years may very well have reached the maximum level for their position. If that is the case, it is destructive to your system to allow their salaries and wages to increase without limit. Each position should have a minimum and maximum pay range, and if the employee has "maxed out," maybe he/she will decide that retirement is better than standing still on the pay scale.

Benefits. Your retirement benefits are an integral part of your organization's ability to move people toward retirement, if that is what you want. For example, if you compete in a tight market for younger, more physically capable staff members, speak with your benefits professionals about restructuring benefit programs so that they are tilted to the needs of attracting and retaining a younger staff. Although this might sound like it is per se discrimination, in fact a 2005 Supreme Court case found that it was acceptable, so long as you can show a demonstrated need for younger staff.[5]

Evaluate the overall needs of your organization. A restructuring program is a good time to retire employees whose skills are no longer needed, or place older employees on a reduced work schedule that will allow them to phase out of their careers over a period of time. When you base terminations or reduced work schedules on a restructuring program, especially one that is related to financial considerations, you are very unlikely to be found liable for age discrimination.[6]

Shake it up. If you have older employees who are "coasting," you might give them new tasks to do or new positions entirely. This challenge of new expectations will either excite them with new possibilities or help them decide that this might be a good time to retire.

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Universities struggling with tenured faculty members who no longer attract research grants will often require a greater number of teaching hours, aware that a heavier teaching workload will push long-term faculty to consider retirement more seriously.

Pre-retirement counseling and succession planning. You may find that retirement-age employees will be more willing to retire if they have help in preparing themselves financially. You might consider offering pre-retirement planning as a benefit to workers over age 50 so that they will plan for a reasonable retirement date.

Succession planning for key positions is another form of pre-retirement planning. A formal succession planning program will not only help you establish an agreed-upon retirement schedule, but will include the selection and preparation of a qualified replacement team.

[Editor's Note: For more information and tips on succession planning, review the winter 2008 *Alliance for Children & Families Magazine* at alliance1.org/magazine.]

ENDNOTES

1. The Age Discrimination in Employment Act (ADEA) prohibits an employer with 20 or more employees from discriminating against any individual with respect to hiring, compensation, and other terms, conditions, or privileges of employment because the individual is 40 years of age or older. 29 U.S.C. '623(a); 29 U.S.C. '631(a).
2. 29 U.S.C. '631(c)(1).
3. Smith v. City of Jackson, 544 U.S. 228 (2005).
4. According to the Older Workers Benefit Protection Act (OWBPA), a release of potential age discrimination claims will not be knowing and voluntary unless a number of minimum requirements are met. The most important of these is that the employee must have 21 days to consider an offer and another seven days after signing it to revoke the consent. The rules differ slightly if a class of employees is involved. 29 U.S.C. '626(f).
5. In Smith v. City of Jackson, the Supreme Court found that a plan whose stated purpose was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability" did not violate the ADEA. The plan may have had a disparate impact, said the Court, but it was not an illegal one.
6. I recall one nonprofit in the Chicago area that moved a number of older employees into a single branch office and then eliminated that office. My suspicion was that this was a ruse, but everyone was offered a generous severance package, and everyone took it, and the office was quietly closed.

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