

Staying Afloat in the Sea of Employment Law



***Broaching Retirement with Older
Employees: A Delicate Discussion***

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Celebrating Its 50th Anniversary – A Brief History of ADEA

Outgrowth of Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 prevents discrimination based on:

- Race
- Color
- Religion
- Sex
- National Origin

Age not a protected class

Celebrating Its 50th Anniversary – A Brief History of ADEA (cont.)

- ADEA passed in 1967
- EEOC took enforcement authority of ADEA in 1980
- Congress eliminated the upper age limit in 1986
- OWBPA passed in 1990 and added release provisions to separation agreements
- Disparate Treatment – Claim based on action against individual employee
 - 2009 Gross v. FBL Fin. Servs., Inc. – SJC
 - To win, plaintiff has to prove that age discrimination is a prime or motivating factor
- Disparate Impact – Claim based on adverse impact of class



Three Scenarios

1. *Employee is considering retirement*
2. *Employee is NOT considering retirement*
3. *Employee's performance is deteriorating and he/she is near retirement age*

Scenario 1: How to Approach an Employee Who Mentions Retirement

- Don't assume that an employee's retirement plans are based on age.
- If an employee indicates that he/she may be retiring soon, an employer has a right to receive a clear answer about the employee's plans.
- Offer flexible scheduling options
- Mentoring match-ups

Scenario 2: How to Approach an Employee Who Is Not Considering Retirement but “Long in the Tooth!”

- Forced retirement is almost always unlawful under age discrimination.
- “No” ends the conversation.
- Courts have long recognized that employers have a legitimate interest in planning their future workforce and grooming successors for the current leadership.
- Make no assumptions -- Cannot make assumptions about expected tenure based on age.
- Employers should refrain from referencing an employee’s age when asking about future plans.



Scenario 2

- Repeated or coercive inquires are likely impermissible.
- Ask employees at all levels of seniority what their short term and long term goals are.
- Don't express disapproval when asking employees about their future.
- Consider whether any employment practices driven by succession planning may have a disparate impact based on age.
- Refrain from "new blood" or "next generation" or "energetic" when announcing new leaders.



Scenario 3: How to Approach an Employee Who Is Not Considering Retirement But Performance Is Deteriorating

- Treat like all other employees with performance issues
- Uphold health and safety standards
- Reasonable accommodation – ADA issues



Alternatives

- Cautions

- Job elimination
- Layoffs
- “Suddenly stupid!”
- Cutting job duties
- Cutting hours
- Denying opportunities for promotion

- RIF

- VSP

- Early Retirement Incentive Programs

- Set the eligibility group
 - Minimum years of service?
 - Minimum age and years of service?
 - Specific departments?
 - Salaried employees/non-exempt positions only?
 - Geographic location?
- Have to consider ERISA

Comments? Questions?

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