

Managing Baby Boomers

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There have been many comments and analyses lately about how employers should handle the emerging youngest generation, usually referred to as Gen Y. But as the 77 million baby boomers begin reaching 65 years of age this year, they will present some unique challenges to employers.

On one side of the issue, there will be the continuing challenge of making sure your work force retains sufficient employees with critical skills and experience to benefit the operation. The well-publicized problem created by the coming retirement of large numbers of experienced air traffic controllers is an example. To address this side of the issue, employers are taking various steps to keep these valuable employees in their work force including flexible work schedules, restructuring of job duties and responsibilities, creation of consulting positions, and positive reinforcement and encouragement.

On the other side of the issue, there is the equally difficult challenge of managing those boomers who want to continue to work but who may be experiencing declining physical and mental capabilities. The challenge includes ensuring that you are handling promotions, transfers, wage increases, and terminations in a way which will minimize your legal risk. Under federal law, and in many states, it is unlawful to discriminate against employees who are 40 years of age or older because of their age.

In a recent survey by the Associated Press, one in four of the boomer group said they will never retire, and two thirds of them said they will work at least part time for financial reasons. Although according to the survey 61% of boomers surveyed said their age is not an issue at work, the boomers continue to file a large number of EEOC charges and lawsuits claiming age discrimination. For example, in 2010, they filed 23,264 charges alleging age discrimination. This constituted 23.3% of all of the charges filed.

What Makes Age Different?

Unlike race and sex, which are immutable characteristics, age is ever evolving. One day you are not in the protected category, the next day you are. That day is your 40th birthday. This has enormous implications for employers when making employment decisions, such as promotions. Based on extensive studies, labor economists have found that as employees grow older, they may be less willing to relocate, less willing to devote the time necessary to learn new skills, such as how to use new computer software, and may be less motivated to work the hours or do the other things that increase their potential for promotion to a higher level.

For example, let's use a fictitious employee, Alan Silver. While Alan, as a 20, 30, or 40 year old is still the same Alan when he is in his 50s, 60s, and 70s, a whole lot of his physical, mental, and emotional characteristics and goals *may* be quite different. For example, when Alan joined your work force at age 25, he was single, highly energetic, and ambitious. He was willing to put in very long hours, and leapt at the chance to learn new skills. He was also willing to move anywhere if there was an opportunity for advancement.

Today Mr. Silver is 60 years old. He is married, very involved with his community, and has paid off his house note. He feels he has paid his dues, and is no longer willing to sacrifice his leisure time in the name of moving up the ladder. He is not, under any circumstances, willing to move to a different city. And, perhaps, most importantly, over the years Silver has received a number of promotions because of his satisfactory performance in his job. But, as is sometimes the case, after his most recent promotion he is now at the highest level consistent with his abilities, or – as noted by Laurence Peter, the author of *The Peter Principle* – may be one level higher than his level of competence. Additionally, at his level in the organization, there are fewer opportunities for promotion, and the criteria for promotion are more stringent.

The question facing employers is how to manage this issue in a way that minimizes legal risks. Before discussing some tips in making some of the normal day-to-day employment decisions, we felt it would be useful to briefly discuss how the courts analyze age discrimination claims.

How Courts View The Issue

The courts typically categorize age discrimination claims based on how an employee intends to prove the claim. In cases where there is a single plaintiff, an employee will try to prove intentional discrimination by using either direct or circumstantial evidence. Direct evidence usually consists of alleged statements by the person who made or participated in making the employment decision, which indicate that the employee's age was a factor in making the decision. Some examples are:

- comments by the manager making the decision or recommending the decision that the employee is "over the hill," "too old to do the job," or "needs to retire";

- statements in job advertisements suggesting an intent to discriminate based on age, such as "Looking for motivated, young self-starter," "Prefer new high school or college graduates," or "Delivery boy wanted"; or
- statements or questions in documents included in the personnel records concerning age.

Employees may also attempt to prove there was intentional age discrimination by circumstantial evidence. They can do this if:

- similarly situated employees who are meaningfully younger, such as five to six years younger, were treated more favorably;
- the reason articulated by the employer for the action is not supported by the underlying evidence;
- the employee's age is noted on the employee's personnel records or other records that were reviewed by the decision maker; or
- the employee's personnel evaluations consistently rated the employee satisfactory or higher.

Where employees have no persuasive direct or circumstantial evidence, they may attempt to prove their case by showing that the company relied on an objective factor, or a subjective decision-making system, which has a statistically-significant adverse impact on older workers. This category of claims is usually referred to as disparate-impact cases. Even if an employee is able to identify a specific employment practice that has a disparate impact on older employees, the employer can, nevertheless, lawfully continue to use the practice by proving the practice is based on reasonable factors *other than age*.

How To Avoid Trouble

Following are some useful suggestions you can follow in order to minimize your legal risks when making some typical employment decisions involving an older worker. Of course, first and foremost, while the scenario involving Alan Silver discussed above is not, in any sense, an aberration from what often happens, it cannot be stressed enough that an employer cannot and should not stereotype its employees based on their age.

Here are some additional points to remember:

- base your employment decisions on job-related criteria;
- apply the job-related criteria consistently to *all* candidates potentially affected by the employment decision;
- train your managers involved in making the employment decisions on the company policies and legal prohibitions against age discrimination and the importance of using job-related criteria for making the decision;

- if the older employee was hired in the last four or five years, include the manager who hired the employee as one of the decision makers if not the key decision maker;
- include managers who are in a similar age group as the older employees potentially affected by the employment decision; and
- if you use performance evaluations, make sure they are valid and job-related and that the managers completing the performance evaluations have been properly trained on how to evaluate their employees.

The importance of doing performance evaluations properly can't be stressed enough. When defending age discrimination claims that the older employee was unlawfully passed over for promotion, we often are faced with attempting to explain a history of positive or satisfactory performance evaluations when the reason for the decision was based on unsatisfactory performance.

While it's beyond the scope of this article to discuss in any detail what's required for a valid performance evaluation, some of the critical requirements include: 1) using only job-related criteria in your evaluation; 2) clearly communicating those job requirements ahead of time to the employee; 3) basing your evaluation on specific demonstrated behaviors as opposed to general traits; 4) ensuring that the job criteria being used are being applied consistently by all evaluators; and 5) training your evaluators to avoid common mistakes and biases in completing the evaluations.

Following these few simple guidelines can not only help you avoid costly litigation, it will also ensure that you are making the most of one of your company's most valuable resources – its older employees.

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