

The aging workforce: Give older workers a boost and avoid age discrimination

The aging workforce continues to grow. How you manage them should be top of mind.

Clara Burns, partner at Kemp Smith LLP, points out that the institutional knowledge and experience that older workers possess—skills honed in the rough arena of cold business reality—are invaluable. She reveals how to give these employees what they really want, while making sure they still give *you* their all:

- 1. Eliminate old thinking about the timing of retirement.** Age 65—what's that? An arbitrary number, perhaps even an unrealistic one. We're staying healthier longer, and yes, our expenses seem to keep climbing. Embrace the notion of "phased retirement," in which a pre-retiree is invited to reduce his or her workload over an extended stretch of time.
- 2. Give them a chance to mentor.** Mentoring is an expression of appreciation and respect for a valued employee, a chance to rekindle enthusiasm that might be fading and a good way to show someone younger the ropes. It also brings two generations together for an eye-opening series of exchanges. This can also sometimes get the older person in the equation more comfortable with the tech that the younger one might be working with more smoothly.
- 3. Get comfortable with job-sharing,** telecommuting and flex time. Burns describes older workers as often being "differently motivated," not necessarily less so. The powerful desire to spend more time with one's family—and perhaps someone at home who needs to be cared for—is difficult to understand when you're not in that situation. Ask yourself: Does this person absolutely need to be physically here 40 hours a week to get the job done?
- 4. Try intergenerational teaming for surprising results.** When you let workers choose their own teams for every project, you might start to see generational divides. Forcibly break them once in a while. Also, include age-related education in your diversity training. Sure, you might be flawlessly obeying the law in regards to age discrimination—but those are just words on paper, after all.

Need to lay off older employee? You can do so without violating age discrimination laws

Older workers who lose their jobs often sue. If your organization is contemplating a reduction in force, be sure to conduct a quick self-audit for hidden age discrimination. Calculate the average age of the workers you plan to retain and compare it to the workers you plan to terminate.

Recent case: Karen, who was over age 60, worked in HR for a child care chain.

Then a larger day care chain purchased her employer. The new owner already had a large HR department. During the transition, it began assessing each HR employee's job duties and identified some employees for termination. Karen became one of those designated for layoffs.

She sued, alleging that she had been terminated because of her age and that younger employees assumed some of her duties.

The employer countered that it compared the average age of those it retained with those it terminated. The age was higher for those retained by a fraction of a year. Thus, it argued, it could not have discriminated on the basis of age.

The court let Karen present evidence that the underlying motivation for termination was *her* age, even if the average ages were close. She pointed out that she was about 15 years older than either the average retained or average terminated employee. But she could not point to any specific evidence, such as ageist comments, that the decision-makers were biased against older workers. That killed her case. (*Mazarki v. Bright Horizons*, MD PA, 2018)

Eliminating an older worker's job doesn't necessarily mean you are committing age discrimination—as long as you don't replace the worker with someone substantially younger.

To prove age bias in that case, the discharged older worker would have to show that another similarly situated younger worker was treated more favorably. And that would require her to show that the two of them held almost identical jobs.

Recent case: Julia, who was born in 1944, lost her job as the HR director for the American Paint Horse Association. At the time, she was terminated because the CEO needed to "reduce head count," not because of poor performance. The association outsourced Julia's duties.

She sued, alleging age discrimination. She argued that since the association didn't fire the much younger director of accounting, then age must have been a motivating factor in her termination.

The court tossed out Julia's case. It concluded that Julia hadn't shown that she and the accounting director held the same or an equivalent position. That meant she could not use the younger woman as proof that someone younger was treated more favorably because of her age. (*Mitchell v. American Paint Horse Association*, ND TX, 2019)

Advice: Beware one potential trap some employers fall into: They fill the position with an older worker as soon as they hear that the fired one will be filing suit. A judge may consider that evidence of guilt.