

How to steer clear of Age Discrimination in Employment Act lawsuits

An older gentleman comes in for a job interview. In the interest of making polite conversation and getting to know the applicant better, you ask if he has any grandchildren. It seems like a natural question, but you may have just made a big mistake.

Could this well-meaning comment be construed as age discrimination? Drawing attention to an applicant's age is risky territory. If you later chose a younger applicant for the position, this man may feel as though his age was a factor in your hiring decision. What counts as age discrimination and how can you avoid committing it? Let's take a closer look at the current laws governing age nondiscrimination so you can steer clear of potential lawsuits.

Age discrimination under the ADEA

Age discrimination occurs when job applicants or employees are treated unfavorably on the basis of age. Discrimination occurs when age is used as a factor in employment decisions such as hiring, promotions, and terminations.

Under the Age Discrimination in Employment Act of 1967 (ADEA), employers with 20 or more workers cannot engage in personnel practices that discriminate against employees or applicants that are 40 years of age or older. In addition, those employed by employment agencies, labor organizations, the federal government, and state or local government agencies are protected under the ADEA regardless of the number of employees in your organization.

It's also important to check your local state laws, as some states have extended ADEA protections to other employers with less than 20 employees.

Employees that feel as though they have been victims of age discrimination can file complaints with the Equal Employment Opportunity Commission (EEOC) within specified time limits. Having EEOC complaints filed is bad news for business owners, so it's best to proceed with caution and ensure that all ADEA obligations are being met.

Proving age discrimination under the ADEA

Workers over 40 who are terminated have two ways to prove age discrimination under the ADEA: the direct method and the indirect method.

To be successful under the direct method, a plaintiff must produce direct evidence of age discrimination. The evidence may consist of deposition testimony containing discriminatory statements or other evidence revealing that management held a bias against older employees.

Under the indirect method, first, a plaintiff must establish a prima facie case by demonstrating that they:

1. Are within the protected class. In the case of age discrimination, this means that they are age 40 or older.
2. Performed their job satisfactorily.
3. Were discharged from their job position
4. Similarly situated, substantially younger employees were treated more favorably.

Second, if the plaintiff is able to establish a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the termination.

Third, the plaintiff must then show that the employer's reason was a pretext for discrimination. However, at this third stage, the plaintiff is not required to produce any new or additional evidence, according to a U.S. Supreme Court ruling in an ADEA case. The court stated in the *Reeves v. Sanderson Plumbing Products* ruling that if evidence in the record contradicts the employer's reason, the case can proceed to a jury.

Defenses against age discrimination claims

Most age discrimination cases grow out of wrongful discharge and mandatory retirement policies. However, they can involve any adverse change in working conditions, including denial of a promotion or training.

An employer may defend itself on several grounds including:

1. The employee's age represented a bona fide occupational qualification (BFOQ)—that is, an older worker could not perform the job by virtue of his age. For example, age qualifies as a BFOQ for pilots, who cannot receive FAA certification if they are older than age 65.
2. The employee was terminated for just cause as the result of misconduct, performance issues, or incompetence.
3. The employee was discharged for business necessity. In this defense, the employer must prove the existence of valid business reasons, unrelated to age, that required the termination of the employee. A common example of this would be layoffs that occur due to financial difficulties.

Factors such as the higher cost of salary, overqualification, and lesser years of remaining service are considered to be closely tied to age and thus are not reasonable factors for termination under age discrimination laws.

Mandatory retirement under the Age Discrimination in Employment Act

You can't just force out older employees anymore. Setting age limits for mandatory retirement is no longer allowed in most cases.

In 1986 an amendment was added to the ADEA banning mandatory retirement at any age, regardless of any early retirement provisions in applicable employee benefit plans or seniority systems. This amendment does not preclude provisions permitting employees to elect early retirement at a specified age.

However, there are two exceptions to the ban on mandatory retirement. The first exception is if age is a bona fide occupational qualification. As discussed previously, if age is a BFOQ for a position, employers may discharge employees due to age or require that they retire. This is commonly seen in public safety roles such as police officers and first responders.

The second exception is for employees that are employed in high policy-making or bona fide executive

positions. If an employee is at least 65, has held a high policy-making or executive position for the preceding two years, and is entitled to receive employer-financed pension benefits or other retirement benefits of at least \$44,000 annually, they may be subject to mandatory retirement policies.

Employer strategies for dealing with an aging workforce

The U.S. Department of Labor's Office of Disability Employment Policy studied the intersection of an aging workforce and disability claims. In 2019, it released *Employer Strategies for Responding to an Aging Workforce*.

The study proposed these strategies for employers when dealing with older workers:

- **Data collection policies.** Employers should not collect information about age and should not stereotype employees based on age.
- **Job descriptions and evaluations.** Employers must carefully craft fact-specific job descriptions and include measurable expectations for every position. Employees should be evaluated at regular intervals and the results should be well documented.
- **Layoffs, terminations and advancements.** Decisions about layoffs, terminations or advancement in the organization should be based upon the objective evidence in personnel records. Any employer who conducts a layoff should evaluate its impact on protected groups, including older workers. Employers should periodically collect and analyze data regarding the impact of employment conditions upon older and younger workers.
- **Reducing compensation and benefits.** Employers should explore whether they can retain older workers whose salaries and/or benefits are more consistent with those paid to younger workers to avoid adversely affecting older workers because of expense.
- **Employment decisions based upon subjective criteria.** Employers should strive to maintain accurate and comprehensive records of factors considered in the decision-making process since the employer may need to provide such records as proof that the factor was justified (i.e., not age related).

Staying on the right side of the law

Employment law is complex. It's not difficult for business owners to inadvertently find themselves in violation of employment laws. In order to avoid charges of age discrimination, lawsuits, EEOC complaints, and other tricky legal situations it's important to stay up to date on employment law and employer responsibilities.

If you need help navigating the complicated and often cumbersome business laws, check out *The Employer's Practical Legal Guide*. This guide features easy-to-follow explanations on all forms of discrimination laws as well as other relevant employment laws for business owners.