Age Discrimination Update - Part 2

September 5, 2012

In the Spring edition of Legal Currents, we published an article entitled "Age Discrimination Update - Part 1." It discussed recent labor statistics, commonly expressed attitudes toward age in the workplace, and a primer on the Age Discrimination in Employment Act ("ADEA"), the federal law that prohibits discrimination against employees who are aged 40 or over. Part 1 also summarized important ADEA enforcement issues. Part 2 will address additional issues confronting the employer, including compliance with the ADEA and other laws that relate to a growing segment of the labor force.

Compliance

Compliance with the ADEA is not difficult. One prohibition is quite explicit: Subject to a narrow exception, job notices and advertisements may not specify age preferences. For example, a job notice which reads "Seeking energetic recent college graduate, age 22-30," most likely would violate the ADEA. Likewise, phrases including terms such as "young," "boy," or "girl" should be avoided. Specification of an age limit is legal only in rare circumstances where age is shown to be a "bona fide occupational qualification" ("BFOQ"), a topic discussed in detail below.

Employment applications and interview protocols should be scrubbed clean of any questions which would elicit information about an applicant's age. Open and obvious attempts to establish age, date of birth, year of graduation from high school, and the like are to be avoided in the selection process. The ADEA considers this to be data that would not assist an employer in selecting the best candidate on the basis of performance-based criteria. Furthermore, once the employer has acquired the information, the final decision could be tainted. Age-related information in the record may serve as the bootstrap for a charge of discrimination.

However, the Equal Employment Opportunity Commission ("EEOC"), the agency which enforces the ADEA, does not consider the request for such information a per se violation of the ADEA. There are conceivably good reasons for requesting a person's age or date of birth, perhaps to verify other information in a background check (although name and social security number may be sufficient even for that purpose). The EEOC will closely scrutinize the application and interview process to rule out any ulterior motive.

The best practice is to defer requesting the age or date of birth information until the individual is on board as an employee when the information is needed for insurance enrollment, I-9, and payroll purposes. In fact, date of birth is not even a required field now in many payroll systems.

So long as the employer can demonstrate that there are performance-based reasons for selecting a younger applicant or, for that matter, taking action that adversely impacts a protected incumbent employee, the current state of the ADEA is still actually favorable to the employer relative to the other discrimination laws. In Part 1 of this article, we discussed the United States Supreme Court's decision in *Gross v. FBL Financial Services, Inc*., which held that in a mixed motive case (one in which there is evidence of age discrimination together with some other motivation for job action), the employee has to prove that age was the "but for" cause of the adverse action. This burden is more onerous than the burden of proof in cases of alleged discrimination under Title VII (on the basis of sex or race, for example), which requires only a showing that the protected trait or characteristic was a motivating factor.

A bill pending in the United States Congress, S. 2189, would specifically modify the language of the ADEA to require alignment with the other laws prohibiting discrimination. If amended, the ADEA would then only require the employee to prove that age was *a* motivating factor, not *the* "but for" cause. This Bill, the explicit purpose of which is to overturn *Gross*, remains in the Senate Committee on Health, Education, Labor, and Pensions at this time.

A related principle of ADEA law likewise falls on the employer's side of the equation. An employer need not prove "business necessity" to avoid liability under a disparate impact claim, but will have a valid defense if it can prove "Reasonable Factors Other than Age" ("RFOAs"). If an otherwise neutral policy, rule, or practice has the effect of harming older workers, it would still withstand legal scrutiny if it is reasonably designed and administered to achieve a legitimate business purpose. Again, this defense applies only to disparate impact cases (those based on unintentional discriminatory actions), and not to disparate treatment cases which involve intentional discrimination against older workers. Here again, the ADEA is less stringent on the employer than Title VII which requires the employer to show "business necessity" to avoid a finding of employment discrimination based on race, color, religion, sex, or national origin. RFOAs are discussed in greater detail below.

The ADEA and Employee Benefits

The ADEA prohibits discrimination against employees who are aged 40 or over in all terms and conditions of employment; therefore, employee benefit plans must maintain equality between the amount spent on benefits for older and younger workers. Employers may not pay less in benefits to members of the protected class than they pay to younger employees.

In addition, the Social Security Act prohibits an employer having 20 or more employees who sponsors a group health plan to require its employees who are aged 65 or over to look to Medicare as their primary payor for healthcare. The benefits offered to employees who are aged 65 or over must not differ in any way from the benefits offered to employees who do not have access to Medicare coverage. The employer's group health plan must be the primary payor for those benefits and must not take into account the entitlement to Medicare of the "working aged." Employer plans may also offer coverage for items and services which Medicare does not cover (such as eyeglasses).

Employers are required to inform employees who are entitled to Medicare that they may reject coverage under the employer's plan and choose Medicare as their primary payor, but the employer may not offer, facilitate, or subsidize a plan intended only to supplement Medicare's benefits. Employees who reject coverage under their employer's group health plan may purchase Medicare supplement (Medigap) coverage from a source other than the employer, but the employer may not subsidize or arrange for the employee's individual supplement policy. Bottom line: employers having 20 or more employees cannot play the employer-sponsored group health plan against Medicare for the "working aged."

The same principles do not hold true for retirees. The EEOC, anxious to avoid an incentive for employers to offer no coverage for retirees, promulgated a rule providing that it is not a violation of the ADEA to alter, reduce, or eliminate health benefits for retirees when they become eligible for Medicare or comparable state health benefits.

Exceptions to the Prohibition against Age Discrimination

Although the purpose of the ADEA is to allow people to work regardless of age as long as they are able to do the job, there are exceptions to its coverage. Mandatory retirement may be permissible in the case of firefighters and law enforcement officers. Also, compulsory retirement of bona fide executives and high policymakers may be legal under certain circumstances. For this latter exception to apply:

- The individual must have attained 65 years of age; *and*,
- For the two-year period immediately before retirement, the employee must have been employed in a bona fide executive or a high policymaking position; *and*,
- The employee must be entitled to an immediate nonforfeitable retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, *of the employer*, which equals in the aggregate at least $44,000 annually.

Further, while the ADEA no longer allows a tenured university or college professor to be legally subject to mandatory retirement at age 70 (that exception expired in 1994), it still allows institutions of higher education to offer tenured employees "supplemental benefits" to encourage them to voluntarily retire. The supplemental benefits must be above and beyond retirement or severance benefits generally offered to other employees of the institution. "Phased retirement" programs are offered to faculty at many universities to allow older faculty to exit by stages.

Employer Defenses to Age Discrimination Claims

There are defenses available to an employer accused of age discrimination. One such defense is that of a bona fide occupational qualification, or "BFOQ," which allows employers to impose age limits in appropriate cases. To establish a BFOQ, the employer must prove that the age limit imposed is reasonably necessary to the essence of the employer's business and that the employer is compelled to rely on age as the determinative criterion. The employer must prove that its business has a specific, articulable basis for the requirements. Stereotypes will not do. A job, therefore, may not be restricted to younger workers just because it requires heavy lifting or long hours. The BFOQ defense is most often raised when age limits are justified by public safety concerns. For example, the Federal Aviation Administration's "Age 60" rule for airplane pilots is one such BFOQ.

Other recognized defenses to ADEA claims are for "Reasonable Factors Other than Age," or "RFOAs." Of course, performance-based reasons are the ultimate ADEA defense. Failure of an employee to meet the reasonable performance standards to which others are held constitutes a reasonable defense for job actions up to, and including, termination of employment. Under the ADEA, there is no such thing as reasonable accommodation for age. In the absence of disability, the question is solely whether or not the person who is aged 40 or over can perform the job duties. The law of reasonable accommodation is part of the Americans with Disabilities Act, not the ADEA. Age is a protected status, not a disability.

Cost-cutting may be a legitimate RFOA if based on criteria unrelated to age. For example, the employer may determine, based on an objective measurement, that a higher paid employee is not as productive as employees who are paid less. The less productive, more highly paid employee can be let go to reduce costs. Cost-cutting cannot serve as a proxy for age discrimination, however. The employer may not simply replace older, better-paid workers with younger people who will do the same job for less pay.

The EEOC has issued some elaborate guidance to determine whether an employment practice is based on RFOAs. Individualized consideration will be given to:

- The employer's stated business purpose;
- The extent to which the employer has accurately defined the factor and whether it is applied fairly and accurately;
- The extent to which managers and supervisors are trained to apply the factor without engaging in discrimination;
- The extent to which the employer has limited the supervisor's discretion to act based on subjective judgments;
- The extent to which the employer assessed the adverse impact of the practice on older workers; and,
- The degree of harm to individuals within the protected age group.

The employer is not required to search for and use the least discriminatory method for achieving its purpose, but the employer's cognizance of harmful impact and its efforts to mitigate it will be relevant in establishing a successful defense. The employer is not even required to show that it used each and every one of the considerations listed above to establish the defense.

The ADEA allows employers to observe the terms of a bona fide seniority system. The seniority system, however, cannot be used to require or permit the involuntary retirement of anyone aged 40 or over unless the employee falls within the bona fide executive or high policymaking exemption (as discussed above). The bona fide seniority system provision of the ADEA has prompted relatively little commentary as seniority systems by and large favor older workers. Furthermore, voluntary early retirement incentive plans may be legal under the ADEA so long as there is compliance with the Older Workers' Benefits

Protection Act.

Another related concept is that of firing an employee with the intent to prevent vesting in the employer's pension plan. Such a job action is illegal under another law, the Employee Retirement Income Security Act ("ERISA"). The termination, however, does not necessarily constitute a violation of the ADEA even though the employee's years of service are related to age.

Often, other factors can be pretexts for age discrimination, in which case an ADEA violation may occur, especially where the other factors are highly correlated with age. Nevertheless, age can get lost in the shuffle. In the 2008 case of *Kentucky Retirement Systems v. EEOC*, the United States Supreme Court upheld a state retirement plan that imputed additional years of service to employees who became disabled before reaching eligibility for retirement at age 55 but, for purposes of calculating pensions, did not impute additional years of service to employees who became disabled after attaining eligibility for retirement. The difference was based on pension status and was designed to provide pension benefits to disabled employees. The Court held that it was not actually motivated by age. Consequently, the retirement plan did not violate the ADEA.

Retirement Plans

Normally, a retirement plan participant must begin receiving required minimum distributions ("RMDs") from a plan annually starting with the year the participant reaches age 70½ or, if later, the year in which the participant retires. Exceptions are made for Simplified Employee Pensions ("SEPs") or SIMPLE IRA plans, or when the participant is a five percent owner of the business sponsoring the retirement plan. In those exceptional cases, the RMDs must begin when the participant reaches age 70½, regardless of whether the participant has retired.

Furthermore, employers must continue to make plan contributions for any employee who has turned 70½ and is receiving RMDs from the plan. Employers must also give these employees the option to continue making salary deferrals if the plan permits. Failure to follow the terms of the plan may cause it to lose qualified status.

The Internal Revenue Service ("IRS") has issued guidance on these issues in *Employee Plans News, Issue 2011-7* (October 12, 2011). The IRS also publishes Frequently Asked Questions (and answers) on its website regarding RMDs, as well as a comparison chart explaining differences between RMDs in IRAs and Defined Contribution Plans.

Severance Agreements and Settlements

There are occasions when the employer and employee reach a meeting of the minds in a disputed case, adjusting the employee's rights and remedies under the ADEA. Mutual assent of this sort may come in conjunction with a separation from employment or in the wake of a dispute over terms and conditions of employment. The agreement or settlement may involve something the employer would like to get (for instance, the employee's resignation or retirement from employment) in consideration for monetary incentive or severance. In turn, the employee will agree to release the employer and will waive any further claims under the ADEA.

Under the Older Workers' Benefits Protection Act ("OWBPA"), an enforceable release and waiver can be agreed to by the employee so long as all of the following conditions are met:

1. The agreement must be knowing and voluntary;
2. The agreement must be written in a manner calculated to be understood by the employee signing it;
3. The agreement must specifically refer to claims arising under the ADEA;
4. The agreement must not purport to waive claims arising after the date of execution;
5. The employer must provide consideration for the release of the ADEA claims over and above any compensation to which the employee would otherwise be entitled;
6. The employee must be advised in writing to consult with an attorney prior to executing the agreement;
7. The employee must be given at least 21 days to consider signing the agreement; and,

8. The agreement must allow the employee to revoke the agreement up to seven days after signing.

If the agreement is offered in connection with a group discharge, an early retirement incentive plan for a number of employees, or the typical reduction in force ("RIF"), then the requirements are different in a couple of respects. First, the employer must publish to those to whom the incentive is offered the job titles and ages of all employees in that category, as well as the ages of the otherwise similarly-situated employees who will be retained. The potential for disparate impact is then brought to the forefront by this device. Second, the 21-day period is enlarged to 45 days.

The downside in such cases is not just in faulty paperwork. The employer also wants to avert disparate impact on employees who are aged 40 or over. For example, an employer making a 30-person RIF resulting in loss of employment for 30 employees who are each aged 40 or over would violate the ADEA. On the employees' side of the case, there is strength in numbers. Class action lawsuits are permitted under the ADEA, and a viable collective action does allow people to pool their resources, time, money, and moral support. Similarly-situated individuals may opt into class actions challenging not only discriminatory layoff plans, but also selection processes and other patterns or practices of age discrimination. Selecting the array of individuals who will be incentivized to resign or retire should be based solely on performance-based considerations.

The Internal Revenue Code may also have something to say about a separation agreement reached by an employer and employee which includes the employer's promise to make payments to the employee in the future, i.e., deferred compensation. A deferral of compensation occurs if the employee obtains a legally binding right to compensation in one year that is payable in a later year. Section 409A of the Internal Revenue Code governs any such arrangement that defers compensation other than a qualified employer plan or any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan. Unless an exception to Section 409A applies, compensation deferred under any other plan would be includable in the employee's current income – and, therefore, taxable in the current year – to the extent the compensation is not subject to a substantial risk of forfeiture and not previously included in income. In addition, the employee would have to pay a penalty equal to 20% of the compensation which is required to be included in income, as well as interest.

An arrangement that provides for severance payments upon involuntary separation from employment may not be subject to Section 409A if certain requirements are met. To qualify for this exception, the payments must be available *only* upon an involuntary termination of employment. Also, to fit within the severance exception, the payments must be made no later than the end of the second calendar year following the year in which the employee terminates employment and the payments must be the lesser of twice the employee's annual compensation or twice the IRS limit, currently $250,000 for 2012. Any excess would still be subject to Section 409A unless another exception applies.

Conclusion

The participation of baby boomers in the work force is increasing. While the percentage of male baby boomers in the work force was 43.2% in 2004, that number is projected to increase to 46.3% in 2014. And the figures for female baby boomers are even more staggering. In 2004, female baby boomers comprised 24% of the work force. That number is projected to increase to 35% in 2014. These statistics are all the more remarkable for those who recall that just a generation ago, a lengthy, active early retirement in a nice location was within the grasp of many.

The struggling economy is forcing many older workers to remain in the work force longer than expected, either because they cannot afford to retire, or because they simply prefer not to "take it to the barn" quite yet. Consequently, employers also are facing the challenge of operating their businesses within laws that are increasingly relevant to these growing numbers of aging employees.

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