

HIGH TECH

LAW & TECHNOLOGY

Age discrimination a real concern at high-tech firms

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In industries where employees must keep pace with rapid changes in technology, companies often value workers with advanced skills over workers who have more years of experience. And when companies attract younger and more recently trained workers who also have lower salary expectations, it often can be tempting to let older, more highly paid workers go.

Thus, a dilemma: How can technology-based companies remain competitive while avoiding age discrimination?

While the termination of older workers (at least 40 years old) may be justified at times, the decision to fire someone should not be based on age. If it is, the stakes are very high.

It is against the law to discriminate on the basis of age when firing or hiring. In the wake of recent rulings such as *Harnett v. CSA Financial Corp.*, in which the plaintiff was awarded \$1.7 million in damages, aggrieved employees in Massachusetts are now more likely to litigate.

In similar cases of age discrimination, employees can receive major compensation in lost wages and emotional distress. What's more, the actual damages may be tripled, and the employer may have to pay the employee's attorney fees.

With this as a backdrop, employers are well advised to exercise due diligence with older workers in their employ they should also think twice before terminating these workers. And they should move swiftly to engage counsel if legal action is imminent

What follows is a road map to help management avoid liability:

Exercise caution before termination

While older workers are still on staff, management should avoid being shortsighted or hasty. Management's actions should prevent employees from being able to argue that the reasons they were given for termination are only a pretext for age discrimination, as illustrated in the examples below:

Outdated skills –

A typical rationale for firing is that an employee's skills are outdated. Too often, however, employers transparently try to fulfill the prophecy by assigning less demanding work to older workers, then claiming that they are less productive. Ironically employers frequently underestimate the skills of these workers, taking the attitude that you "can't teach an old dog new tricks."

In many instances, 50-year-olds have, in fact, performed advanced tasks through the years, making them at least as proficient as workers 20 years younger. In this light jurors may well view the outdated skills rationale as shallow.

Age gap –

Another specious justification is the so-called age gap. For example, managers revered for being hard-driving throughout their careers might be summarily dismissed because they are deemed "too demanding" or not in tune with younger workers.

A corollary of this can occur when the older worker is a commissioned marketing representative. If his or her responsibility is sales rather than management, then termination based on a lack of communication with younger marketing reps may not ring true.

Training –

In technology fields, training is often required to keep abreast of industry changes. If the employer doesn't select older workers for training, this may serve to establish pretext

Reorganization –

In the event of reorganization, older workers must receive a fair chance to compete for new positions. Too frequently, however, employers don't interview older workers, or claim they were considered but simply lost out.

Another tactic is to describe the reorganized position erroneously. For instance, the employer may say that the position requires a specific skill when that skill actually comprises just a small part of the overall work. Here again, a jury may see this strategy as a thinly veiled pretext

Changing corporate culture –

The modern organizational paradigm is moving away from a hierarchical structure to that of flat organizations working in teams. Older workers may feel threatened by such changes, but that doesn't give employers a license to presume that older workers can't adapt.

Prepare a termination checklist

Even if management passes the "smell tests," there are further considerations that should precede a decision to fire an older worker. A final checklist includes the following:

- Has management adequately communicated the older worker's deficiencies?
- Has the older worker received an opportunity to make the necessary adjustments?
- Has management planned to deal with an older worker's reticence to change?
- Has management adequately documented its efforts to counsel older workers through employment evaluations and other progressive disciplinary or counseling efforts?
- Has management considered the prospects for the older worker's future employment?

One additional Factor. Is the older worker the only one being terminated, or is he one of many employees of various ages to lose their jobs? In the latter case, the employer will be in a stronger position.

Dealing with a claim

If management learns of an actual or imminent claim, it must be proactive. This involves seeking counsel, trying to settle quickly, or preparing for trial.

Seeking counsel –

It is best to engage competent counsel before terminating an employee. Such counsel can objectively evaluate records that are key to a defense. In the unlikely event of an internal complaint, it is critical to conduct a prompt, comprehensive investigation, report the results, punish the wrongdoer, and otherwise remedy the wrong.