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How companies can avoid age discrimination litigation

With so many sectors of the employment market, how can companies maximize productivity and maintain staff compatibility? It's not easy. In fact, it can be outright dangerous.



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In the progressive workplace culture of the '90s, older workers with more traditional experience are often viewed as less adaptable than their younger counterparts. When companies seek more recently trained employees, it's tempting to hire younger applicants with lower salary expectations. It's also tempting to let go of older, more highly paid workers to decrease expenses further. Careful. Age discrimination is illegal and the stakes are very high.

Plaintiffs can receive major compensation for lost wages and emotional distress. What's more, the actual damages may be tripled, and the employer may have to pay the plaintiffs attorney fees.

In the wake of recent rulings such as *Harnett v. CSA Financial Corp.*, in which the 63-year-old plaintiff was awarded \$1.7 million in damages, aggrieved employees are more likely to litigate.

Accordingly, companies should be open to hiring older candidates (at least 40 years old) and think twice before terminating older workers.

Check for age discrimination when hiring

While the hiring of younger workers over older workers may be justified based on qualifications, the hiring decision should never be based on age. To avoid age discrimination, carefully monitor all steps of the hiring process:

Recruitment. Recruitment practices should be designed to reach the widest array of applicants.

Note that companies can be held liable for acts of third-party recruiting agencies. Document directives

reversed for being hard-driving, might be dismissed for being too demanding or out of synch.

Outdated skills. A typical rationale for firing older workers is that their skills are outdated and they are untrainable. Too often, employers don't select older workers for training or they assign them less demanding work.

Thus, many employers who claim their older employees are less productive are actually limiting their opportunities.

Reorganization. Employers often use reorganizations as an excuse to let older employees go. Frequently, employers don't interview older workers, or claim they were considered for positions but lost out. This constitutes blatant discrimination.

Handling a claim. If you learn of an actual or imminent claim, recommend that your company seek legal counsel immediately.

When a complaint is lodged, the Massachusetts Commission Against Discrimination or the Equal Employment Opportunity Commission conduct investigations. In response, employers should not mount a defense without advice of counsel.

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If a trial is inevitable, diligent preparation is necessary.

Throughout the trial, try to humanize the company and prepare testimony to maximize the effectiveness of presentations.

Understanding the law. Age discrimination may be proved through direct evidence (e.g., a memo stating a need for fresh, young blood) or

to recruiters and specify that they comply with fair employment practices.

Job Description. One tactic used to attract younger workers--and deter older workers--is to describe positions misleadingly

For example, a position may be advertised as requiring a new skill when that skill comprises just a small part of the overall work. A jury may recognize this thinly veiled pretext.

Interview. First, never ask a prospective employee's age.

The question implies age as a factor in the selection process. Second, be sure all interviewers understand the job requirements to avoid rejection based on non-permissible criteria.

Also, conduct interviews with uniformity, since unstructured interviews expose employers to potential liabilities. And consider that interview notes may be used as evidence in litigation.

Exercise caution before terminating older workers

Consult with management before terminating an older worker. Be sure that the reason for termination cannot be considered a pretext for age discrimination such as:

Age gap. This is a specious justification often used when firing an older worker. For example, an older manager, once

circumstantial evidence.

In circumstantial cases, employees must prove they are at least 40 years old, could have performed the job or were performing the job satisfactorily and were overlooked in favor of or replaced by younger people with similar qualifications.

Proof of replacement isn't necessary in downsizing cases, but the employer must articulate a nondiscriminatory reason for termination. Then, the employee must prove the employer's stated reason was false.

In the final analysis, the legal and economic ramifications of age discrimination are avoidable.

Although some forms of discrimination insurance are available to businesses, it's up to conscientious company professionals to prevent age discrimination from happening in the first place.

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