THE AGE DISCRIMINATION IN EMPLOYMENT ACT
AND REDUCTIONS IN FORCE

C.W. VON BERGEN, Ph.D.*
BARLOW SOPER, Ph.D.**
SUSAN ANDERSON, J.D.***

INTRODUCTION

Every eight seconds an American turns fifty years old.1 While in 1900, the average life expectancy was 47 years, today it is 76. "We've turned the age pyramid upside down, and our institutions are not ready for it. In the early 1900s, the population swelled among young age groups, and thinned out as people aged. In the next 20 years, the population glut will move into the 65 and older age group."2 From a demographic perspective, the fact that the United States is an "aging" society is relevant to the new spate of age discrimination claims.3 To gain perspective on this demographic shift it should be noted that in 1960 the average age of the U.S. population was 25. By 1993 this average had risen to 33.5, and is predicted to reach about 36 by the end of the 20th century.4 As the average age increases, the group "protected" under age discrimination legislation (40 and older) is growing and this trend will continue leading one to reasonably expect that the absolute and relative incidence of employment discrimination suits brought by older workers will continue to increase.

With the discontinuance of the philosophy and traditional practice of a "career with the company" many older, experienced employees have been "reduced in force" or otherwise terminated by their employers. Not only are these employees highly experienced, many of them are in white-collar, professional, and managerial specialties, and may have both the motivation and the financial resources necessary to bring and sustain legal challenges against former employers.5 Therefore, not only may we reasonably expect increases in age discrimination in employment suits in the years ahead, but also relatively more of these suits may

---

*Associate Professor, Southeastern Oklahoma State University.
**Professor, Louisiana Tech University.
***Professor Southeastern Oklahoma State University.

5 David Lewin & Donna Mitchell, HUMAN RESOURCES MANAGEMENT: AN ECONOMIC APPROACH (South-Western, 2d ed. 1995).
proceed to court trials and be the subject of judicial decisions.

The purpose of this article is to provide an overview of age-related laws as they relate to reductions in force. With the present economic climate and an aging population, reductions in force will present serious legal consequences as it is more likely that terminated older workers will pursue age discrimination claims. The authors will give a brief overview of the Age Discrimination in Employment Act as it relates to reductions in force and will provide advice on how to limit an employer's legal exposure in age discrimination lawsuits.

A knowledge of the law (legislation) and how the law is interpreted (litigation) relevant to age discrimination are important starting points in avoiding ageism. Keeping in mind that legislation is a reaction to public sentiment, not a manipulation of social behavior, we see America's changing attitudes reflected over time. In the first half of the century we tended to view older workers as burdens and, accordingly, sought to aggressively retire them. As we moved toward the latter half of the century, our legislation became more and more geared toward tempering this trend. With the letter of the law now more in their favor, the employment conditions of older workers cannot be mandated or manipulated as in the past.

I. AGE DISCRIMINATION LEGISLATION

The key piece of legislation designed to protect older workers against age discrimination in hiring, retention, compensation and other conditions of employment is the Age Discrimination in Employment Act ("ADEA" or the "Act") of 1967. The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age in employment." Although there were proposals to include age in the original list of protected classes contained in the Civil Rights Act of 1964, Congress rejected these proposals. It was not until 1967, therefore, upon the proposal of the Secretary of Labor that the ADEA was passed.

The ADEA covers employers with 20 or more employees and unions with 25 or more members. Workers over the age of forty are protected by the Act. The Act is enforced by the Secretary of Labor and applies to any employer subject to Title VII of the Civil Rights Act.  

---

6 Crampton, supra, note 4, at 246.
8 29 U.S.C. Sec. 621(b) (1088).
10 HOUSE COMM. ON EDUC. & LABOR, AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, H.R. DOC. No. 805, 90th Cong., 1st Sess., reprinted in 1967 U.S.C. 2213, at 2219. Congressional testimony indicated that age forty was the point at which discrimination based on age becomes evident.
11 Hugh Eglit, AGE DISCRIMINATION, Sec. 16.11 (1982 & Supp. 1986.) Although originally applicable only to the private sector, 1974 amendments extended the protection to workers employed by local and state entities.
Act. There are several statutory exceptions to the provisions of the ADEA. For example, mandatory retirement at age sixty-five is permitted for those executive or policy making employees who have held their position for at least two years and whose annual retirement benefits attributed to employer contributions total at least $44,000. Also, exempted from jurisdiction are elected officials, political appointees, and their personal advisors. However, "any individual chosen or appointed by a person elected to public office in any State or political subdivision of any State... (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor..." is protected against employment discrimination on the basis of age by section 321 of the Civil Rights Act of 1991, which extended certain ADEA rights to political appointees and advisors. The prohibition of mandatory retirement policies does not pertain to certain firefighters, law enforcement personnel, individuals in jobs where public safety is at risk (e.g. airline pilots, bus drivers), nor to tenured faculty.

The legislative language prohibits discrimination which is arbitrary in nature and allows several statutory exceptions including discharge or discipline based on good cause and employment decisions based on "reasonable factors other than age." Additionally, an employer can defend against liability if age is a bona fide occupational qualification (BFOQ) reasonably necessary to the ordinary course of business. The BFOQ defense is in essence a statutorily allowed form of legal discrimination based on age. For example, Greyhound Bus Lines survived a court challenge to its rule that it would accept no applicants over 40 years of age to drive its buses. The company successfully contended that age was a BFOQ since it was related to the safe conduct of the bus line.

In 1990, the Older Workers Benefit Protection Act (OWBPA) amended the ADEA to require that waivers signed by older workers in early retirement situations be "knowing and voluntary." The amendments also affirmed the "equal benefit or equal cost" principle, under which an employer must provide older workers with benefits equal to those of younger workers, unless the employer can prove that the cost is greater. The effect of the OWBPA is that employers should have two separately worded severance agreements, one for employees under 40 and one for those over 40 years of age. It is anticipated that other age-related laws and regulations will be enacted in the future as the graying of America continues.

12 29 U.S.C. Sec. 630(b) (1988). Employers must have at least twenty employees.
16 Supra., note 15: Section 4(j) of the ADEA permitted hiring/retirement age limits for many such public safety officials. This section expired in December 1994; however, the section may be reenacted. The similar exemption for tenured faculty also expired; however, it is unlikely to be reenacted.
22 HOW TO MANAGE OLDER WORKERS, (American Association of Retired Persons, ed. 1994).
II. LITIGATION & REDUCTIONS IN FORCE

Reductions in force (variously called downsizings, reorganizations or right sizings) fall into three main categories: (1) Involuntary terminations which include plant closures, discharge based on poor performance, and early or mandatory retirement; (2) Layoffs under which the right to recall exists; or, (3) Voluntary separations or retirement in which incentives and special benefits are provided.23

A. ESTABLISHING AN AGE DISCRIMINATION CLAIM IN A REDUCTION IN FORCE

The mere fact that a reduction in force reduces the average age of the workforce does not in itself establish age discrimination.24 A disparate treatment age discrimination claim may demonstrate by either direct or indirect evidence that age was a motivating or determining factor in the employment decision.25 If a plaintiff presents direct evidence of illegal discrimination, the burden then shifts to the employer to prove that it would have taken the challenged action even if it had not been motivated by a discriminatory purpose.26

In the absence of direct evidence, the controlling case of McDonell Douglass Corp. v. Green,27 as further refined by Texas Department of Community Affairs v. Burdine28 and St. Mary's Honor Center v. Hicks,29 established that the plaintiff must first establish a prima facia case by producing sufficient evidence to create an inference of age discrimination. Then the burden shifts to the employer to demonstrate a legitimate non-discriminatory explanation for the action. If the employer meets this burden, then the inference of discrimination disappears30 and the plaintiff bears the burden of proving that the employer's explanation is a pretext for discrimination.

When there is a termination as a result of a reduction in force, the employer will have to establish a legitimate business consideration which prompted the reduction in force. The legitimate business consideration need not be financial distress. Attempting to improve profits is equally legitimate.31

Once the legitimate business purpose explanation is demonstrated by the employer, the burden falls to the plaintiff to establish (as a fourth element of a prima facia case) that age was a factor in the termination or that the employer did not treat age neutrally. Plaintiff may rely on statistics to establish the fourth element, in which case, some courts have required that the statistics show "a pattern of discrimination"32 on the basis of age. Other courts have required

29 Id. at 508.
30 Id. at 508.
a showing of "gross statistical disparities."³³ Age related comments may also be used to establish the fourth element provided the comments suggest that the employer may have considered improper factors in their employment decision.³⁴

In Matras v. Amoco Oil Company,³⁵ the Michigan Supreme Court examined the issue of a work force reduction and age discrimination. Amoco had developed a layoff plan that classified employees by age, sex and race which was designed to maintain a fixed percentage of workers in each category. Plaintiff, a terminated worker over forty, alleged age discrimination in his termination. He won a jury decision which was reversed by the Michigan Court of Appeals. In reviewing the case, the Michigan Supreme Court recognized that when the employer is making cutbacks due to economic necessity, the plaintiff must sustain an additional burden. In such a case, the plaintiff must also prove that age was a determining factor in the decision to discharge the older protected worker.³⁶

The Court addressed Amoco's guidelines for selecting workers for layoffs. The guidelines classified all employees in order to assure that protected groups were not disproportionately affected; however, Amoco never considered whether a neutral classification would have had a disparate effect on the protected groups. The Court found Amoco's guidelines to be discriminatory because they did not provide more protection to the employees within the protected groups. Instead, analyzed the Court, the plan gave each group protection only when compared to the other groups.³⁷

The plaintiff was then required to establish that the layoff would not have taken place if it had not been for the discriminatory guidelines. Although plaintiff had not introduced any evidence to show age as a determining factor, the court held that Amoco was in the best position to provide information showing that the plaintiff would have been selected for termination despite the discriminatory guidelines. Therefore age was held to be the determining factor behind the termination.³⁸

If a reduction in force adversely affects members of the protected group substantially more than others, liability may result. To rebut such a claim the employer must demonstrate that the disparity resulted from the application of job-related criteria rather than impermissible discrimination.

Additionally, any reviews conducted to assess adverse impact based on race, sex and age of employees should be conducted under the direction of a lawyer. Care should be taken that the assessment remains protected under the attorney-client privilege.

Documentation is important. Each an every document generated should be clearly labeled both as privileged attorney-client documents and should clearly state that documents were generated for the purpose of determining adverse impact based on sex, race and age and for the purpose of seeking legal advise based on the information revealed.

If the review process reveals that potential adverse impact issues may exist, management must reconsider and adjust preliminary decisions relating to reductions in force. Upon a

---

³⁵ 385 N.W.2d 586 (1986).
³⁶ Id.
³⁷ Id.
³⁸ Id.
revelation that reductions in force do indeed have an adverse impact on protected groups, management must modify the reduction in force plan so that members of protected groups are not adversely affected. If this is not feasible and management chooses to adhere to an initial reduction in force plan, it should take pains to document that its decisions were based on permissible job-related criteria.

B. EMPLOYER DEFENSES

Employer defenses against such ADEA claims usually fall into one of two categories: BFOQ or FOA (factors other than age). Employers using the BFOQ defense admit their personnel decisions were based on age, but seek to justify them by showing that the decisions were reasonably necessary to normal business operations (for example, an airline might insist that a pilot maximum-age requirement is necessary for the safe transportation of its passengers). An employer who raises the FOA defense generally argues that its actions were "reasonable" based on some business factor other than age, such as the terminated person's poor performance. Numerous suits under the ADEA have been filed involving workers over 40 who were forced to take "voluntary retirement" when organizational restructuring or workforce reduction programs were implemented.39

C. OTHER SIGNIFICANT LITIGATION ISSUES

1. ADEA AND JURY TRIALS

It should be noted that the ADEA allows jury trials in age discriminations suits. Since the average age of people selected to serve on a jury is over 40 and almost all jurors are now or were at one time employees, sympathy may lie with the employee.40 This is supported by an interesting finding from Miller, Kaspin, and Schuster who reviewed 53 ADEA federal court cases and found that in each of the six jury trials the decision was for the employee-plaintiff.41

2. THE ADEA AND EMPLOYER COSTS

In 1989, employers paid out almost three times as much in damages or settlements pertaining to EEOC age discrimination suits than in cases pertaining to EEOC race or job bias suits.42 Recent examples include the following. Schering-Plough fired 35-year employee Fred Maiorino after he twice filed to accept an early retirement offer made to all sales representatives. The jurors found that Maiorino's boss had plastered his file with negative

42 Ivan Pave, "They Won't Take it Anymore," ACROSS THE BOARD (Nov. 27, 1990), at 19.
paperwork aimed at firing him, rather than trying to help him improve his performance, and unanimously decided he had been discriminated against because of his age. They awarded him $435,000 in compensatory damages and $8 million in punitive damages. In another case the Equitable Life Assurance Society of the United States agreed to a $12.5 million settlement in a case involving 363 former employees. All were over forty years of age and had been fired, according to the company, as part of a cost-cutting plan. Other firms that have either lost age discrimination suits or settled out of court include Sandia National Laboratories, Atlantic Container Line, Textron, Connecticut General Life Insurance, ITT Corp., The Standard Oil Company of California, Sears, Roebuck and Co., American Express Company, and Monarch Paper Company. Much of the age discrimination litigation is in a state of flux and some feel that there may be a backlash against the ADEA. For example, equal-rights attorney for the American Association of Retired Persons, Cathy Ventress-Monsees cites numerous instances where judges held that ageist comments were not indicative of discrimination. In one case a supervisor's remark that "it's about time we get some young blood in this company" made two days before the plaintiff was fired, was dismissed as an "innocuous" and "humorous comment." A supervisor's suggestion in another case that "there comes a time when we have to make way for younger people" was deemed irrelevant because it was a "fact of life." Yet, in race or sex discrimination cases, judges often accept such disparaging remarks as evidence of discrimination. A study by Miller, Kaspin, and Schuster is consistent with the view that judges may be less sympathetic to employee plaintiffs in age discrimination cases. They reviewed six cases with a jury decision where performance appraisal evidence was central to the case outcome and noted that the jury found for the employee-plaintiff in each case. However, in three cases the district court judge subsequently granted the employer-defendant's motion for judgment notwithstanding the verdict, or vacated and overruled the jury's verdict as unsupportable. In a fourth case, the court of appeals reversed, finding no evidence to support the jury's finding of age discrimination.

### III. HUMAN RESOURCES MANAGEMENT ISSUES

Clearly, human resources planning needs to accommodate to the ADEA to avoid age discrimination charges. Beyond that; however, it is important that the organization develop personnel policies and practices that will enhance and maintain the motivation and morale of employees of all ages, including those 40 and over.

---

44 George Ruben, "Developments in Industrial Relations," 108 MONTHLY LAB. J. 47, at 47-49.
47 Id.
49 Id.
A. SPECIFIC EMPLOYMENT PRACTICES AND AGE DISCRIMINATION

Organizations should conduct periodic checks in the personnel-related areas of hiring, training and development, performance appraisal, benefits, downsizing, and employee relations to ensure that they are not practicing (intentionally, or otherwise) age discrimination. EEOC guidelines call for fair employment practices with regard to any measure used as the basis for personnel decisions. Following are some examples.

1. DISCHARGE

There are right and wrong ways to fire someone. The EEOC has explicitly cited the example below as The Wrong Way: 50

"I'm very sorry, Jones, you have been a very loyal and admired salesperson for these last two years, but we need to cut our staff and, unfortunately, you are the person who must go. We greatly appreciate your efforts on behalf of our company, and will of course give you the best possible references for any new employment you might seek."

Jones, who is aware that the employer recently advertised for several new sales positions, begins to question the truthfulness of the organization and may begin to reason that they are firing him because of his age and could start thinking about suing the organization. A Right Way scenario might be as follows: 51

"It is always difficult firing a person, Jones, but we did warn you. Last October, when you punched our best client in the mouth, we told you that any further such outbursts would cause you to be fired. Well, yesterday you burned down our warehouse, tried to shoot our Comptroller, and stole $50,000 from the company safe. We hope you'll understand why we won't be giving you a going-away party."

Jones, who did indeed take the anti-social actions described by the boss, may resent the firing, but (unless totally irrational) is highly unlikely to sue.

2. PERFORMANCE APPRAISALS

50 Supra. note 15, at D-9.
51 Id.
Performance and its appraisal plays a central role in the outcome of a considerable amount of ADEA litigation.\textsuperscript{52} Ensuring that age discrimination or any kind of illegal discrimination does not affect employment decisions requires that documentation of performance be completed by supervisors and managers. Terminations based on documented performance deficiencies not related to age are perfectly legal. When a retail collection manager over age 40 was terminated by Sears, after receiving five negative performance-appraisal ratings from five different supervisors, the termination was ruled to be performance based, not age discrimination.\textsuperscript{53} Ashe and McRae examined performance evaluation evidence in ADEA cases and concluded that the most important factors determining employers’ success in court were a formal, written performance evaluation system and objective evaluation procedures.\textsuperscript{54} They found that evaluation records indicate to the court that the employer has gone about the evaluation process in a conscientious and fair manner. It is also important that there be sufficient documentation supporting the personnel decision, particularly a layoff or discharge. Employees should be evaluated over a longer period of time and not just on the most recent performance appraisal. Otherwise, an employee with twenty straight “excellent” ratings may easily be able to convince a jury that the “poor” rating issued just before the firing was not a good faith appraisal, but rather an attempt to disguise an age-based action. A sudden drop in a performance rating may be viewed with suspicion by juries, particularly when the supervisor failed to give any notice to the employee of his or her apparent dissatisfaction with the employee’s performance.\textsuperscript{55}

Employers who conduct periodic, well-designed performance evaluations with formal appraisal interviews and make personnel decisions based upon the evaluation are more likely to successfully rebut a claim of discrimination. While some organizations have successfully introduced layoffs with such simple instructions to supervisors as “select those employees that you feel like you would miss the least,”\textsuperscript{56} the prevailing opinion is that more objective appraisal ratings and more impartial evaluations of ability and job performance are needed by the employer to successfully defend itself against disparate treatment charges.\textsuperscript{57} However, the presence of an appraisal system is no guarantee of employer success. In \textit{Oshiver v. Common Pleas Court}\textsuperscript{58} the court held in favor of the employee because the employer could offer no extrinsic or objective evidence of inadequate performance by the employee. In this case, the employer’s own performance appraisal evidence showed the plaintiff to be a satisfactory performer. Efforts by the employer to portray the employee as a poor performer through the oral testimony of supervisors were refuted by the plaintiff showing herself to be one of the highest scorers on a promotion examination. This decision should serve as a


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} Allison v. Western Union Telegraph Company, 680 F.2d 1318, at 1321 (11th Cir. 1982).

\textsuperscript{57} \textit{Id.}

message to employers that hastily developed appraisal evidence is unlikely to be treated as favorably as evidence that has been compiled through a period of contemporaneous performance appraisals. Various researchers point out that the existence of inflated or imprecise evaluations can make it very difficult for an employer to defend a negative action later.\textsuperscript{59} In an analysis of more that 50 age discrimination cases filed in federal court other research shows that employers who conduct periodic, well-designed performance evaluations of their employees and who use them to make personnel decisions are more likely to be successful in rebutting claims of age discrimination.\textsuperscript{60} However, an effective appraisal system will not necessarily prevent findings of liability in ADEA lawsuits, which may send a message to employers that they do not need to be concerned with designing and using one.\textsuperscript{61}

a. Age Bias in Performance Appraisal Systems

Findings indicate that courts will not allow management to disguise age-biased personnel actions as legitimate business decisions, as shown in the following cases in which the employee was a successful litigant. In Davis v. Ingersoll Johnson Steel Co.,\textsuperscript{62} it appears that top management manipulated the performance appraisal system to justify its termination of older employees. After Davis’ name appeared on a termination/retirement list, his supervisor was told by management to give Davis a lower performance rating even though he was performing at the same satisfactory level as in the past.\textsuperscript{63} In Guthrie v. J. C. Penney,\textsuperscript{64} the company had a written policy to conform to the amended ADEA, with the policy requiring store managers to retire at age 70. However, there was still an unwritten policy of forcing store managers to retire at age 60, which had been the written policy until 1978. For five years, Guthrie received satisfactory or above average performance ratings as well as merit pay increases. When Guthrie was 63 years old, he was one of only 21 store managers over 60 years old in Penney’s 1,700 stores nationwide. That year a reorganization placed Guthrie under a different district manager. The new district manager lowered Guthrie’s performance rating and set new performance goals, and Guthrie soon resigned. His replacement received a satisfactory rating although sales and profits declined. The court concluded that Guthrie had been subjected to tougher standards than his younger colleagues. In another case, Mastie v. Great Lakes Steel Corp.,\textsuperscript{65} the employer maintained that Mr. Mastie had been discharged in reduction-in-force efforts due to his poorer performance relative to other employees. Mr. Mastie presented personnel records reflecting an exemplary performance record and a history of merit-based, salary increases. However, the court found for the employer and said the controlling issue should be whether age was a determinative factor in

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} 628 F. Supp. 25 (S.D. N.Y. 1982).
\textsuperscript{63} Id.
\textsuperscript{64} 803 F.2d 202 (5th Cir. 1986).
the personnel decision, not the "absolute accuracy" or correctness of the personnel decision. Several other courts have established that it is not the role of the court to "second-guess" employers in their personnel decisions (i.e., did they really discharge the poorest performer or hire the very best person?). Essentially, the critical question in ADEA litigation is simply whether age was a "determinative factor" in a personnel decision. The difference in approach to jobs by older and younger workers may be incorrectly interpreted as inferiority on the part of the older worker. Younger workers, who are beginning their chosen profession, may show enthusiasm, energy, and ambition that lead to immediate dramatic advancement. Older workers, on the other hand, may be well established or nearing the end of their careers and may show discretion and wisdom. Older workers already at higher job levels without realistic hope for further advancement may still be excellent performers, yet not display the energy and ambition that is stereotypically characteristic of younger workers. Any evaluation of workers that uses subjective factors, such as "dedication" or "hard worker," should be examined carefully to ensure that the conclusions do not produce discriminatory results. In summary then, performance appraisal information gathered in an objective manner over an extended period can be important to rebutting charges of discrimination.

b. Early Retirement Windows

Most early retirement window plans are arrangements in which specific employees (often age 50-plus) are eligible to participate. The "windows" represents the fact that the company opens up (for a limited time) the opportunity for employees to retire earlier than usual. The financial incentive is usually a combination of improved or liberalized pension benefits plus a cash payment. One expert concludes that early retirement has become the method of choice for reducing mid-management and white-collar work forces, with about 13% of 362 employers surveyed providing such early retirement windows in one recent year.69

Other voluntary separation plans operate more like bonuses for leaving and may apply even to recent hires. The offerings are usually made regardless of age. The financial incentive is typically a cash payment that varies substantially by company but often is in the range of one week's pay per year of service. About one-third of those employees eligible to move through the early retirement windows accept the offer.70 Early retirement windows must be used with caution. Unless structured properly, early retirement programs can be challenged as de facto programs for forcing the discharge of older employees against their will.71 While it is generally legal to use incentives to encourage individuals to retire early, employees' decisions must be voluntary. In fact, in several cases individuals who were eligible for and elected early retirement later challenged their early retirement by claiming that their decision

66 Id.
71 Mark L. Colosi et al., Is Your Early Retirement Package Courting Disaster? PERS. J. (August 1988) at 59.
was coerced. In one case, for instance, employees were told on October 12 that they were eligible to retire under a "totally voluntary" early retirement program, but that they must inform the company by October 18 to take advantage of the offer. However, they were not informed of the details of the program (such as the amount of medical insurance and pension benefits for each individual employee) until October 15. This did not leave appropriate decision time, so that employees who had at first elected early retirement were able to subsequently sue, claiming coercion. The U.S. Court of Appeals for the Second Circuit (New York) agreed with their claim, arguing that an employee's decision to retire must be voluntary and without undue strain. Employers must exercise caution in encouraging employees to take early retirement. The waivers of future claims that they sign should meet EEOC guidelines. In particular, they must be knowing and voluntary, not provide for the release of prospective rights or claims, and not be an exchange for consideration that include benefits to which employees are already entitled. It should give employees ample opportunity to think over the agreement and seek advice from legal counsel. The OWBPA, signed into law in 1990, imposes specific limitations on waivers that purport to release a terminating employees' potential claims against employers based on age discrimination.

IV. AVOIDING AGE DISCRIMINATION CLAIMS WHEN ENACTING REDUCTIONS IN FORCE

The chief concern in 1967 when Congress enacted the ADEA was bias in hiring. Now, however, the biggest complaint of older workers is discriminatory firing practices, especially in connection with mass layoffs. About 60 percent of ADEA complaints to the EEOC now allege wrongful discharge, but only 10 percent charge hiring discrimination. This has developed because the pressure to lay off employees and reduce corporate employment rolls has been particularly intense during recent years due to changing economic conditions. Production cutbacks, plant closings, corporate mergers, restructurings and technological change have prompted a growing number of U.S. businesses to reduce their work forces or downsize. One of the areas that as been given particular attention under the ADEA is termination as a result of a reduction-in-force (RIF). Often the older workers' performance has not been objectively evaluated for a long period of time, yet they continue to be employed and receive periodic wage increases. As discussed previously, any RIF program care must be taken to be sure that age is not a factor in selecting employees terminated. If as a result

72 Paolillo v. Dresser Ind., 821 F.2d 81 (2d Cir. 1987).
73 Id.
74 Evelyn Seibert, supra. note 71 at 30-31.
75 Arnold Silbergeld, Release Agreements Must Comply With the Older Workers' Benefit Protection Act, EMPLOYMENT REL. TODAY (Winter 1992/93), at 457.
76 Raymond A. Noe et al., HUMAN RESOURCE MANAGEMENT: GAINING A COMPETITIVE ADVANTAGE (Irwin, eds., 2d ed. 1997), at 110.
77 R. Lewis, supra. note 46.
of a RIF there is a disparate impact, it is very difficult to defend. The employer can reduce the exposure associated with selecting employees for RIF by implementing the following actions:

1) Answer the following questions before a RIF is put into place:
   a) What is the purpose of the RIF?
   b) What are the criteria for selecting those who will be fired? (e.g., performance, experience, knowledge, just closing one division)
   c) Will the RIF result in a disproportionate number of older workers being fired? If so, are there lesser discriminatory alternatives available?

2) Adopt objective criteria. The selection of the person to be terminated should not be subjective. There must be an objective method of selecting the most appropriate person that eliminates any concern that age was a factor in the selection process. Where the employer used a supervisor peer committee, a number of rating systems (which were sent to the personnel department and objectively reviewed), and some of the senior older workers who were terminated, the court held that the employer had proved the nondiscriminatory basis for the decision.

3) Provide supervisory training in the use of the criteria and make sure all levels of management are sensitized to ageist stereotypes and behaviors and trained in the basic requirements of the ADEA. Even an age-neutral company decision can become discriminatory in the hands of an untrained manager.

4) Eliminate any words, such as a code, that might suggest age is a factor.

5) Analyze statistical data of the employees selected for RIF. Have more than one person rate employees without knowing their ages.

6) Provide terminated employees a full range of outplacement services, such as: immediate and follow-up counseling, lessons in job seeking, career planning, interview techniques, and resume writing, along with office space, telephones, and secretarial help to facilitate job searches.

7) Avoid age caps in exit incentive programs. Minimum age requirements normally are not a problem.

8) Give employees adequate time to consider an exit incentive offer and resources to evaluate the offer. Then, their decisions can be informed and voluntary (provide a minimum of 30 days and encouragement to consult an attorney).

9) Remember that severance and other benefits are protected under the ADEA. Pension eligibility generally cannot be used to offset severance benefits.

10) Be sensitive, but not apologetic, when informing employees selected for RIF.

11) Use common sense and put yourself in the position of a judge or jury called upon to decide whether the firing of one or more older workers was reasonable. Put aside technical questions of law and ask how your decision would look to a neutral third party.

---

70 Uffelman v. Lonestar Steel Co., 863 F.2d 404 (5th Cir. 1989).
It is anticipated that further rounds of downsizing will continue\textsuperscript{81} and that individuals over 40 will continue to experience difficulties as this organizational phenomenon proceeds. While reductions in force and downsizing may be inevitable, how an organization handles this emotionally charged issue may well dictate its ability to maintain and enhance employee commitment and avoid costly litigation.