



CLIENT ADVISORY

PREVENTING AGE DISCRIMINATION IN THE WORKPLACE

As an employer, you may not have control over how individual employment decisions are made or the manner in which they are carried out. As a result, your company may be practicing age discrimination without your knowledge and without your endorsement. It is, therefore, critical for you to implement company practices and policies that prevent discrimination and ensure that your managers are educated about the policies and that they are uniformly enforced. Here are some recommended guidelines:

Hiring

While the hiring of younger workers over older workers may be justified based on the qualifications required for the job, hiring decisions should never be based on age. To avoid age discrimination, carefully monitor the hiring process, including recruitment and selection.

Recruitment and Advertising

Searching for employees from a predominately young applicant pool may effectively screen out older applicants, so you should target a wide net of applicants through recruitment and advertising measures. You should also communicate to third-party recruiters that you expect them to comply with all applicable employment laws and document all directives you give to them. Further, advertisements and job descriptions should be carefully written to employ age-neutral language and list necessary skills. If you reject an applicant for not having a specific skill and you failed to include that skill in your job posting, it can be used as evidence of pretext and subject you to liability.

Selection

Ensure that the job criteria and assessment of an applicant's skills are job-related. Also, take steps to ensure that individuals involved in the selection process understand the job requirements and avoid rejection of applicants based on impermissible criteria. Do not ask an applicant's age or date of birth if there is no legitimate business reason for doing so. Overall, interviews and selections should be consistent. By developing a uniform process that is uniformly applied, you can minimize your exposure.

Termination

Prior to terminating an older worker, management should analyze all the facts, weighing the perception of the decision as well as the actual decision. It is a good idea to consult with human resources or legal counsel prior to terminating an older worker. Again, the termination process should be uniform and uniformly applied.

If a termination is for cause, make sure that the policy you claim was violated was clearly communicated to employees and was applied to all. Ask yourself whether the employee's deficiencies were communicated accurately and if there was an opportunity for improvement. Also, if applicable, did you employ a progressive discipline system?

Deciding that an older employee no longer has the skills to remain in an organization may

become suspect if it is a long-term employee who is suddenly deemed not a “good fit.” Make sure you have adequately documented the efforts to counsel the older worker through employment evaluations and other progressive disciplinary measures.

In a layoff situation, develop a consistent and objective method for selection and ensure that the people making the selection understand the process thoroughly. Before making final decisions, analyze the group selected for layoff as well as the employees remaining to determine if the selection process has unfairly affected older workers.

Finally, try to obtain valid waivers of discrimination claims. Under federal law, an employer must include specific language and time references for the waiver to be valid. Once again, consult with your legal counsel to address these requirements in your waiver and release documentation.

The legal and economic ramifications of age discrimination are usually 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.

*FOR QUESTIONS, PLEASE CONTACT ATTORNEY ROBERT BERLUTI, THE FIRM'S
LITIGATION PARTNER,*