



Legal Aspects of the Aging Workforce

Presented by Mountain States
Employers Council

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Introduction

- ◆ Over 134 million people in US over age 40
 - ◆ almost 45% of US population in 2006
 - ◆ 37.3 million people age 65 years + in 2006
- ◆ By 2030 there will be approximately 71.5 million over 65
 - ◆ More than twice the amount in 2000
 - ◆ Expected to be 20% of the population by 2030



Age Related Laws

- ◆ Age Discrimination in Employment Act (ADEA)
- ◆ Older Workers Benefit Protection Act (OWBPA)
- ◆ Colorado Anti-Discrimination Act



Age Discrimination in Employment Act 1967

- ◆ Illegal to discriminate in any aspect of employment (including hiring, firing, promotions, benefits, etc.) against individuals 40 years of age or older
- ◆ Applies to all employers (public and private) with more than 20 employees
- ◆ Enforced by Equal Employment Opportunity Commission (EEOC)



ADEA Mandatory Retirement

- ◆ To have a mandatory retirement age must be a Bona Fide Occupational Qualification (BFOQ)
 - ◆ If due to public safety, employer must prove mandatory retirement age effectuates public safety and there is no acceptable alternative that is less discriminatory
 - ◆ Exceptions for Executives



ADEA Mandatory Retirement

- ◆ To prove BFOQ employer must show:
 - ◆ The age limit is reasonably necessary to the essence of the business, **and either**
 - All or substantially all individuals excluded from the job involved are in fact disqualified,
 - **or**
 - Some of the excluded individuals possess a disqualifying trait that cannot be ascertained except by reference to age



ADEA Mandatory Retirement

- ◆ Exception allows mandatory retirement ages for bona fide executives/ higher policymakers
 - ◆ Must be 65 or older
 - ◆ For the 2-years immediately before retirement, must be employed as a bona fide executive/ higher policymaker
 - ◆ Employee must also be entitled to an immediate non-forfeitable annual retirement benefit plan(s) worth at least \$44,000 (29 U.S.C. 631(c)(1))



EEOC Statistics

- ◆ In Fiscal Year 2006:
 - ◆ 16,548 age discrimination cases filed
 - ◆ \$51.5 million dollars in damages recovered*
 - ◆ In Fiscal Year 2005:
 - ◆ 16,585 age discrimination cases filed
 - ◆ \$77.7 million in damages recovered*
- *Does not include money recovered in litigation



ADEA Recent Cases

- ◆ EEOC reaches \$27.5 million settlement for 32 former attorneys at law firm that forced retirement of partners over 60
 - ◆ Firm made no secret that it was targeting partners in their 50s
 - ◆ Several national publications reported stories about the strategy and quoted top firm officials about their desire to expand opportunities for younger partners and associates



ADEA Recent Cases

- ◆ 53 year old man awarded \$3.7 million in age suit in Reno, NV
- ◆ Court reinstates ex-director of operations' age discrimination suit against Google
- ◆ Dillard's stores settle class action age discrimination lawsuit for \$35 million



Older Workers Benefit Protection Act

- ◆ After US Supreme Court decision *Public Employees Retirement System of Ohio v. Betts* Congress amended the ADEA in 1990
 - ◆ Prior to OWBPA employees had to prove reductions in benefits intentionally discriminated against older workers
- ◆ Why is this important?



Older Workers Benefit Protection Act

- ◆ After OWBPA in 1990, Employers can't offer less benefits to older workers even if costs for older workers are higher
- ◆ Also, must provide greater protection for terminated employees who are over 40 when writing waiver/ release agreements



ADEA and OWBPA Waiver and Release Agreements

- ◆ Must be a written agreement in clear understandable language
- ◆ Must specifically refer to the waiver of rights and claims under the ADEA
- ◆ May not waive rights or claims that arise after the date of agreement
- ◆ Must have consideration (more than what employee was already entitled to receive)



ADEA and OWBPA Waiver and Release Agreements

- ◆ Employee must be:
 - ◆ advised in writing to consult with an attorney before signing the agreement
 - ◆ given at least 21 days to consider agreement (unless group waiver)
 - ◆ allowed at least 7 days after executing agreement to revoke
 - Money paid prior to 7 days may not be returned to employer if employee breaches the agreement



ADEA and OWBPA Waiver and Release Agreements

- ◆ Group Waivers (2 or more employees)
 - ◆ If connected to exit incentive program employees must be given a period of 45 days to consider the agreement
 - ◆ Must list all employees affected by the program, any eligibility factors and any time limits applicable to the program; and
 - ◆ job titles and age of all employees eligible or selected for the program, and the ages of those in the same job classification/ organizational unit who are not eligible or selected for the program



CO Anti-Discrimination Act

- ◆ Illegal to discriminate against employees (or applicants) on the basis of age
 - ◆ Interpreted to protect people over the age of 40
- ◆ Applicable to organizations with one or more employees



Family Medical Leave Act

- ◆ Employers with 50 or more employees must provide eligible employees up to 12 weeks of unpaid, job-protected leave in a 12-month period
 - ◆ Care for a newborn child or newly placed adopted or foster child; or
 - ◆ Care for a seriously ill child, spouse or parent; or
 - Biological parents or person who stand or stood in *loco parentis* to employee
 - ◆ Because of the employee's own serious health condition



U.S. Supreme Court 2007

- ◆ In fall session Court will hear these ADEA related cases:
 - ◆ **Kentucky Retirement System v. EEOC**
 - ◆ **Gomez-Perez v. Potter**
 - ◆ **Federal Express Corp. v. Holowecki**
 - ◆ **Sprint/United Management Co. v. Mendelsohn**
 - 10th Circuit case



In Conclusion

- ◆ Good management practices help employers avoid and defend against legal claims
- ◆ Maintain clear performance standards
- ◆ Consistent application of standards
- ◆ Good documentation and written warnings when necessary
- ◆ Objective basis for employment decisions