

CLIENT ALERT

Economic Climate Leads to Dramatic Increase in Age Discrimination Claims

The Age Discrimination in Employment Act of 1967 (“ADEA”) protects anyone 40 or older from employment discrimination in hiring, firing, layoffs, promotions and pay. It applies to employers with 20 or more employees, including state and local governments, and covers benefits including severance pay if it is offered. Consequently, even smaller business must be cognizant of and abide by the requirements of the ADEA.

Recent statistics show that age discrimination claims are rising at a dramatic rate. The Equal Employment Opportunity Commission (“EEOC”) has issued a report showing that age-discrimination allegations by employees are at a record high, jumping from 19,100 in 2007 to 24,600 filed in 2008. While overall employment discrimination complaints were also at a record high, according to the EEOC, the most dramatic increase was in the age-related complaints. With continuing layoffs and the rising unemployment rate, age discrimination claims may even be higher in 2009.

The reason for this dramatic increase in age discrimination claims is not hard to understand. Simple, financial logic indicates that companies may be targeting older workers in layoffs because these workers are generally the highest paid and have the most lucrative benefits (or at least that’s what the terminated workers believe is happening). Some experts think that the number of claims is also increasing because inexperienced managers performing the layoffs are not following the correct procedures before terminating an employee. For example, if an employer asks a terminated employee to sign a waiver agreeing not to sue, under certain circumstances federal law requires the employer to supply the employee with data regarding job titles and ages of all individuals in the same job classification or organizational unit who are being terminated, as well as the ages of those who were not selected for termination. If the correct procedure is not followed, the waiver is ineffective.

Derogatory remarks by managers demonstrating a bias against older workers could also lead to an age discrimination claim if an older employee is later terminated and replaced by a younger employee. For example, a Pennsylvania company has recently agreed to pay \$80,000 to settle an age discrimination lawsuit brought by a 71 year old sales representative. According to the allegations, prior to the sales representative’s termination, the employer’s sales manager made several comments demonstrating a bias against older workers, such as repeatedly asking the sales representative about his retirement plans and commenting that he would retire if he were “as old as” the employee.

Minimizing age-related claims

What can employers do to minimize age-related claims? While this is by no means an exhaustive list, there are some common sense steps employers can take to minimize the risk of an age discrimination claim. As noted above, age related remarks (no matter how innocuous) by managers or supervisory personnel can lead to age discrimination claims. Employers should provide training to their managers and supervisors that addresses this issue and teaches them how to avoid such remarks. Additionally, if an employer asks an employee to waive his or her rights or claims under the ADEA in connection with an exit incentive program or other employment termination program, the employer must follow the correct procedure. For example, a valid ADEA waiver must (among other requirements):

1. be in writing and be understandable;
2. specifically refer to ADEA rights or claims;
3. be in exchange for valuable consideration;
4. not waive rights or claims that may arise in the future;
5. advise the individual in writing to consult an attorney before signing the waiver; and
6. provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If a number of employees are to be let go as part of a reduction in the company's workforce, the list of employees to be terminated should be evaluated from an age discrimination standpoint to determine if there will be any disproportionate effect on workers 40 years of age or older. If that is the case, the company should evaluate whether the selection of these specific employees can be justified by reasonable factors other than age. If there is no such justification, the termination of these individuals could generate age discrimination claims.

Finally, companies should make sure they comply with the ADEA's record keeping requirements. Under the ADEA, certain employment-related records must be retained for one year, including:

1. Records used in hiring such as applications, resumes and responses to job advertisements;
2. Records of promotions or discharges;
3. Job orders submitted to employment agencies or labor organizations for recruitment purposes;
4. Results of physical examinations considered in connection with personnel actions;
5. Test papers disclosing results of aptitude or employment tests administered by the company;
6. Job advertisements; and
7. Employee benefit plans and seniority and merit systems during the time they are in effect and for one year after a termination.

Additionally, information regarding employee name, address, birth date, occupation, rate of pay, and weekly compensation must be retained for three years. Moreover, if an age discrimination charge is filed or

a complaint is made to the EEOC, all pertinent records listed above that are in the employer's possession must be retained until the complaint is resolved.

Employers who fail to comply with record retention requirements could face significant penalties. For example, an employer's failure to retain records that are relevant to a lawsuit may result in adverse evidentiary findings by a court. Aside from the risk of penalties, careful recordkeeping is important for any employer because such records could provide the employer with a valid defense to an employee's claim or lawsuit.

For more information, please contact Ed Kelbon at (215) 495-6500 or ekelbon@regerlaw.com.



CIRA CENTRE, 13TH FLOOR, 2929 ARCH STREET, PHILADELPHIA, PA 19104-2899
TEL: 215.495.6500, FAX: 215.495.6600
www.regerlaw.com

These materials have been prepared for informational purposes only and are not legal advice.