



## Practical and Legal Tips for Hiring and Retaining Older Workers

When it comes to steering clear of age discrimination, there are many things to keep in mind.

By Ellen Rosen Rogoff

In today's world, virtually every HR professional knows the legal basics of age discrimination. The federal Age Discrimination in Employment Act protects employees over 40 years old from discrimination in every aspect of the employment relationship, from hiring to promotions to terminations. Additionally, states and most major cities have parallel laws that protect older workers. And, while the ADEA has a requirement of 20 employees, state and municipal laws usually have a much lower threshold -- many as low as one employee. As a practical matter, this means that a large percentage of every workforce is covered by the age discrimination laws.

Given the combination of increasing life expectancies and uncertainty in the financial markets, more and more employees are planning to continue working at least until their late 60s or early 70s. As discussed below, there are several ways to limit the risk of an age discrimination claim in the workplace. Equally as important, however, is for management to focus on the strengths of seasoned employees and consider ways to utilize their experience. Here are some tips to consider when hiring, working with and terminating older workers.

**Check all of your company's application forms and recruiting policies.** As a reminder, company forms should not request an applicant's or employee's age -- either directly or indirectly. In addition to making sure that there is no date of birth listed on the application, you need to confirm that applications and other forms do not ask for dates of graduation or other "age-identifying" information. While that age information will be part of insurance forms, under HIPAA and related regulations, those forms must be kept confidential (and should be maintained separately from the personnel files).

**Provide "tune up" training for managers and supervisors.** Company management should understand that discrimination claims often involve age-related comments or jokes that relate to age stereotypes. For example, a question such as "Are you planning to retire soon?" can be problematic and used as evidence that a company wants to "push out" older workers. Joking about an older employee's unfamiliarity with computers or other technology (a common stereotype) creates similar risks.

**Help your company's supervisors to think outside the box when recruiting talent.** A common knee-jerk reaction when considering an older applicant is that he or she would be at the company for, at most, five to seven years. That may be true. But even five years is a significant period of employment for today's mobile workforce. After all, consider that most millennials have several jobs before the age of 30 - - and it is not uncommon for them to move positions every 18 to 24 months. An older employee often demonstrates stability and a professional work ethic that are positive additions to the culture of a growing company.

**Consider implementing an employee task force that is both diverse and crosses age/generational lines.** One of the major issues for companies today is employee retention. Significant management time and company resources are spent on training and integrating every new hire. As a result, an increase in the employee retention rate can improve the bottom line of any organization. Establishing a formal task force (or informal committee) with a mandate to work on retention issues not only improves employee morale but also allows management to develop policies or procedures (often at little expense) that are important to employees and increase retention rates. Older workers -- with years of experience in business environments -- can be a productive part of this process.

**Where appropriate, establish mentor-mentee relationships to allow employees of different ages to get to know each other.** Employees at different stages of their careers often can gain insights and soft skills by learning from each other. This can improve performance and help to build professional relationships between and among employees.

**Remember to include your older workers in any training sessions for new procedures and technologies.** Employees often may view exclusions from training or seminars to be sign of how they are viewed -- and potential evidence of discrimination. In contrast, including older employees in training sessions can provide unexpected dividends, such as improved productivity.

**Be specific in addressing performance issues.** If there is a performance issue involving an older employee, be sure that any disciplinary documentation reflects concrete performance issues (e.g., missed deadline for project) rather than "impressions" -- for example, employee seems low-energy or not engaged. Not only are specific performance issues much more compelling evidence should there be a claim, but personality-related criticisms also can be viewed as code words for age discrimination.

**Tread carefully during layoffs.** Should your organization contemplate a mass layoff, keep in mind that given the aging workforce nationally, plaintiffs' attorneys focus not on just the over-40 age group but on the over-50 and over-60 age groups as well. Analyze the number of employees (and related statistics) for each group and subgroup, and the reasons each employee was chosen.

Most employers are not attempting to weed out older workers. However, certain decisions and actions can make age appear to be a factor even when it is not an issue. Emphasizing the benefits that older employees bring to the workplace and remaining sensitive to the impact of policies and procedures can help cultivate a culture that would reduce the likelihood of a discrimination claim.

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