IN THE BUSINESS OF YOUR SUCCESS®

HR411® Tip of the Week

Age Discrimination: Frequently Asked Questions

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against individuals aged 40 and older on the basis of their age. The ADEA prohibits discrimination related to all aspects of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

The following are answers to frequently asked questions about the ADEA.

Q: Which employers are covered by the ADEA?

A: The ADEA applies to employers with 20 or more employees, but some states have enacted similar laws that cover employers with fewer employees. Check your state law to ensure compliance.

Q: Which individuals are protected from age discrimination?

A: The ADEA protects applicants and employees who are aged 40 and older, but some states protect younger workers.

Q: Can my company limit jobs to individuals under a certain age?

A: In general, an employer may not exclude workers over the age of 40 from a job because of their age. In very rare cases, age limits may be permitted as a bona fide occupational qualification (BFOQ) under the ADEA. An employer asserting that a BFOQ exception applies has the burden of proving, among other things, that the age limit is reasonably necessary to the essence of the business. For example, if the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that it results in the intended objective and that there is no acceptable alternative that would better advance it or equally advance it with less discriminatory impact. Employers should always consult legal counsel when determining whether a BFOQ exception applies.

Q: May I limit jobs to individuals over a certain age?

A: Employers may have minimum age requirements for jobs. In fact, minimum age requirements may be set by various federal and state laws designed to protect minors from hazardous work.

Q: May I ask job applicants for their age?

A: Employers should avoid asking for an applicant's age during the hiring process, including on job applications and during interviews. If there are minimum age requirements, the employer may ask whether the individual meets that requirement without asking for a specific age. For example, for a job from which minors are excluded, the employer may ask "Are you at least 18 years old?"

Q: Can my company offer better benefits to older workers than to younger ones?

A: The ADEA does not prohibit an employer from favoring an older worker over a younger one, even if both workers are age 40 or older. As mentioned above, state law may protect younger workers from discrimination, so employers should check their state law.

Q: Are there special considerations for laying off employees who are age 40 and over?

A: Yes. An employer's decision to lay off certain employees while retaining others may lead discharged workers to believe that they were discriminated against based on their age or other protected charac-

teristics. Employers implementing layoffs sometimes choose to present their separated employees with severance agreements that require the separated employees to waive their rights to bring action against the employer, in exchange for monetary compensation. In 1990, Congress amended the ADEA by adding the Older Workers Benefit Protection Act (OWBPA) to clarify the prohibitions against discrimination on the basis of age. OWBPA establishes specific requirements for waivers of ADEA claims in severance agreements.

Q: What does the OWBPA require?

A: The OWBPA requires that the waiver be "knowing and voluntary" to guarantee that an employee has every opportunity to make an informed choice about whether to sign it.

Q: What constitutes a "knowing and voluntary" waiver?

A: The OWBPA lists seven factors that must be satisfied for a waiver of age discrimination claims to be considered "knowing and voluntary." These are:

1. A waiver must be written in a manner that can be clearly understood. The Equal Employment Opportunity Commission's (EEOC) regulations emphasize that waivers must be drafted in plain language geared to the level of comprehension and education of the average individual(s) eligible to participate. Usually this requires the elimination of technical jargon and long, complex sentences. In addition, the waiver must not have the effect of misleading, misinforming, or failing to inform participants and must present any advantages or disadvantages without either exaggerating the benefits or minimizing the limitations.

2. A waiver must specifically refer to rights or claims arising under the ADEA. EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.

3. A waiver must advise the employee in writing to consult an attorney before accepting the agreement. It is not sufficient for the release to simply state that the employee had a chance to consult with an attorney, rather the employee must acknowledge that they were advised to consult with an attorney.

4. A waiver must provide the employee with at least 21 days to consider the offer. The regulations clarify that the 21-day consideration period runs from the date of the employer's final offer. If material changes to the final offer are made, the 21-day period starts over.

5. A waiver must give an employee seven days to revoke his or her signature. The seven-day revocation period cannot be changed or waived by either party for any reason.

6. A waiver must not include rights and claims that may arise after the date on which the waiver is executed. This provision bars waiving rights regarding new acts of discrimination that occur after the date of signing, such as a claim that an employer retaliated against a former employee who filed a charge with the EEOC by giving an unfavorable reference to a prospective employer.

7. A waiver must be supported by consideration in addition to that to which the employee already is entitled.

Q: Are the waiver requirements the same for group layoffs involving employees age 40 and over?

A: There are additional requirements for when employers decide to reduce their workforce by laying off or terminating a group of employees. When a waiver is offered to two or more employees in connection with "exit incentive programs" or "other employment termination programs," an employer must: 1) meet the "knowing and voluntary" requirements above and 2) provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained. In addition, the employer must give each separating employee at least 45 days to consider the waiver before signing it.

Q: What terms should be avoided in severance agreements?

A: Agreements should not ask employees to waive their rights to file a charge, testify, assist, or cooperate with the EEOC or to waive any rights or claims that may arise after the date the employee signs the waiver. In addition, the agreement should not ask employees to release claims for unemployment compensation benefits, workers compensation benefits, claims under the Fair Labor Standards Act, health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA), or claims with regard to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA). It is a best practice to consult legal counsel when drafting severance agreements.

IN THE BUSINESS OF YOUR SUCCESS®

SBS0914NO