What Employers Need to Know About Age Discrimination (ADEA) Claims

Background

The ADEA went into effect on June 12, 1968. Congress implemented the ADEA to prohibit age discrimination in the workplace and promote the employment of older, experienced workers. Marking the 50th anniversary of the statute, in June 2018, the Equal Employment Opportunity Commission ("EEOC"), the federal agency responsible for enforcing the ADEA, published a report entitled "The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)." This report reviewed the history of the ADEA, the demographics of today's older workforce, the state of age discrimination today, and strategies to prevent age discrimination in the future. The report confirms that the aging workforce is increasingly filing charges of age discrimination against employers. In order to avoid liability for ADEA claims, employers should be proactive and implement policies to avoid and make it easier to defend against claims of age bias and age discrimination.

Summary of the EEOC Report

History and Overview. The ADEA allows employees to sue their employers in federal court for monetary damages, provided within 300 days after the unlawful discriminatory practice occurred they first file a complaint with the EEOC, which has authority to investigate claims of discrimination and to even file lawsuits against employers. When the ADEA was initially enacted, Congress limited ADEA coverage to individuals age 40 to 64, than capped coverage at age 70 in 1978. Congress removed the age cap in 1986. This decision was supported by evidence that age is not predictive of job-related ability or performance. The ADEA was last amended in 1990 when Congress enacted the Older Workers Benefit Protection Act of 1990, which established minimum standards for voluntary waivers and releases of ADEA claims and rights.

Today's Workforce. Today's older workforce is much larger, more diverse, more educated, and more female than previous generations. Over the last 25 years, the percentage of workers age 55 and over has doubled. Due to factors such as eligibility for Social Security starting at a later age and the demise of traditional pension benefits, older workers are working longer to support their retirement income. The EEOC report found that older workers work predominantly in jobs that require a college education (i.e. teachers and lawyers) and/or are physical in nature (i.e. janitors, aides, and nurses).

State Of Age Discrimination Today. The EEOC report found that while the ADEA continues to be an important enforcement tool in combating age discrimination, negative stereotypes are still often applied to older workers in the workplace and such age-based discrimination is underreported. Although most experienced workers, when surveyed, state that they have seen or experienced age discrimination, only 3% report making a formal workplace complaint. African American older workers and workers in the technology industry reported having witnessed or experienced age discrimination at higher rates than others. When they do file complaints, older workers typically make claims for unlawful discharge, mandatory retirement, discriminatory hiring practices, or age-based harassment claims.

Today, all states except South Dakota have their own laws prohibiting workplace age discrimination. Almost 2/3 of state laws provide for both compensatory and punitive damages. Thus, older workers in those states often pursue claims under both state and federal law, or just state law, because state law typically allows for greater awards.

Age Discrimination Claims Are on the Rise

Since 2008, approximately 20,000 charges have been filed each year under the ADEA, and the EEOC has collected about $90 million annually for claimants. In the largest reported ADEA lawsuit to date, *Arnett and EEOC v. California Public Employee Retirement System*, Case No. 95-3022 CRB (N.D. Cal. Jan. 29, 2003), the court approved a consent decree in which the defendant agreed to pay $250 million to California state safety employees who alleged that their disability pension benefits were reduced based on age.

Private citizens can recover a number of benefits from filing ADEA claims, including reinstatement, back pay, front pay, compensatory damages, and punitive damages. There have been a number of ADEA lawsuits that have resulted in large settlements for private plaintiffs. For example, an employer settled a 2015 ADEA lawsuit for $37.25 million after 129 former employees claimed that they lost their jobs based on age. In a recent single-plaintiff discrimination case from 2017, a New Jersey jury awarded a plaintiff alleging age discrimination $51.4 million, including $50 million in punitive damages. The punitive damages award was vacated by the court as excessive.

Strategies for Avoiding Age Discrimination Claims

To avoid liability under the ADEA, employers should be proactive and implement policies that make age discrimination in the workplace less likely. The following are best practices:

- Implement diversity and discrimination training for managers and other workers.
- Train recruiters and interviewers to avoid expressing ageist assumptions or stereotypes during interviews.
- Use employment applications that avoid age-related questions.
- Review policies and procedures to ensure that they do not have a discriminatory effect on older employees.
- Develop mixed-age and reverse-age mentoring programs to increase worker productivity and satisfaction.
- In the event of a layoff or reduction in force, avoid considering age and review the impact of the layoff on older workers.
- Don't offer retirement plans that are biased against older employees.

The employment practices and litigation team at Kasowitz Benson Torres LLP has extensive experience and familiarity with avoiding, and successfully resolving cases under the ADEA, including through litigation where necessary. If you would like to discuss these issues, please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789).