

Employment Law for Business, 6<sup>th</sup> ed.  
 Bennett-Alexander

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Chapter 11

Age Discrimination

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**Statutory Basis**

Sec. 4 (a) It shall be unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this chapter.

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**Oldie...But Goldie!**

- American culture values youth
- Statistics do not match perceptions
- By 2012 the number of workers 55 and over will almost double
- Older workers perceived as more costly
- Younger workers perceived as better educated and better qualified

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## Myths about Older Workers and Age Discrimination

- In a reduction in force caused by economic reasons, employers should always terminate the older workers, since they are usually the highest paid.
- If most people in a certain age group have a common weakness, it can be generalized that all in the group have the weakness, and age can be used as a job qualification.
- If an employee is discriminated against because of youth, the employee has a claim under the Age Discrimination in Employment Act.
- Employees must retire at age 65 in the United States.

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## Myths about Older Workers and Age Discrimination (continued)

- As workers, older employees:
  - Are not hard workers
  - Will get tired more easily than younger workers
  - Are less able to perform than younger workers
  - Don't understand technology
  - Don't want to travel too much and are generally more stubborn and uninterested in learning
  - Make too much money since it's often based on seniority and not performance
  - Are just making time before they can retire

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## Myths about Older Workers and Age Discrimination (continued)

- As workers, younger employees:
  - Have it easy; they never suffer discrimination
  - Always win the job when competing against older workers
  - Have a lower unemployment rate than older workers
  - Can easily find jobs since older workers are retiring all the time

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## Age Discrimination in Employment Act

- Prohibits discrimination in employment on the basis of age
- Applies to individuals who are at least 40 years old
- No upper age limit
- Different from factors covered by Title VII:
  - The ADEA is more lenient than Title VII regarding the latitude afforded employers' reasons for adverse employment decisions.
  - An employee is not barred from pursuing a claim simply because the employer treated another older worker better.
  - The act only protects employees over 40 from discrimination.

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## Age Discrimination in Employment Act (continued)

- State employees are not able to sue their state employers under the ADEA
- Specific recordkeeping provisions for employers
- Employers are held to an equal benefit/equal cost rule

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## Proving Discrimination

- The employee's prima facie case: disparate treatment
- Member of the protected class
- Adverse employment action
- Qualified for the position
- Dissimilar treatment

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## Employer's Defenses

- Bond Fide Occupational Qualification
- Mandatory retirement
- Reasonable factor other than age
- Economic concerns
  - Nothing in the ADEA prohibits elimination of a protected employee's position for budgetary reasons
  - Employers may offer pay cut in lieu of termination (if business necessity)
  - Correlation between compensation and age
  - Two views from the courts

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## Employer's Defenses (continued)

- Defenses based on benefit plans and seniority systems
- "Same actor" defense
- Defenses based on waivers under the Older Workers' Benefit Protection Act of 1990
  - Waivers
  - Early retirement plans

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## Employee's Response: Proof of Pretext

- Where there is direct evidence of discrimination, proof of pretext is not required
- Showing pretext:
  - Offered reasons for the adverse employment action have no basis in fact
  - Offered reasons did not actually motivate the adverse employment action
  - Offered reasons are insufficient to motivate the adverse action taken

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### Employee's Prima Facie Case: Circumstances Involving Claims of Disparate Impact

- Exists where a policy or rule of an employer has a different effect on one group than on another
- RFOA
  - It is crucial that discharges be made on the basis of an objective standard
  - Reduction in force—employer should:
    - Follow a specified procedure for termination
    - Use objective criteria to determine the individuals to be discharged
    - Eliminate the entire position

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### Employee's Prima Facie Case: Hostile Environment Based on Age

1. The employer is 40 years or older
2. The employee was subjected to harassment, either through words or actions, based on age
3. The harassment had the effect of unreasonably interfering with the employee's work performance and creating an objectively intimidating, hostile, or offensive work environment
4. There exists some basis for liability on the part of the employer

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### The Use of Statistical Evidence

- Generally more useful in disparate impact cases
- Skepticism relating to statistical evidence in age discrimination cases
- Supreme court guidelines
  - Standard deviations
  - Special qualifications

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## Remedies

- Money damages
- Equitable relief
  - Reinstatement
  - Promotions
  - Injunctions
- Liquidated damages

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## Employee Retirement Income Security Act

- Regulates private employee benefit plans
- Protects employees from wrongful denial of all types of benefits
- Regulates:
  - Who must be covered
  - Vesting requirements
  - The amount that the employer must invest
- Distinctions among benefit plans

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## Management Considerations

- Employers should:
  - Evaluate the true requirements of a position
  - Test for those characteristics
  - Pay attention to the basis for decision-making and selection in connection with training and development opportunities
- Problems with RIFs:
  - Employers generally do not retain intricate written analyses of performance
  - Managers and supervisors will likely evaluate an employee as compared to other employees
  - The employer may make a decision based on some factor other than performance
- Be sure all employees periodically receive an objective, detailed performance appraisal

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## Summary

- Employees are protected against discrimination on the basis of their age under the ADEA, unless age is a bona fide occupational qualification.
- To prove a case of age discrimination, the employees must show that:
  1. They are 40 years of age or older.
  2. They suffered an adverse employment decision.
  3. They are qualified for the position (either that they meet the employer's requirements or that the requirements are not legitimate).
  4. They were replaced by someone younger.

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## Summary (continued)

- Once the employee has presented this information, the employer may defend its decision by showing that:
  1. Age requirement of a job is a bona fide occupational qualification. This can be done by showing:
    - The age limit is reasonably necessary to the employer's business and
    - All or a substantial number of people over that age are unable to perform the requirements of the job adequately; or
    - Some of the people over that age possess a trait which disqualifies them for the position and it cannot be ascertained except by reference to age.
  2. The decision was made based on some other reasonable factor than age.
  3. The employee was not qualified for the position.
  4. The decision to leave was because of a voluntary retirement plan.
  5. The "same actor" defense may be used in some courts. The presumption is that when the same person hires and fires a worker protected by ADEA, there is a permissible inference that the employee's age was not a motivating factor in the decision to terminate.

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## Summary (continued)

- Once the employer presents its defense, the employee will have the opportunity to prove that this defense is mere pretext for the actual discrimination that exists.
- Federal courts are split as to whether an employer can terminate an older employee due to economic considerations.
- Benefit plans and seniority systems cannot be created for the purpose of evading the ADEA or the OWBPA.
- The OWBPA amended section 4(f) of the ADEA and places restrictions where employers offer employees amounts of money through retirement plans as incentives for leaving the company.
- The Employee Retirement Income Security Act (ERISA) regulates private employee benefit plans. It governs the operation of welfare and retirement plan provisions.

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## Summary (concluded)

- There is a difference in the circuits whether disparate impact claims are actionable under the ADEA.
- There are a variety of remedies available to those discriminated against due to their age.
- A reduction in force (RIF) occurs when a company is forced to downscale its operations to address rising costs or the effects of a recession. When an individual is terminated pursuant to a bona fide RIF, the employer's actions are protected. In the event of a RIF, age discrimination may be proven when:
  1. The employer refuses to allow a discharged or demoted employee to bump others with less seniority.
  2. The employer hires younger workers when jobs become available.

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