



The Age Discrimination in Employment Act (ADEA) & Waivers

American Health Lawyers Association

Congressional Statement of Findings and Purpose 29 U.S.C. Sec. 621(b)

- Promote employment of older persons based on ability rather than age.
- Prohibit arbitrary age discrimination in employment.
- Help employers and workers find ways of meeting problems arising from the impact of age on employment.

Covered “Employer” & “Employee”

- Employer:
 - Engage in industry affecting commerce.
 - Employ 20 or more employees in each working day in at least 20 weeks in the current or preceding calendar year.
- Employee:
 - 40 years old or older
 - Except:
 - Retaliation claims
 - *Bona Fide* Executives who are at least 65 years of age and who were employed in that capacity for most immediate 2-year period if they receive annual, non-forfeitable retirement benefit equal to or greater than an annualized amount of \$44,000.

The ADEA Prohibits . . .

- Hiring, discharging, or otherwise discriminating against an employee because of their age (40 or older).
- Limiting, segregating, or classifying any employee aged 40 or older that would tend to deprive him/her from employment opportunities or adversely affect their employment status.
- Reducing the wage rate of any employee in order to comply with the ADEA.
- Advertising jobs on the basis of age.
- Retaliating against anyone because they oppose unlawful practices or because they participated in an investigation, proceeding, or litigation under the ADEA.

The ADEA Prohibits (cont.) . . .

- A defined benefit plan from reducing or ceasing the accrual of benefits because of one's age.
- A defined contribution plan from allocating, ceasing, or reducing the allocation to a person's account because of their age.
- It is permissible for a plan to have a minimum age for eligibility, and it is permissible for a defined benefit plan to provide for termination of eligibility at an age when the person would be eligible for social security benefits.

Theories of Liability

- Disparate Treatment
 - Adverse Impact
 - Harassment
 - Retaliation

Defenses

- Bona Fide Occupational Qualification (BFOQ)
- Reasonable Factor Other Than Age (RFOA)
- Compliance with Foreign Law
- Observance of *Bona Fide* Seniority System
- Observance of *Bona Fide* Employee Benefit Plan

Waivers – Older Workers Benefit Protection Act

- Must be “knowing and intelligent.”
- Must be written in “plain language” calculated to be understood by individual (or average individual eligible to participate in waiver plan).
- Must advise of right to consult with counsel.
- May not release future rights.
- Must be supported by adequate additional consideration.
- Must provide at least 21/45 day consideration period and 7-day revocation period.
- Waivers offered to groups must include certain additional information so that individuals considering whether to waive their age discrimination claims have the benefit of being informed of the nature and circumstances of the exit incentive or termination program.

The End

