

AMERICAN HEALTH LAWYERS ASSOCIATION
Labor and Employment Practice Group
What Every Healthcare Lawyer Needs to Know About the ADEA
Tutorial Transcript
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Scott Hardy:

Hello, my name is Scott Hardy. I am an attorney with the law firm Cohen & Grigsby where I serve as the Deputy Chair of the Labor and Employment Practice Group. I also have the privilege of serving as a Vice Chair of the American Health Lawyers Association's Labor and Employment Practice Group.

Today I will be discussing the Age Discrimination in Employment Act (ADEA), at least those basic provisions of the act, to serve as a primer as an introductory discussion of the act, what it prohibits, who it covers and what its general defenses are, as well as the parameters of proper knowing and intelligent waiver of ADEA claims.

The Age Discrimination in Employment Act was initially enacted in 1967 and was amended several times in 1978, 1986, 1990 and then most recently in 1996.

The congressional purpose of the act was set forth in the congressional statement and findings of purpose contained in the first section of the act as follows: It is the purpose of this chapter to promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from impact of age on employment.

In order to accomplish these purposes Congress set forth several prohibitions for employers, labor organizations and others that are prohibited by the act. For instance, it is prohibited for an employer to hire, discharge or otherwise discriminate against an employee because of their age being at least 40 years old or older. Secondly, it is prohibited for an employer to limit, segregate or classify any employee that would tend to deprive that person of employment opportunities or to adversely affect the status of an employee again because of that person's age being 40 years or older. Third, it is prohibited for an employer to reduce the wage rate of any employee in order to comply with other obligations of the Age Discrimination in Employment Act.

It is also prohibited for an employer to discriminate against any employee or applicant because they opposed unlawful practice under the ADEA or because they participated in an investigation, proceeding or litigation under the ADEA. It is also prohibited for an employer, a labor organization or certain other covered entities to advertise jobs in publications and in other media on the basis of age.

In addition, it is illegal for a defined benefit plan to reduce or cease the accrual of benefits under a defined benefit plan because of one's age or likewise for a defined contribution plan to allocate, to cease or reduce the allocation to a person's account because of their age. However, it is permissible for a plan to have a minimum age for

eligibility and it is also permissible for a defined benefit plan to provide termination of eligibility at the age when a person would be eligible for social security benefits.

In order for an employer to be covered by the ADEA, and therefore subject to these prohibitions, that employer must be proven to be engaged in an industry affecting commerce; that employer must employ 20 or more employees in each working day in 20 weeks in the current or proceeding calendar year. However, bona fide executives or high policy makers are excluded from the protections of the ADEA under the following limited set of circumstances:

1. They are at least 65 years of age.
2. They have been employed as a bona fide executive or high policy maker for the employer for the most immediate two-year period, and upon their mandatory retirement they be entitled to an annual, non-forfeitable retirement benefit greater to or equal of an annualized amount of \$44,000 per year.

If they meet those criteria they would not be entitled to the protections of the ADEA. That being said, they may very well be entitled to other protections of age discrimination laws that are state laws or local ordinances.

As with other forms of employment discrimination those who pursue age discrimination claims under the ADEA may do so under various theories of liability.

The most notable theory of liability is disparate treatment. Disparate treatment is the type of claim where an individual attempts to prove that they have been treated less favorably because of their age in employment. That can be done either by way of direct evidence in which the evidence, if believed, in and of itself would demonstrate that the employer engaged in unlawful practice.

In the absence of direct evidence, an aggrieved individual could prove a circumstantial case using the McDonnell Douglas burden shifting conceptual framework that is the standard in claims under Title VII in the ADEA, meaning that the aggrieved individual would need to establish a prima facie case that they are a member of the protected category. In this case, at least 40 years of age or older and that they have suffered an adverse employment consequence whether it be being discharged from employment, demoted, having their pay reduced or otherwise suffering some adverse employment action.

Additionally in order to establish the prima facie case the aggrieved individual would need to present evidence and establish that they were treated less favorably than a substantially younger person—whether that younger person was or was not under 40 years of age is not germane to the analysis.

If the aggrieved individual can demonstrate each of those prima facie elements under this circumstantial evidence framework, then the courts would determine that an inference of age discrimination has been created which would only be rebutted if the employer could produce evidence to establish that the action that is being scrutinized

has a legitimate business purpose. If so, then that presumption of discriminatory intent disappears and can only be reestablished if the aggrieved individual can prove that the employers produced reason or articulated reason is a pretext for actual age discrimination disparate treatment.

The second theory of liability under the ADEA would be disparate impact. This would be the type of case where a facially neutral employment policy or decision is applied in a uniform manner, but nonetheless has a disparate impact on those who fall within the protected category under the ADEA, meaning that a facially neutral policy or practice when applied to a particular workforce has an adverse impact or disparate impact on older employees. This would result in liability much like disparate treatment would unless the employer could demonstrate that the decisions and the outcome was based upon reasonable non-age factors, in which case the employer would be absolved of liability.

In addition to these various prohibitions under the ADEA, and these two general theories of liability, the ADEA statutes provides for several defenses. I will go through each of these briefly.

1. The first defense is the bona fide occupational qualification BFOQ defense.
2. The second is what is known as the RFOA or the reasonable factor other than age.
3. The third defense would be for those involving employees in foreign work places if compliance with the ADEA would cause the employer to violate a foreign law.

In addition to those defenses, there is a defense laid out in the ADEA itself for employers who observe terms of a bona fide seniority system. Under this type of defense an employer is exculpated from liability if they base their employment decision upon a bona fide seniority system.

1. A bona fide seniority system must be one in which the length of service is the primary criteria in which an employee or employees are allocated terms and conditions of their employment.
2. A bona fide seniority system must be one in which longer service with the employer would result in greater benefit. If, on the other hand a seniority system would result in longer-service employees receiving lesser benefits than shorter-term employees, such a seniority system would likely not be a bona fide system under the ADEA and would likely result in liability.
3. Then, thirdly, in order for a seniority system to be a bona fide system and as such be one that qualifies for this defense under the ADEA, the essential terms and conditions of the seniority system must be communicated to the workforce and must be uniformly applied to those members who participate in the seniority system.

If an employer follows a bona fide seniority system that meet these criteria the application of that system will in and of itself be a defense to any resultant allegations of age discrimination born from its application.

Then finally, the defense involving an employer's observation of the terms of a bona fide employee benefit plan qualify for a defense under the ADEA. For instance, benefit levels that an employer provides to its employees may be reduced to achieve an approximate equivalence in cost between younger and older workers. For instance, if the actual cost of a particular insurance benefit is greater for older employees, if the employer is following the terms of a bona fide employee benefit plan, that employer would be permitted to offer a lesser level of insurance benefit to the older employees provided that the actual cost to the employer providing that benefit to the older employee is equivalent to the level of benefits that are being offered to the younger employees.

The next aspect of the ADEA that we are going to discuss is waivers, waivers of claims under the ADEA. Congress amended the ADEA in 1990 by what is now known as the Older Workers Benefit Protection Act. This appears at Section VII(f) of the ADEA. This states that waivers of age discrimination claims are valid only if they are knowing and voluntary. The knowing and voluntary standard is not unlike the standard for the enforcement of waivers of other types of employment discrimination claims such as those under Title VII in the Americans with Disabilities Act. However, the Older Workers Benefit Protection Act provides very specific enumerated elements in the statute and as articulated in the Equal Employment Opportunity Commission guidelines involving the Older Workers Benefit Protection Act. This spells out exactly what the criteria are for determining whether an age discrimination claim waiver is in fact knowing and voluntary.

First and foremost, any such waiver must be in writing and must be written in a manner calculated to be understood by the individual or an average individual eligible to participate in such a waiver plan. In other words, the waiver has to be in writing and written in plain language so that the employee who is being asked to waive age discrimination claims can understand what he or she is being asked to sign.

The waiver not only must be in writing, and be written in plain language, but it must also make a specific reference to the Age Discrimination in Employment Act. The waiver must also advise the individual that they have a right to consult with an attorney prior to signing the waiver. The waiver must not provide for release or waiver of the individual's future rights, and the waiver and release must be supported by adequate consideration. Additionally, for an individual employee being asked to sign a waiver, that individual must be provided a minimum of 21 days in which to consider whether or not to execute the waiver. That twenty-one-day period runs from the date of the employer's final offer to the employee. That twenty-one-day period can be shortened if mutually agreed by the employer and the employee, and the employee agrees to such shortened period of time in a knowing and voluntary way.

Similarly if the exit incentive or termination program involves a group of employees, where two or more employees are being offered or incentivized to waive age claims in exchange for severance benefits, then that group of employees must be provided 45 days at a minimum in order to consider whether or not to execute the waiver. Much like

the twenty-one-day period for an individual employee, the forty-five-day period can be shortened again by mutual agreement between the employer and employees, again provided the employees agree knowingly and voluntarily.

In the context of a group-exit incentive or termination program the Older Workers Benefit Protection Act provides additional requirements that the waiver itself contain certain types of information designed so that the individual who is considering whether or not to waive age discrimination claims has the benefit of being fully informed or more informed about the nature and circumstances of the exit incentive or termination program. As such, each person in the decisional unit who is asked to sign a waiver agreement must be provided the following information: the eligibility factors and time limits applicable to the severance offer, as well as the job titles and the ages of the incumbents of those jobs that are selected, and again those not selected or eligible and not eligible to participate in the exit incentive program or termination program. The decisional unit at issue is the organizational unit within the employer's organization that served as the conceptual framework or basis upon which the employer decided who was and who was not going to be eligible for the exit incentive or termination program.

Now, in addition to these criteria to satisfy the knowing and voluntary waiver obligations of the Older Workers Benefit Protection Act, such a waiver cannot preclude a person from filing a charge of discrimination of participating in investigative issue involving the process that the Equal Employment Opportunity Commission or similar agency would make available. In other words, an employer cannot condition the waiver of an age claim and severance benefits upon an employee's agreement not to file a charge of discrimination of the Equal Employment Opportunity Commission.

Finally, an employee who signs such a waiver cannot be obliged to tender back a consideration paid for the waiver before filing a charge or suing the employer on the understanding or under the argument or contention that the waiver that they have signed in exchange for that money was not compliant with the Older Workers Benefit Protection Act. In other words, if an employee or ex-employee who was offered a severance package, which includes a request that the employee waive their right to sue the employer for age discrimination claims, but for some reason, whether technical or otherwise, that waiver agreement is not compliant with the Older Workers Benefit Protection Act, that employee or ex-employee who was offered consideration, offered monetary payment in exchange for signing a defective release would not be obligated to tender back the consideration paid to him or her as a condition precedent to pursuing claim against the employer by way of direct lawsuit in court or by way of filing a charge of discrimination with the Equal Employment Opportunity Commission.

The employer's only recourse at this point would be to take an offset for the amount paid as consideration for the release if and when the employee ultimately prevailed in litigation and won some monetary award. In other words when an employer seeks to have an employee waive their rights to any purported claims under the Age Discrimination in Employment Act, it would be wise of the employer to consult with the Older Workers Benefit Protection Act to ensure that any waiver agreement commonly

referred to as a severance agreement or severance package be fully compliant with all of the dictates of the Older Workers Benefit Protection Act to ensure that the employee who is being asked to sign it, is in fact is making a knowing and voluntary waiver of their rights.

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