

Employment Practice Liability (EPLI) Update: Over 40 And Protected

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A salesperson who has been with your company for over twenty years is simply not as productive as she once was. And, due to her many years of service, her commission and salary rate are well above today's market rate. You believe a younger, more energetic salesperson could better suit your needs-and save some salary/commission overhead as well. What do you do?

With the majority of Baby Boomers now over the age of 40, coupled with a competitive focus on a company's bottom line, situations such as this are an everyday reality. Striking a balance between the needs of a business and the rights of older employees is often a difficult task for an employer. While an employer needs to evaluate each employment situation on its individual merits, it is often helpful for an employer to first consider the legal implications of its actions, and understand the guidelines established by The Age Discrimination in Employment Act of 1967 (ADEA). This federal law, governing a variety of employment situations, has many broad-based implications for the employer-employee relationship.

The ADEA prohibits discrimination on the basis of age in the employment of persons 40 years of age, or older. The ADEA bans such practices as mandatory retirement under most circumstances, reductions in workforce that unfairly target older workers, and pretexts for eliminating older employees because they have the highest salaries. Further, the ADEA not only covers the termination of employees over the age of 40, but also governs the entire employment relationship - hiring, promotion and termination. More specifically, under the ADEA, discriminatory hiring and discriminatory treatment based on age in the normal course of employment are prohibited.

The ADEA can impact a company's employment relationship even before there is an employee. Refusing to hire or promote a person simply because he or she is "over-qualified," for example, could easily result in an ADEA suit. During the hiring process, older applicants are often discriminated against by being classified as "over-qualified." This becomes a real issue concerning most of the "over-40" workforce since their many years of business experience has often left them with "too much" experience. This "over-qualified" issue is now triggering many age discrimination lawsuits. To minimize the company's exposures during the hiring process, the assessment of an applicant's qualifications for a position should characterize that applicant as MEETING or NOT MEETING the position's requirements. The courts have held that if a candidate has more than the stated requirements for the position, he or she MEETS the requirements and, therefore, is qualified to perform the job.

At the other end of the employment spectrum, an employer should also pay special attention to layoffs and downsizings, ensuring that staff reductions do not adversely impact workforce age diversity. If, for example, there is a wrongful termination grievance filed against a company as a result of a layoff or downsizing, the Equal Employment Opportunity Commission's (EEOC) first course of action may require a listing of all the terminated employees' names, positions and ages. If the list appears more heavily weighted in the over-40 category, for example, the company might be in violation of the ADEA.

Interestingly, a California state court recently challenged the above scenario regarding corporate downsizing. The court ruled that a company can lawfully terminate workers due to high salaries, even if these decisions have a disparate impact on older, higher paid employees. Nevertheless, this ruling has broken new ground, and while it is effective only in California, the rest of the nation will most likely look closely at it in taking a position on this issue. This California ruling explicitly relates to monetary compensation. However, cases without the foundation of salary-based downsizing could be in violation of the ADEA. Originally established by the federal government to provide protection for employees over the age of 40, the ADEA has numerous implications on the employer-employee relationship today.