

FISHER &
PHILLIPS LLP
ATTORNEYS AT LAW

ADEA

The Age Discrimination In Employment Act

TABLE OF CONTENTS

INTRODUCTION	1
FUNDAMENTAL CONCEPTS	3
TYPES OF DISCRIMINATION	4
A. Disparate Treatment	4
B. Disparate Impact	6
NON-DISCRIMINATION EMPLOYMENT ACTIONS	8
A. Actions Based On Reasonable Factors Other Than Age (RFOA)	8
B. Bona Fide Occupational Qualifications (BFOQ)	10
REVERSE AGE DISCRIMINATION	10
HARASSMENT BASED ON AGE	10
RETALIATION	11
SPECIAL CONSIDERATIONS AND UNIQUE SITUATIONS	12
A. Benefits	12
B. Early Retirement Plans	13
C. Reductions In Force	13
D. Releases Of ADEA Rights In Settlement/Severance Agreements	14
GUIDELINES	15
A. Job Postings And Advertisements	16
B. Job Applications And Interviews	16
C. On-The-Job Comments	17
D. Changes In Company Identity And Culture	18
E. Adverse Action Decisions	19
F. Retaliation	19

This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to state requirements that extend beyond the scope of this booklet.

T

he average lifespan of Americans is approaching 80 years. The ratio of older adults to younger adults is rising. And as the population changes, the workplace changes too. Some employees are choosing to work longer. Others are using their longer and healthier lifespan to pursue a second career. Still others find themselves in need of a job during a longer than expected retirement. As these changes occur, employers are increasingly faced with new challenges in employing older workers. It is now more essential than ever for employers to understand the laws prohibiting age discrimination in employment.

In 1967, Congress passed the Age Discrimination in Employment Act, commonly referred to as the ADEA, which protects individuals age 40 and older from discrimination in the workplace based on age. In 1990, Congress passed the Older Workers Benefit Protection Act, or OWBPA, which amended the ADEA to prohibit employers from denying benefits to older

workers. Together the ADEA and the OWBPA amendments comprise the federal law that protects older employees from workplace discrimination.

Both laws will be discussed in this booklet. Many states also have laws protecting workers against age discrimination in the workplace, which this booklet does not address. Some state laws closely parallel the ADEA, but other states have enacted more restrictive age discrimination protections. Employers must ensure compliance with the laws of the states in which they operate, in addition to the ADEA and OWBPA.

The ADEA is separate and distinct from another principal law governing discrimination in employment – Title VII of the Civil Rights Act of 1964 – which protects individuals against discrimination on the basis of race, color, national origin, sex and religion. Certain aspects of Title VII and the ADEA are similar, but the two laws are not duplicative in every respect. To fully understand the reach of protections for older workers and the set of laws governing age discrimination in the workplace, employers must familiarize themselves with both the general principles behind the ADEA and its specific provisions.

To assist you in understanding these laws, this booklet first explains the basic principles of the ADEA. It then discusses specific types of age discrimination and what type of related conduct falls outside of illegal age discrimination. Next, the booklet addresses retaliation restrictions, age harassment and the legality of reverse age discrimination. It then explores several special considerations and unique situations under the ADEA. Of course, the discussion is intended only as a general overview of the most important aspects of this law, not as legal advice for any specific factual situation.

FUNDAMENTAL CONCEPTS

“It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age.” – United States Supreme Court in *Hazen Paper v. Biggins*

The ADEA applies to employers in industries affecting commerce with 20 or more employees in the current or preceding calendar year. Leased employees, overseas employees and employees of integrated companies count for the 20 employee threshold, but temporary employees do not.

The ADEA prohibits employers from discriminating against employees and applicants, who are 40 years old or older, based on age. Specifically, the ADEA makes it unlawful to discriminate against these persons because of their age with respect to any term or condition of employment, including hiring, firing, compensation, layoffs, promotions, compensation, benefits, job assignments and training.

This includes discrimination against an employee in favor of a worker who is under the age of 40, but it also prohibits discrimination against an individual in favor of a worker who is 40 years old or older, but younger than the employee claiming the discrimination.

Example: Maria, a 56-year old employee is refused a promotion. She may be able to show that her employer discriminated against her by promoting Paul, an employee who is 42 years old, even though Paul also falls within the protected age category established by the ADEA.

The following are examples of the type of conduct that violates the ADEA:

- a supervisor’s refusal to promote older employees because they are “too old” or assuming they will be retiring soon;
- a company-wide decision to lay off all older employees as part of an effort to promote a youthful company image and culture;
- implementing a health benefit program for retirees that reduces benefits at age 65; or
- awarding bonuses to all employees under 35 years of age

because the company values younger employees more than older employees.

The ADEA also makes it unlawful to retaliate against an applicant or employee for conduct related to age discrimination. Protected conduct includes opposing a discriminatory employment practice, filing an age discrimination charge, or testifying or participating in an investigation, proceeding or litigation involving age discrimination. The following acts are some examples of unlawful retaliation:

- firing an employee because he complained that his supervisor did not consider him for a promotion because of his age;
- denying an annual bonus to employees because they testified in support of a lawsuit brought by a former employee claiming age discrimination.

TYPES OF AGE DISCRIMINATION

The ADEA prohibits two different types of discrimination – disparate treatment and disparate impact. Disparate treatment discrimination occurs when an employer intentionally treats an employee or applicant 40 years old or older less favorably than a younger employee or applicant because of his or her age. Disparate impact discrimination occurs when an employer implements or maintains a policy that has an adverse impact on employees 40 and older even though the policy or practice itself has nothing to do with age.

A. Disparate Treatment

Under the ADEA, employers cannot treat employees 40 or older less favorably than younger employees because of their age. This means that you cannot refuse to hire, demote, fail to promote, fire, pay less, refuse to train, or provide reduced benefits to employees 40 and over because of their age. To understand how to avoid treating employees less favorably because of their age, it is helpful to look at the types of evidence that employees use to show age discrimination.

The most obvious evidence that an employee might use to establish age discrimination is a decision-maker's statement that he or she treated an employee adversely because of the

employee's age. For example, assume that Tom is a 52-year old employee who does not receive a promotion he was hoping for. He asks the manager who made the promotion decision for the reason, and is told the following:

“If you were 20 years younger, you would have had that promotion. But we needed to bring in some fresh ideas and connect with the younger part of our workforce.”

This statement is direct evidence of age discrimination because it ties the negative treatment directly to the employee's age.

But direct evidence rarely exists. The more common evidence of age discrimination is much more subtle. It often involves either negative comments made about or to older workers or favorable remarks made about or to younger workers, but not directly tied to the employment decision. This type of evidence is often referred to as circumstantial evidence because the underlying circumstances suggest that something is true, but do not directly prove that it is true.

Comments like the following have been found to be circumstantial evidence of age discrimination:

- claiming that the company “should get rid of the old guys;”
- referring to older workers as “old farts,” “dinosaurs,” “geezers,” or “little old ladies;”
- talking negatively about the “graying of a department;”
- commenting that “old people should be seen and not heard;”
- referring to the skills, approach or attitude of an older employee as “old school;”
- telling older employees that they “need to retire;”
- saying that the company would be better run by “the younger guys;”
- expressing an interest in “refreshing” the top executive pool; and
- criticizing the company for its “old white male culture.”

How strongly these types of comments might support an age discrimination claim depends on who says them, when they are said, where they are said, to whom they are said and how often they are said. Statements by a decision-maker are more likely to suggest that an adverse employment decision was based on age, particularly if the decision-maker is the one responsible for the adverse action. Comments made around the same time as the adverse action are more likely to suggest that a decision was based on age than comments made years or months before the adverse employment decision. Comments made as part of company policies or in company meetings are also more likely to suggest an age bias than comments made outside of work or in a context that does not relate to work. The more frequent the comments are, the more they suggest a bias based on age.

The age of the individual(s) who received the benefit denied to an older employee can also be evidence of age bias. The younger the age, the stronger the difference suggests age bias. For example, promoting a 25-year old over a 55-year old looks more like age discrimination than promoting a 54-year old over a 55-year old.

The qualifications of the individuals involved in any employment decision also may evidence age discrimination. Hiring a younger, less qualified employee over an older more qualified employee looks more like age discrimination than hiring an equally qualified or more qualified younger employee over an older candidate.

Courts look at these types of facts in deciding whether employees might have legal claims against their employers for age discrimination. To even move forward with a claim, employees must show that they were at least 40 years old, qualified, suffered an adverse employment action, and that there is some additional evidence, such as the above examples, that shows age was a factor in the adverse action.

B. Disparate Impact

Employers may engage in unlawful age discrimination even without any conduct or action that shows discriminatory animus towards individuals 40 or older under a disparate impact claim. Disparate impact discrimination involves a policy or

practice that is not about age, but has a disproportionate, negative effect on employees or applicants 40 or older

Policies that tend to have a disparate impact on employees over 40 are often those based on factors that have some correlation with age. The following types of policies tend to correlate with age and so are more likely to have an adverse impact on individuals 40 or older:

- policies based on seniority;
- policies related to retirement;
- policies focusing on the highest salary levels or pay rates;
- policies based on school graduation year;
- policies based on certain health conditions; and
- policies aimed at turnover in high-level executives.

Until recently, it was not clear that the ADEA made disparate impact discrimination illegal. Disparate impact claims have always been unlawful under Title VII, the law that prohibits discrimination in employment based on race, color, national origin, sex and religion. But courts disagreed on the viability of disparate impact claims under the ADEA. In 2005, the United States Supreme Court ended the debate. In the case of *Smith v. City of Jackson, Mississippi*, the Supreme Court ruled that the ADEA makes disparate impact discrimination unlawful.

Not all disparate impact claims are the same, however. As the Supreme Court explained, disparate impact claims under the ADEA are different and more limited than disparate impact claims under Title VII.

Merely alleging an age imbalance in the workplace does not show age discrimination under a disparate impact theory. An imbalance could be due to numerous factors that have nothing to do with age. Nor is it enough to point to a generalized policy that leads to such a disparate impact on older workers. Instead, an employee must isolate and identify specific employment practices responsible for the disparate impact. In addition, disparate impact age discrimination can only exist where there are statistically significant disparities between older and younger workers.

NON-DISCRIMINATORY EMPLOYMENT ACTIONS

A. Actions Based On Reasonable Factors Other Than Age (RFOA)

Age-based comments or practices that adversely affect older employees do not always establish claims for age discrimination. Employers can, and indeed, often must take disciplinary action against someone who is 40 years of age, or older.

The ADEA only prohibits adverse action because of age. In the disparate treatment context, that means that you can take adverse action against employees 40 and over if the adverse action is based on reasonable factors other than age.

You can promote candidates under age 40 in preference over an older employee for legitimate reasons other than age – superior experience, unique skills or other work-related qualifications. Likewise, you can discipline or terminate an employee who is in the protected group if there is a job-related reason for doing so. Proper reasons include those reasons that might justify discipline or termination of any other employee, including:

- poor performance;
- excessive tardiness or unexcused absences;
- violation of a no-call, no-show policy;
- failure to meet quotas or inability to meet deadlines;
- losing clients or accounts;
- failure or refusal to follow management’s instructions or directions;
- violation of company rules;
- sleeping on the job; or
- refusing to work scheduled hours.

In short, you can and should hold employees in the protected age group to the same standards, conduct and work rules as younger employees.

Just as circumstantial evidence can show age discrimination, it can also refute any suggestion of age discrimination. For example, the same manager’s previous preferential treatment of an employee 40 years old or older may help show that

the manager's later, adverse treatment of the same employee had nothing to do with age. Having a significant number of other employees in the same position or department who are close in age to the employee who is treated adversely will also help show that the treatment was not based on age.

Even if an employer has a legitimate reason to treat an older employee differently, it may still be illegally discriminating against an employee if it had a legitimate ground for the adverse action but did, in part, carry out the adverse action because of an age bias. The ADEA allows these "mixed motive" cases, meaning that an employer may still violate the ADEA if it treats an older employee less favorably partly based on a lawful reason, but also partly based on the applicant's or employee's age.

In the disparate impact context, the ADEA and OWBPA do not prohibit employers from establishing and implementing policies that adversely affect older employees where they are based on reasonable factors other than age. For example, you can establish a policy to cut costs when necessary by trimming employee salaries even if the policy adversely affects older workers by cutting their salaries more significantly. The motivation behind the policy is to cut costs in a time of financial need, (a reasonable factor other than age) not to discriminate based on age.

Title VII uses a more difficult test to satisfy. Under Title VII, if a policy is challenged as having a disparate impact, the employer must show that there are other ways to achieve its goals that do not result in a disparate impact on protected employees. The ADEA's RFOA test requires no such thing. In the above example, the employer does not have to prove that there are no other ways to cut costs. Cutting costs alone is a reasonable factor other than age, even if there are other ways of achieving the same result.

Even though the RFOA reasonable factors test is broad, not all factors are reasonable factors other than age. Courts will look carefully at the reason for an employer's policy to make certain it is not unreasonable. Employers should ensure that a lawful and reasonable factor other than age is motivating the decision.

B. Bona Fide Occupational Qualifications (BFOQ)

The ADEA also recognizes that in limited circumstances, age may be a legitimate reason to treat employees or applicants differently. The legal term for this is a bona fide occupational qualification or BFOQ. An employer does not violate the ADEA by treating applicants or employees differently because of age if it can show that age is a bona fide occupational qualification of the job.

But showing that age is a legitimate job qualification is not as easy as it may sound. You may only use age as a job qualification if the age limit is reasonably necessary to business operations and either 1) almost all of the individuals who do not satisfy the age-qualification are actually incapable of doing the job or 2) the only way of determining that some individuals are not capable of doing the job is by using an age-qualification.

REVERSE AGE DISCRIMINATION

Knowing that the ADEA prevents employers from discriminating against older workers in favor of younger workers begs the question of whether the opposite is true. Can employers treat employees who are older more favorably than younger employees because of their age under the ADEA?

As a matter of fact, they can under the federal law. As the United States Supreme Court explained in a case from 2004, the ADEA is designed as a remedy for unfair preference based on relative youth, not relative age. It protects older workers against younger workers, but does not protect younger workers against older workers. And that is true even if the younger employees are over the age of 40 and thus within the protected age group.

Note, however, that the ADEA does not require employers to prefer older individuals, and it does not affect applicable state, municipal, or local laws that may prohibit such preferences.

HARASSMENT BASED ON AGE

When most employers think of harassment, they think of sexual harassment. But employers are seeing more and more claims of harassment based on other protected categories (i.e. race,

color, age, national origin and religion). Unlawful harassment occurs when an employee experiences age-biased words or actions that are unwelcome, offensive and so severe or pervasive that they alter the employment conditions and create an abusive or intolerable working environment.

No adverse action is required to show a hostile work environment harassment based on age, only a showing of actions or conduct causing a hostile work environment. The same type of comments and conduct that support claims for age discrimination can also support a claim for age harassment.

Age harassment claims are still less frequent than other types of harassment claims and it is not entirely clear that the ADEA allows them. As with Title VII, the ADEA does not specifically reference harassment, only discrimination. However, some courts have allowed age harassment claims under the ADEA. In addition, several state statutes specifically prohibit harassment based on age. Employers should therefore be aware that even if an employee does not suffer an adverse employment action because of his or her age, he or she may still be able to sue the employer for age harassment based on age-biased comments and conduct.

RETALIATION

As with all discrimination laws, the ADEA would not be complete without another type of protection for employees – protection against retaliation. In general, retaliation provisions under any discrimination statute encourage employees to report unlawful acts and to exercise their rights under the law.

The ADEA is no exception. Employers cannot fire or take any adverse action against employees who complain about age discrimination. Nor can you take any action against an employee who files an administrative charge, arbitration claim or civil lawsuit against an employer for age discrimination. Last, but certainly not least, the ADEA makes it illegal to retaliate against an employee or applicant for testifying or participating in an investigation, proceeding or lawsuit involving age discrimination, whether brought by the employee or another employee.

SPECIAL CONSIDERATIONS AND UNIQUE SITUATIONS

A. Benefits

OWBPA specifically prohibits employers from denying benefits to older workers. An employer may reduce benefits for older workers only if the cost of providing the reduced benefit to older workers equals the cost of providing the same benefit to younger workers.

Two cases, *EEOC v. AARP* and *Erie County Retiree Association v. County of Erie*, recently tested this rule. These cases came about because the Equal Employment Opportunity Commission (EEOC), the administrative agency that handles federal age discrimination claims, proposed a controversial new regulation. The regulation would have made it lawful for employers who provided their retirees with health benefits to reduce those benefits when Medicare starts, at age 65.

The EEOC argued that this regulation would encourage employers to establish retiree health benefit plans. Without such a regulation, the EEOC claimed, the potential cost of retiree health benefit programs was just too large and employers could not afford to provide such benefits. With such a regulation, employers could afford to provide retiree health benefits and would be more likely to do so.

The Erie County Retiree Association and the American Association of Retired Persons (AARP) disagreed. They claimed that the new regulation was illegal under the ADEA because it did exactly what the ADEA says employers cannot do – treated older employees less favorably because of their age. The lawsuits asked the courts to declare that the new EEOC regulation violated the ADEA, and to prohibit the EEOC from rolling it out.

Both courts considered the issue and decided that the new EEOC regulation violated the ADEA. These cases ensured that the type of reduced benefit program at issue would be treated just like all other reduced benefits under the ADEA. They are only lawful if the cost of providing the reduced benefits to older workers would be the same as providing the same benefit to younger workers.

B. Early Retirement Plans

Under the ADEA, employers cannot require employees in a certain age group to retire because of their age. That means that having a seniority system or a benefits plan that forces older employees to retire violates the ADEA.

Of course, an employer can have an early retirement program that is completely voluntary and is offered to keep costs down. But be careful in using and carrying out any voluntary retirement plan. There is always a danger that what an employer thinks is voluntary, is structured and presented in such a way that employees feel it is involuntary.

There is also a significant exception to this general rule. The ADEA allows employers to implement mandatory retirement plans for a select group of individuals who are otherwise protected. It allows compulsory retirement plans for employees who are 65-years old, employed in bona fide executive or higher policymaking positions and are entitled to an immediate, non-forfeitable annual retirement benefit from the employer that equals at least \$44,000. The benefit can be from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of plans. A single plan does not have to provide the \$44,000. Several plans together can provide the \$44,000.

C. Reductions In Force

Reductions in force pose a unique situation under the ADEA. Because they usually involve a large-scale layoff, it is more difficult to establish that any reduction of a particular employee was based on age. However, there is no wholesale exclusion from the ADEA for adverse actions made as part of a reduction-in-force.

Rather, the same general prohibitions against age discrimination apply. This means that even if transfers or lay-offs are part of a reduction-in-force, they are unlawful under the ADEA if age was a motivating factor in the decision, just as with any other age discrimination claim under the ADEA.

D. Releases Of ADEA Rights In Settlement/Severance Agreements

Most severance and settlement agreements contain a general release. Usually the release is a lengthy paragraph where the employee agrees not to sue the employer and to give up any legal claims he or she might have against the company.

OWBPA adds special requirements for any release of rights under the ADEA. Employers incorporating a release as part of a severance or settlement agreement must adhere to these unique requirements:

- the waiver of ADEA rights (or release) must be in writing and understandable to the average person;
- the waiver must specifically refer to ADEA claims;
- the employee cannot waive the right to claims that occur after the employee signs the agreement;
- the release must be supported by a benefit that the employee is not already entitled to (e.g., cannot ask for a release of ADEA claims in exchange for COBRA benefits since the employee is already entitled to COBRA benefits);
- employees must be advised in writing to talk to a lawyer before signing the agreement;
- employees signing an individual agreement must have 21 days to consider a proposed written release; and
- employees must have 7 days to revoke the agreement once they sign it.

These last two provisions often cause some confusion. To comply with these provisions, an employer must leave the settlement or severance offer open for 21 days. But the employee is free to sign the agreement before the 21-day period expires. Once the employee signs the agreement – whether on the first day of the 21-day open acceptance period or the twenty-first day – the employee must be given 7 days to change his or her mind. Because of this 7-day waiting time period requirement, severance or settlement agreements for individuals 40 or older must be drafted so that they do not become effective until after the 7-day waiting period has passed.

Employers seeking a waiver of ADEA rights as part of an exit incentive or other employment termination program offered to a group or class of employees must comply with slightly different requirements. Under those circumstances, you must provide employees with 45 days instead of 21 days to consider the agreement. And you must provide the following disclosures to the employees in the group at the beginning of the 45 day offer period:

- the class, unit or group of individuals covered by the program;
- any eligibility factors for the program;
- any applicable time limits for the program;
- the job titles and actual ages of all individuals eligible or selected for the program; and
- the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

EEOC regulations on the ADEA make the disclosures even more rigorous by requiring that employers: 1) break down age, grade and subcategory information, 2) distinguish between voluntary and involuntary terminations and 3) provide the information to the whole decisional unit.

Failure to comply with OWBPA's requirements can invalidate the ADEA release.

GUIDELINES FOR AVOIDING LAWSUITS

It is one thing to understand what the ADEA says. But it is another thing to understand what the ADEA means for your day-to-day operations and to understand how even seemingly small actions and words can lead to large issues of age discrimination. Although no text could possibly address the countless situations where ADEA concerns come into play, the following practical guidelines provide some context for how the ADEA affects employment decisions and the workplace.

A. Job Postings And Advertisements

Under the ADEA employers cannot include age preferences, limitations or specifications in job notices or advertisements. The italicized words and phrases are examples of job language to avoid because they may suggest an intent to discriminate based on age:

- “Looking for motivated, young self-starter!”
- “Only under age 35 need apply.”
- “Position for individual age 25-35.”
- “It’s any girl’s dream job...”
- “Youthful face needed for customer relations.”
- “The perfect job for new high school or college graduates.”
- “Delivery boy wanted.”

You should also avoid words and phrases that focus on employees under a certain age even if they are over 40, because the ADEA also protects against age discrimination *within* the protected class of employees. The italicized words or phrases are potentially problematic for that reason:

- “Applicants between age 40 to 50 only.”
- “Having a midlife crisis? Ready for a career change?”
- “If your kids have just left for college and you’re ready to return to work, this is the job for you!”

B. Job Applications And Interviews

Contrary to popular belief, the ADEA does not absolutely bar an employer from asking job applicants how old they are or what their birth date is. But there are at least three reasons why you should not ask for such information. First, such inquiries are closely scrutinized by the EEOC. Second, asking about age may dissuade older workers from applying for a position. Third, it is difficult to discriminate against someone based on their age if you do not know what the applicant’s age is.

Limiting age-related inquiries is consistent with a more general rule for applications and interviews – ask the question you need the answer to, not just any question that will give you an answer.

The most obvious question to avoid on applications and in interviews is how old an applicant is. Avoiding age-based questions also means you should not ask for birth dates. You do need to know how old someone is to determine if they are legally able to work. But while that's true, learning that information does not require asking an applicant how old they are – only if they are over 18. Applicants can answer that question with a simple “yes” or “no,” without revealing their age.

Any other questions that would tend to reveal age are equally problematic. Instead of asking when someone graduated from high school, simply ask whether someone graduated from high school. Asking when someone graduated from high school is a question that will give employers the answer, but will also reveal information that employers do not necessarily want to know.

C. On-The-Job Comments

You should also avoid age-biased comments in the workplace. Even a few offhand comments based on age may create an inference of age discrimination. This is especially true if the comments are critical of older employees. But it is also true of comments that praise youth or younger workers. The problem with both types of comments is that they show both an awareness of age and an age-related preference.

While stereotypes are difficult to ignore, ensuring that decision-makers recognize the risks of stereotyping older employees will help avoid age discrimination.

Example:

Bill is a supervisor. He is convinced that older employees are not technologically savvy or inclined. As a result, Bill assumes that Jeffrey, age 61, is not interested in attending a new computer training session and does not invite him.

By giving in to stereotypes about older workers, the supervisor has now denied the older employee a job benefit. But there is another problem. Without the skills from the training, the older employee may have a difficult time completing computer-related tasks as quickly as the younger employee who did attend the training. A simple stereotype about an older worker has now led to a much larger problem.

D. Changes In Company Identity And Culture

Problems also often arise when employers try to reinvent or change company identity or culture. There are numerous reasons why employers push for a company image or culture change. They may want to promote innovation, improve efficiency, recruit new talent, boost morale, break down formal barriers, harmonize the work environment, modernize company policies and practices or motivate employees. But the descriptions companies tend to use to describe the types of changes often include words like young, youthful, fresh, new, cool, progressive, cutting edge, forward-looking, evolutionary, modern, liberal, hip or contemporary.

Many of these words have strong connotations of youth. Because of these associations, employees who are treated adversely during such a culture shift are likely to feel that the treatment is based on their age. Often without realizing it, the employer has opened the door to an age discrimination claim.

To avoid this problem, use caution in deciding how to convey a culture shift. Any company memos, strategies and business plans seeking to implement such changes should be carefully drafted to avoid ostracizing older employees or encouraging managers or supervisors to take any action against older employees.

E. Adverse Action Decisions

Employers should treat employees 40 and older the same as they would any other employees. The same performance standards should apply. The same work rules should apply. And employers should conduct the same evaluations for purposes of promotions, training and new opportunities with older employees as they do with younger employees.

While it may be difficult not to think about how soon an employee may be retiring, how long they could work for the company, or how they might compare to a younger worker, you must avoid allowing any such considerations to affect your employment decisions.

F. Retaliation

Take all steps necessary to ensure that an employee who complains about age discrimination, files a complaint or claim of discrimination or otherwise participates in a lawsuit, charge or investigation of age discrimination is not retaliated against.

To avoid problems, you should determine if the employee has recently made any complaints, particularly about age discrimination, before taking an adverse action against an employee. If so, then ensure that the adverse action is not being made because of such complaints.

B

y increasing awareness about age discrimination in employment and recognizing the situations where age discrimination often arises you can avoid both actual age discrimination and any unintended appearance of age discrimination. Doing so ensures that your workplace is a friendly environment for all workers no matter how young or old they may be.

For further information about these contents, contact any office of Fisher & Phillips, LLP or visit our website at www.laborlawyers.com

OTHER BOOKLETS IN THIS SERIES:

Americans With Disabilities Act – Employment Aspects

Americans With Disabilities Act – Public Accommodations

Business Immigration

COBRA

Employment Discrimination

Fair Labor Standards Act – Exemptions & Recordkeeping

Fair Labor Standards Act – Wage & Hour Provisions

FMLA

HIPPA

Immigration Law

National Labor Relations Act – Unfair Labor Practices

National Labor Relations Act – Union Organizing

OSHA

Sexual Harassment

USERRA

WARN Act

ATLANTA

1500 Resurgens Plaza
 945 East Paces Ferry Road
 Atlanta, GA 30326-1125
 404.231.1400

CHARLOTTE

227 W. Trade Street
 Suite 2020
 Charlotte, NC 28202
 704.334.4565

CHICAGO

1000 Marquette Building
 140 South Dearborn Street
 Chicago, IL 60603
 312.346.8061

COLUMBIA

1901 Main Street
 Suite 1400
 Columbia, SC 29201
 803.255.0000

DALLAS

1601 Elm Street
 Suite 4343
 Dallas, TX 75201
 214.220.9100

DENVER

1999 Broadway
 Denver, CO 80202
 303.218.3650

FT. LAUDERDALE

450 East Las Olas Boulevard
 Suite 800
 Ft. Lauderdale, FL 33301
 954.525.4800

HOUSTON

1200 Smith Street
 Suite 2200
 Houston, TX 77007
 713.292.0150

IRVINE

18400 Von Karman Avenue
 Suite 400
 Irvine, CA 92612
 949.851.2424

KANSAS CITY

104 West 9th Street
 Suite 400
 Kansas City, MO 64105
 816.842.8770

LAS VEGAS

3993 Howard Hughes Parkway
 Suite 650
 Las Vegas, NV 89169
 702.252.3131

NEW JERSEY

430 Mountain Avenue
 Murray Hill, NJ 07974
 908.516.1050

NEW ORLEANS

201 St. Charles Avenue
 Suite 3710
 New Orleans, LA 70170-3710
 504.522.3303

ORLANDO

300 South Orange Avenue
 Suite 1250
 Orlando, FL 32801
 407.541.0888

PHILADELPHIA

201 King of Prussia Road
 Suite 650
 Radnor, PA 19087
 610.230.2150

PORTLAND

111 SW Fifth Avenue
 Suite 1250
 Portland, OR 97204
 503.242.4262

SAN DIEGO

4225 Executive Square
 Suite 950
 La Jolla, CA 92037
 858.597.9600

SAN FRANCISCO

One Embarcadero Center
 Suite 2340
 San Francisco, CA 94111
 415.490.9000

TAMPA

Suite 2525
 401 E. Jackson Street
 Tampa, FL 33602
 813.769.7500

**FISHER &
 PHILLIPS LLP**
 ATTORNEYS AT LAW

"SOLUTIONS AT WORK"

ATLANTA • CHARLOTTE • CHICAGO • COLUMBIA • DALLAS • DENVER • FT. LAUDERDALE
 HOUSTON • IRVINE • KANSAS CITY • LAS VEGAS • NEW JERSEY • NEW ORLEANS • ORLANDO
 PHILADELPHIA • PORTLAND • SAN DIEGO • SAN FRANCISCO • TAMPA