

Managing the Aging Workforce

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Why Discuss Aging Workforce Issues?

- ◆ People are living longer:
 - ◆ According to Watson Wyatt Worldwide, the percentage of the population aged 60 and over will increase from 16% in 2000 to 26% in 2040
- ◆ Social Security benefits are not enough to fund the retirement lifestyle sought by most:
 - ◆ The number of workers per retiree is declining, which may force Congress to reduce or delay the onset of benefits
- ◆ Increasing numbers of employees cannot turn to traditional *defined benefit* pension plans for retirement income
- ◆ Retirement health plan subsidies have disappeared as health costs have increased



Why Discuss Aging Workforce Issues?

- ◆ Most employees have not acquired or saved enough money to pay for a work-free retirement at age 65, especially the *affluent retirement* that so many seek
- ◆ *40 is the new 50*, etc. . . . Many baby boomers refuse to see themselves as old; they want to remain active and involved
- ◆ Substantially declining birthrates after the Baby Boom mean there may not be enough younger employees to replace retiring (or semi-retiring) baby boomers



Why Discuss Aging Workforce Issues?

- ◆ As a result:
 - ◆ Many “retirement age” employees will want to (or need to) work into their late 60s or beyond (i.e., greater *employee* demand for delayed retirement)
 - ◆ According to a Merrill Lynch survey, 75% of boomers intend to keep working in retirement, although many plan to retire from their current job and launch a new career; 42% want to cycle between periods of work and leisure (as reported in WSJ)
 - ◆ Many employers will want to retain their experienced and knowledgeable “retirement age” employees (i.e., greater *employer* demand for delayed retirement)
 - ◆ *Retirement* in the next few decades is not likely to fit the traditional notion of “all work stops at age 65”



Why Discuss Aging Workforce Issues?

- ◆ An older work force is likely to have special issues that require employer attention:
 - ◆ Many observers expect large numbers of retirement age employees to seek a *phased retirement* that is characterized by shorter work days or work weeks
 - ◆ Older employees may have the leverage to demand such phased-retirement arrangements
 - ◆ Employers will likely see more older applicants for jobs competing against younger applicants



Why Discuss Aging Workforce Issues?

- ◆ An older work force is likely to have special issues that require employer attention:
 - ◆ An older work force may create a greater potential for age discrimination claims (or maybe not)
 - ◆ An older work force may have a higher incidence of health-related absences and/or a greater need for reasonable accommodations (or maybe not)
 - ◆ *Leakage* from retirement plans may have cost consequences for plan sponsors
 - ◆ Older employees' greater need for medical attention may increase cost of providing health benefits; and this may be complicated by the fact that many of these employees may be phased retirees



Phased Retirement – Reduced Schedule

- ◆ Older workers may want to work reduced schedules instead of simply leaving the work force
- ◆ In many cases, employers may want to work out such arrangements to keep valuable long-term employees performing their jobs
- ◆ There are risks inherent in granting or denying such a request



Phased Retirement – Reduced Schedule

- ◆ Risks of granting request for reduced schedule
 - ◆ Will employer need to give same benefit to other younger workers (i.e. expectant mothers, disabled employee)?
 - ◆ Wage/hour issues
 - ◆ Loss of productivity
 - ◆ May delay diversification of work force/prevent opportunities for newer workers
 - ◆ Perception of preferential treatment for older workers (reverse discrimination)



Phased Retirement – Reduced Schedule

- ◆ Risks of not granting request for reduced schedule
 - ◆ Age discrimination
 - ◆ Loss of productive worker
 - ◆ Older worker may have built up substantial sick or vacation accrual and may take advantage of full use benefits, costing company time and money
 - ◆ Perception of lack of concern toward long-standing employee



Hiring Older Workers

- ◆ More older workers applying for entry level positions
- ◆ Employers are under simultaneous pressure to increase diversity of workforce
- ◆ This pressure can include legal pressure (affirmative action) and business pressure
- ◆ Employers want to maximize their investment to get long term results
- ◆ But older workers are likely to be more experienced than younger more diverse workers



Hiring Older Workers

- ◆ What should employers do?
 - ◆ Train interviewers and managers
 - ◆ Follow pre-employment inquiry guidelines
 - ◆ Avoid stereotypes
 - ◆ Be careful of judging people as “overqualified” based on life or work experience
 - ◆ Carefully draft job descriptions and job application notices
 - ◆ Remember that diversity can include older workers
 - ◆ Older workers can serve mentoring roles



Age Discrimination in Employment

- ◆ Federal and state law prohibit discriminating against individuals because they are age 40 or over
- ◆ The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination based on age against employees who are age 40 or older
- ◆ ADEA covers all businesses with at least 20 employees on each working day of at least 20 calendar weeks



Age Discrimination in Employment

- ◆ ADEA prohibits mandatory retirement and age discrimination in the provision of benefits, subject to a few limited exceptions
- ◆ ADEA covers compensation, terms, conditions or privileges of employment
- ◆ O'Connor v. Consolidated Coin Caterers Corp.
 - ◆ The O'Connor decision held that a prima facie showing of age discrimination did not require the plaintiff's replacement (if any) to be younger than the minimum age (i.e., 40 years old)



Age Discrimination in Employment

- ◆ The Court offered the example of a 68-year-old replaced by a 65-year-old and suggested that such facts might amount to “creating a prima facie case on the basis of very thin evidence”
- ◆ No bright line test, however, and employers must be aware that replacement of a worker over 40 with a younger worker can give rise to a claim of discrimination



Age Discrimination in Employment

- ◆ Can an employer favor the older worker?
 - ◆ *General Dynamics Land Systems, Inc. v. Cline*
 - ◆ There is no claim of “reverse” age discrimination
 - ◆ Employer’s elimination of retiree health coverage for workers under the age of fifty did not violate the federal ADEA



Age Discrimination in Employment

- ◆ Standard for discrimination claims
 - ◆ Employee first must show prima facie case
 - ◆ Employer must then show legitimate nondiscriminatory reason for employment action
 - ◆ Employee must show pretext of discrimination
- ◆ Standard for harassment claims
 - ◆ Unwelcome conduct based on age that creates a hostile work environment
 - ◆ More than “stray remarks”



Older Workers Benefit Protection Act

- ◆ Congress amended the ADEA and enacted the Older Workers Benefit Protection Act of 1990
 - ◆ Created certain safe harbors for employee benefits plans
 - ◆ Created rules for waiver of age discrimination claims
 - ◆ Created litigation minefields!



Older Workers Benefit Protection Act

- ◆ Stated purpose of OWBPA
 - ◆ Promote the employment of older persons based on their ability
 - ◆ Prohibit arbitrary age discrimination in employment
 - ◆ Help employers and workers find ways of meeting problems arising from the impact of age on employment



Severance and Release Agreements and OWBPA

- ◆ Early Retirement Incentive Plans Are Allowed
 - ◆ “Equal benefit or equal cost;” or
 - ◆ Voluntary early retirement incentive
 - ◆ Actual incentive to retire
- ◆ How do early retirement incentive plans further goals of OWBPA
 - ◆ Very unclear
 - ◆ Drafters were hostile toward such plans
 - ◆ Voluntary plans are OK



Release of ADEA Claims

- ◆ Cardinal rules of ADEA releases
 - ◆ “Knowing and voluntary”
 - ◆ Statutory requirements
 - ◆ Strict compliance
 - ◆ If you fail to comply, individual can keep the money and sue



Release of ADEA Claims

- ◆ Statutory requirements for individual releases
 - ◆ Understandable written agreement*
 - ◆ Reference to ADEA
 - ◆ No waiver of claims arising after signing agreement
 - ◆ Supported by consideration
 - ◆ Written advice to seek counsel
 - ◆ 21 days to consider signing agreement (can be waived)
 - ◆ Revocation within 7 days of signing (cannot be waived)



Release of ADEA Claims

- ◆ Understandable written agreement
 - ◆ By employee signing release
 - ◆ Confusing terms may render entire ADEA release unenforceable (*Thomforde v. International Business Machines, Inc.*)
 - ◆ **Lesson learned**: what matters is whether ADEA release is likely to be understood by average person signing, not average lawyer



Release of ADEA Claims

- ◆ Adequacy of written advice to seek counsel
 - ◆ Not “knowing and voluntary” unless advised in writing to see counsel
 - ◆ Avoid “passive” advisory (*Cole v. Gaming Entertainment, LLC*)
 - ◆ **Problematic**: “Employee acknowledges he/she has been advised to consult with an attorney.”



Release of ADEA Claims

- ◆ Advisory should be affirmative statement of advice emphasizing:
 - ◆ Employer is giving this advice, and
 - ◆ An attorney consult is suggested before the employee signs
 - ◆ **Good**: “Employer hereby advises you to consult with an attorney before you sign this Agreement.”



Release of ADEA Claims

- ◆ Waiver of Future Claims
 - ◆ ADEA release invalid if waives claims arising after execution
 - ◆ Cole and IBM mean employers must be careful of language
 - ◆ **Simple fix**: “This release is not to be construed as a waiver of claims that may arise after the execution of this Agreement.”



Release of ADEA Claims

- ◆ Statutory requirements for group exit incentive programs
 - ◆ 45 day period for considering release
 - ◆ “Group” can be more than one person at the same time
 - ◆ Required disclosures
 - ◆ Class, unit, or group eligible
 - ◆ Eligibility factors
 - ◆ Any time limits
 - ◆ Job titles and ages of all eligible or selected
 - ◆ Ages of all in same classifications not selected



Accommodation and Leaves of Absence

- ◆ Older workers may have more need for reasonable accommodations and need for more frequent leaves of absence
 - ◆ Be careful of stereotypes
 - ◆ Treat the performance, not the “disability” or “condition”
 - ◆ Basic rules are the same for older workers



Accommodation and Leaves of Absence

- ◆ ADA covers a physical or mental impairment which substantially limits one or more major life activities
- ◆ FMLA covers the “serious health condition” of the employee or his/her spouse, parent or child
- ◆ Washington Law Against Discrimination covers an abnormal physical or mental condition that substantially limits the ability to perform the individuals job



Accommodation and Leaves of Absence

- ◆ Particular concerns with older workers
 - ◆ Making assumptions about need for accommodation
 - ◆ Failing to offer intermittent leave under FMLA
 - ◆ Failing to designate leave as FMLA leave
 - ◆ Treating older workers differently than younger workers
 - ◆ Determining whether equipment is personal device or device for which employer is responsible



Employee Benefit Issues

- ◆ Phased retirement and retirement plans
 - ◆ In traditional defined benefit pension plans, employees cannot begin to receive retirement benefits until they retire
 - ◆ The IRS has recognized that some employees seeking phased retirement may want to receive a pro-rated retirement benefit to supplement wages that have been reduced because of part-time work
 - ◆ The IRS has issued temporary regulations which allow for such pro-rated distributions from DB plans
 - ◆ Many DB plans have special provisions for employees who return to work after retirement; employers must pay special attention to their plan requirements



Employee Benefit Issues

- ◆ Phased retirement and DC plans
 - ◆ 401(k) and similar plans may allow for penalty-free withdrawal of benefits at age 59½
 - ◆ 401(k) plan leakage has the potential (although perhaps not a great potential) to increase plan sponsor administrative costs as average plan balances decline



Employee Benefit Issues

- ◆ Voluntary and involuntary rollovers may increase
 - ◆ Plan sponsor and administrators should be mindful of their notice obligations
 - ◆ Involuntary distributions must now be rolled over into an IRA unless the employee elects otherwise



Employee Benefit Issues

- ◆ **Remember**: For current employees, Medicare is never the secondary health plan
 - ◆ Some employers may expect or hope to shift some amount of health care expenses to Medicare; however, Medicare cannot be the primary health insurer so long as the employer provides any group health plan for its employees
 - ◆ And, it is *unlawful age discrimination* when an employer provides lesser group health benefits or coverage to older employees
- ◆ **Also**: employers with restricted eligibility or higher-premiums for part-time employees may want to change those terms for phased retirees—reverse age discrimination is not unlawful



Employee Benefit Issues

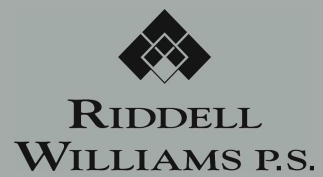
◆ COBRA

- ◆ Remember that COBRA is not just for employees whose employment ends; a COBRA qualifying event occurs whenever there is a loss of coverage as a result of reduced hours (e.g., phased retirement, leave of absence); entitled to Medicare and certain other events
- ◆ The employer—not the insurer—has the statutory obligation to provide COBRA notices and coverage



Employee Benefit Issues

- ◆ Medicare Part D notices to Medicare-eligible participants is required by November 15 for all employers providing *creditable coverage* with respect to prescription drug benefits
- ◆ A *creditable coverage* determination requires actuarial analysis
- ◆ Employers may seek subsidies for their Medicare-creditable prescription drug coverage
- ◆ Confer with your insurers or TPAs as soon as possible



Questions?

Please contact me any time with additional questions.

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