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**Treat Your Elders Well: They Can Do The Job, And They Can Sue You For Age Discrimination**

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**The Number of Workers Protected from Age Discrimination is Growing**

Perhaps you remember (or have heard of) the line: "don't trust anyone over 30." That slogan emerged in the 1960s, when the Baby Boomer generation was coming into its prime and rejected the traditions of the "Establishment"—the structures and beliefs of their parents' and grandparents' generations. From the perspective of a Boomer at that time, 30 seemed old. And society as a whole viewed advancing age as an impediment. In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA), which recognized that older workers were disadvantaged in retaining jobs and in regaining them when they were displaced. The ADEA sought to promote employment of "older persons" based on ability rather than age and to prohibit arbitrary age discrimination. The "older persons" protected by the statute were defined as individuals who are at least 40 years of age.

Fifty years later, 40 is the new 20, or maybe the new 30, but the ADEA's protections remain relevant. In fact, the ADEA likely will increase in importance as ever more older Americans are choosing to continue to work—whether because they enjoy staying involved or need the compensation. As of mid-2016, almost nine million people—18.8 percent of those 65 years and older—were working full- or part-time, an increase from 12.8 percent of that age group in 2000. By 2020, it is estimated, individuals age 55 and older will make up 25 percent of the U.S. workforce. Already, the median age of U.S. employees is about 42 years old, meaning that over half of employees are protected by the ADEA.

Older workers can bring a number of positive elements to a job: skills that have been honed over time, real-life experience, a broader perspective, commitment, fewer ongoing dramas, and greater reliability. While some older people may have medical issues or need additional training to keep up with technical developments, those are factors that should be assessed and addressed on an individual basis, rather than through a generalized judgment that it is best to hire younger people.

**Favor for Younger Workers is Not Uncommon, But Cases Are Challenging This Practice**

Despite the value that older workers can offer, it has not been uncommon for employers to favor younger applicants through use of selective factors that do not directly reference age, but which have the effect of screening out older workers. In some instances, the screening has occurred at the stage of layoffs and resulted in statistically more older people being let go. In others cases, hiring programs have focused on recent college graduates, leading to the exclusion of older individuals. A recent class action against Hewlett-Packard, for example, alleges that company policy required 75 percent of external hires to be recent graduates or individuals with no more than five years' experience related to the job, and that employees who were older than 40 were laid off to be replaced by younger individuals Another class action similarly claims that Google has systemically discriminated against older job applicants and employees.

**The Federal Legal Landscape: Older Employees May be More Protected than Older Applicants**

Legally, there are generally two forms of discrimination—disparate-treatment and disparate-impact discrimination. The former occurs when an employer *intentionally* treats an employee or group of employees differently because of their protected status, such as age. The latter involves employment practices that are *facially* neutral, but have the *effect* of negatively impacting employees in a protected class. The U.S. Supreme Court has held, for example, that requiring a high school diploma or passing a standardized intelligence test as a condition of employment, while apparently neutral, amounts to disparate-impact race discrimination where those requirements are not related to successful job performance but disqualify substantially more black than white employees from promotions. Acknowledging that there are some circumstances in which age may be relevant to ability to perform a

job, the ADEA includes an exception that allows different treatment of older employees when age is a bona fide occupational qualification reasonably necessary to operation of the business, or when different treatment is based on reasonable factors other than age.

The Supreme Court has interpreted the ADEA to require plaintiffs claiming disparate-treatment age discrimination to prove their age was the "but-for" cause of an adverse action such as a termination or a failure to hire. That is, regardless of other possible contributing factors, the employee's age must have been the *determinative* factor, without which the employer would not have taken the adverse action. This is a relatively difficult fact to establish, especially where the employer asserts it simply applied a neutral policy—such as favoring recent graduates—that just happens to have resulted in lower hiring or retention of older employees. In such circumstances, a disparate-impact claim is more likely to succeed.

For a time, though, some courts held that disparate-impact claims could not be brought under the ADEA. In 2005, resolving the issue, the Supreme Court held that the ADEA authorizes not only disparate-treatment, but also disparate-impact claims. The case, *Smith v. City of Jackson*, involved claims by police officers who alleged a set of pay raises by the City favored younger employees.

What *Smith* did not resolve was whether *job applicants* are also entitled to bring disparate-impact claims based on facially neutral hiring policies such as those targeting recent college graduates. Although the ADEA's underlying policy would seem to favor protection of applicants on par with employees, the statutory language is arguably open to interpretation. Two recent cases have come down differently on the issue. In the first, *Villarreal v. R.J. Reynolds Tobacco Co*., the Eleventh Circuit Court of Appeals concluded the ADEA's language excludes disparate-impact protection for job applicants. Since then, in *Rabin v. PricewaterhouseCoopers, LLP*, the U.S. District Court for the Northern District of California has taken the opposite position, relying in large part on the strong dissent in *Villarreal*. It seems likely the Ninth Circuit—which includes federal courts in Washington State—will follow the California District Court's lead and find in favor of disparate-impact claims by job applicants. Until the issue reaches the Supreme Court, however, neither employers nor employees can be sure of their rights in this area.

**The Upshot: Don't Count Older People Out of the Job Pool or Get Rid of Them Without Good Reason**

Although disparate-impact protection for older job *applicants* hasn't been finally decided at the federal level, employers who use qualifications that screen out older applicants without a reasonable connection to likely job performance will place themselves at risk of litigation and liability. Policies or practices that adversely impact older *employees* without reasonable justification will definitely support a disparate-impact claim. Moreover, Washington State law prohibiting age discrimination, which has been found to include disparate-impact discrimination, explicitly applies to both employees and applicants, so employers of individuals in Washington should carefully consider their hiring and employment policies and practices and their impact on older workers. Possible litigation aside, employers should avoid stereotypes about older workers. They can bring a lot to the job.