

Blog Post

Avoiding Age Discrimination Claims During Succession Planning

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As “baby boomers” come of retirement age, employers may find themselves between a rock and a hard place: they can either ask employees about their retirement plans and risk being accused of age discrimination, or they can avoid those conversations and risk being woefully underprepared for the retirements of key employees.

When done right, succession planning affords employers an opportunity to train the next generation of company leaders, ensure continuity in key roles, and manage all aspects of the transition. However, when done wrong, succession planning can expose employers to significant liability under federal and state age discrimination laws.

The federal Age Discrimination in Employment Act applies to employers with 20 or more employees and prohibits discrimination against workers 40 years of age or older. The Older Workers Benefits Protections Act imposes procedural safeguards for releases that waive rights protected by the ADEA. Additionally, state laws in many jurisdictions provide further protection.

Courts have consistently held that merely asking employees about their retirement plans does not constitute age discrimination. However, insulating your company from liability during the succession planning process involves careful consideration of

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the succession plan itself. Employers can reduce the risk of violating federal and state discrimination laws by avoiding the following:

DON'T mention age in retirement planning discussions. While employers may have a reasonable interest in employee's future plans, those conversations should not include references to the employee's age. Comments implying age (*i.e.*, "your generation," or "baby boomer," "you're not as young as you used to be") should also be avoided.

DON'T express an opinion about the employee's response. Regardless of how employees respond to inquiries about retirement, avoid expressing disapproval or surprise. A negative response from the employer may be seen as pressuring the employee to retire.

DON'T assume an employee is planning to retire based on their age. If an employee says they have no plans to retire, avoid repeatedly asking them afterwards. Many employees are choosing to work later. Frequent follow-ups may be seen as pressuring the employee to retire.

DON'T target older employees for retirement inquiries. Avoid initiating retirement conversations with employees of a certain age. Ask all employees (especially those in executive and management-level roles) about their thoughts for the future—not just older employees. Focus on identifying those positions that require a coordinated succession plan to transfer knowledge, rather than those occupied by older employees. If any positions have significant need for advanced notice of retirement, they should be treated similarly in terms of succession planning.

DON'T make employment decisions based on age. Avoid directly tying any employment decisions to an employee's age.

DON'T exclude older employees from the succession pool. When considering potential

successors for retiring employees, avoid excluding otherwise qualified candidates based on age. All positions and applicants should be treated similarly without regard to age.

DON'T forget to include ADEA and OWBPA language in severance agreements. Where applicable, severance agreements can provide employers with certainty regarding age discrimination claims. However, any agreement entered into with an employee 40 years of age or older should include a valid waiver under the ADEA and OWBPA, including all required disclosures and advisements, a 21-day consideration period, and a seven-day revocation period. When two or more employees separate from the company at the same time as part of a Reduction in Force or other exit incentive plan, employers are required to make additional disclosures and the period for employee consideration of the agreement is extended to 45 days.

In planning for your company's future, age discrimination concerns need not sideline succession planning. However, employers must navigate the discussions carefully to avoid exposure under federal and state age discrimination laws. Akerman attorneys are available to provide guidance to employers engaging in succession planning and for other ADEA concerns.

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