Forced Retirement Based On Age

Is it Legal?

By Amy L. Miletich and Jennifer A. Scott

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Mandatory retirement practices were widespread in the United States in the 1960s and 1970s and they are still common in other countries. For example, mandatory retirement is permissible in Egypt at age 60, in Singapore at age 62, in the Philippines at age 65, in the Netherlands at age 66, in Sweden and Finland at age 68, in Peru and Argentina at age 70, and in Norway at age 72. Gender Data Portal: ***Mandatory Retirement Age***, The World Bank. In certain countries, the mandatory retirement age is gender dependent with females facing mandatory retirement at age 50 in China, 60 in Poland, and 65 in Brazil. *Id.*

Originally passed in 1967, the Age Discrimination in Employment Act (ADEA), protected all workers between the ages of 40 and 65 from discrimination in hiring, firing, and promotion on the basis of age. Amendments signed into law in 1978 expanded the ADEA coverage to workers up to the age of 70. In 1986, the upper age limit was removed entirely. Today, with few exceptions, mandatory retirement in the United States is illegal.

The Aging American Workforce

Americans are increasingly working later in life due to a variety of reasons, including longer lifespans, the increased cost of living, and the dearth of once common traditional pension plans.

In the last 20 years, the employment of workers aged 65 and older has grown by 117%. *See* United State Bureau of Labor and Statistics, ***Productive Aging and Work***, US Centers for Disease Control and Prevention.

The percentage of Americans aged 65 or older working or actively looking for work has nearly doubled since 1985, reaching 18% in 2020. ***2020 Profile of Older Americans***, The Administration for Community Living (May 2021).

Many analysts are predicting a "Great Unretirement," in which older individuals return to work because of changing economic conditions. The labor force of people aged 75 or older is expected to continue to grow to nearly double between 2020 and 2030. ***Number of people 75 and older in the labor force is expected to grow 96.5 percent by 2030***, U.S. Bureau of Labor and Statistics (November 4, 2021).

Federal Law Protects Employees Aged 40 and Over

The ADEA makes it unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age. 29 U.S.C. § 623(a)(1). It is not enough to prove that age was a motivating factor in such a decision, as is permissible under other federal anti-discrimination statutes. For age discrimination claims, a plaintiff must prove that age was a "but for" cause of the employer's adverse employment decision. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

According to the U.S. Supreme Court, as set forth in B*ostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), a but-for test requires that a decision maker "change

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one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Under this standard, the protected characteristic (e.g., age) need not be the one and only cause of the adverse action and "a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's [protected status] was one but-for cause of that decision, that is enough to trigger the law." *Id*.

Importantly, the ADEA's protection only applies to workers 40 years old and older and is also limited to employers with 20 or more employees. See 29 U.S.C. §§ 630(b) and 631(a). Some state laws, however, provide broader protections and many state and local anti-discrimination laws expand protection to employees of smaller employers.

Can an Employer Force an Employee to Retire at a Certain Age?

With a few exceptions, the answer is no. A mandatory retirement age is tantamount to an involuntary termination and is therefore a form of discrimination based on age. The exceptions to the ADEA's prohibition of establishing mandatory retirement at a pre-determined age essentially fall into two categories: (1) "executives and high-level policymakers," and (2) age as a "bona fide occupational qualification."

Executives and High-Level Policymakers

The executive and high-level policymaker exemption requires that the employee be at least 65 years old and employed in "a bona fide executive or a high policy-making position" for the two-year period prior to the mandatory retirement. Moreover, the employee must be entitled to an immediate, nonforfeitable retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan of the employer of at least $44,000 annually. 29 U.S.C. § 631(c); 29 C.F.R. § 1625.12. When relying upon this exemption, which is narrowly construed by the courts, the employer has the burden of proving that every element has been met. 29 C.F.R. § 1625.12(b).

As an alternative to mandatory retirement, employers are permitted to modify such an individual's position or status, including a transfer to a position of lesser status or a part-time position. 29 C.F.R. § 1625.12(c). Once an employee accepts a new status or position, however, the employee may not be treated any less favorably, on account of age, than similarly situated younger employees. *Id*.

The ADEA adopts the definition of "bona fide executive" from the Fair Labor Standards Act of 1938 (the "FLSA"). 29 C.F.R. § 1625.12(d)(1); *see also* 29 C.F.R. § 541.100. For mandatory retirement purposes, however, the employee must also meet additional criteria specified in the examples outlined in the Conference Committee Report on the Age Discrimination in Employment Act Amendments of 1978 (the "Conference Committee Report"). 29 C.F.R. § 1625.12(d)(2).

The examples outlined in the Conference Committee Report explain that the head of a significant local or regional operation of an organization, such as a major

production facility, would typically be considered a bona fide executive. H.R. Conf. Rep. No. 95-950, 1978 WL 8765, at *531 (1978). Employees who possess comparable or greater levels of responsibility and authority at higher levels in the corporate organizational structure would also qualify. This could include heads of major departments or divisions, such as finance, marketing, legal, production, or manufacturing. *Id*. Conversely, the head of a minor branch or warehouse would typically not qualify for the executive exemption.

The regulations implementing the ADEA expressly provide that the executive exemption applies "only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." 29 C.F.R. § 1625.12(d)(2). The exemption does not apply to middle-management regardless of retirement income entitlement. Id. As outlined by the FLSA, to qualify as a bona fide executive, an employee's primary duty must be management of the organization or a department or subdivision of the organization, and the employee must regularly direct the work of two or more employees. 29 C.F.R. § 541.100. Additionally, the employee must have the authority to hire or fire other employees, or at a minimum, the employee's suggestions as to personnel decisions must be given particular weight. *Id*.

The question of who may qualify as a bona fide executive was the primary issue addressed in *Passer v. Am. Chem. Soc*., 935 F.2d 322 (D.C. Cir. 1991), where the court found that the director of the American Chemical Society's education division was a bona fide executive because he was the head of one of twelve divisions that performed the Society's core functions. The employee was in charge of the division's 25 to 30 employees and its four-million-dollar budget. *Id*. The court noted that only three supervisors stood between him and the board of directors. *Id*.

Top-level employees who are not bona fide executives may nonetheless qualify for the exemption as a "high policymaker" if the employee plays a significant role in the development and implementation of corporate policy. 29 C.F.R. § 1625.12(e). This could include employees whose duties are primarily intellectual, as opposed to executive or managerial. *Id*. For example, a chief economist or a chief research scientist could meet the definition of a high policymaking employee if the employee has a significant impact on decisions related to economic or scientific policies by virtue of the employee's expertise and direct access to decisionmakers. H.R. Conf. Rep. No. 95-950, 1978 WL 8765, at *531 (1978).

This was the situation in *Morrissey v. Bos. Five Cents Sav. Bank*, 54 F.3d 27 (1st Cir. 1995), in which the First Circuit held that an executive vice president for corporate affairs of a bank was a high policymaker. In making the determination, the court relied on the employee having direct access to the top decisionmakers, being responsible for evaluating significant legislative and regulatory trends and issues, working with legislators on these issues, and recommending policies on acquisitions and mergers, capitalization, and other areas of importance to the bank. *Id*.

Age as a Bona Fide Occupational Qualification

An exception to mandatory retirement prohibition may apply "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). This defense is most often applied where an employee is no longer able to successfully or safely perform the duties of the position. The burden of proving this affirmative defense is onerous. 29 C.F.R. § 1625.6(a). It is very limited in scope and will be narrowly construed by the court. *Id*.

An employer asserting a bona fide occupational qualification ("BFOQ") defense "has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age." 29 C.F.R. § 1625.6(b).

According to the United States Supreme Court, the underlying rationale behind the BFOQ defense is that classifications based on age "may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business." *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985). "If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact." 29 C.F.R. § 1625.6(b).

Mandatory retirement issues become more complex when an older worker is not technically considered to be an employee, such as an equity partner in a professional services firm.

Characteristics associated with age do not provide a sufficient rationale to support a BFOQ defense. For example, if an individual moves more slowly due to age, it generally does not mean that the employee is not qualified for the position. Similarly, customer preferences, such as for female flight attendants or male mechanics, do not present a basis for a BFOQ defense.

The BFOQ defense has, however, been successfully used to impose a mandatory retirement age for corporate airline pilots based on safety concerns. *Rasberg v. Nationwide Life Ins. Co.*, 671 F. Supp. 494 (S.D. Ohio 1987). In *Rasberg*, the holding was based, in part, on a finding that it was "impossible or highly impractical to test for all of the various potential defects in pilot performance on an individualized basis." *Id*. at 497.

In contrast, the Eleventh Circuit in *Tullis v. Lear Sch., Inc*., 874 F.2d 1489 (11th Cir. 1989), reversed a safety based BFOQ finding, holding that tests were available to determine whether individual school bus

drivers were capable of performing their jobs safely.

It should be noted that for firefighters and law enforcement officers employed by a state, a political subdivision of a state, or an interstate agency, the ADEA contains a special exemption for bona fide hiring or retirement plans that are not used as subterfuge to evade the purposes of the law. 29 U.S.C. § 623(j).

Can Owners and Partners be Forced to Retire Based on Age?

Mandatory retirement issues become more complex when an older worker is not technically considered to be an employee, such as an equity partner in a professional services firm. The ADEA only protects employees, not employers. See Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir.1996); 29 U.S.C. §§ 623(a)(2), (a)(3), 630(f).

In *Clackamas Gastroenterology Assocs., P. C. v. Wells,* 538 U.S. 440 (2003), the United States Supreme Court created a six-part test for determining whether a shareholder of a medical practice was an employee or an owner. The Court determined that the common-law element of "control" was the principal guidepost that should have been followed in the case. The Court also endorsed the EEOC standard regarding whether a shareholder-director is an employee. *Id*. at 449-50.

According to the EEOC, each of the following six factors is relevant to the inquiry as to whether a shareholder-director is an employee: 1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; 2) whether and, if so, to what extent the organization supervises the individual's work; 3) whether the individual reports to someone higher in the organization; 4) whether and, if so, to what extent the individual is able to influence the organization; 5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and 6) whether the individual shares in the profits, losses, and liabilities of the organization. EEOC Compliance Manual §605:0009 (2000).

Certain federal courts have extended the protection of the ADEA to partners, particularly where the partnership is large and the partner has minimal authority and autonomy. *See e.g., E.E.O.C. v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006). In *Sidley*, the EEOC sued on behalf of 32 former partners who were demoted to counsel status. The firm claimed that the demotions were based on performance, but the EEOC alleged that older partners were forced to accept a lesser economic share and an earlier retirement in violation of the ADEA. *Id*. Much of the litigation, including pre-suit litigation concerning the enforcement of subpoenas during the EEOC's investigation, centered on whether the former partners were employees subject to anti-discrimination laws or whether they were exempt as employers. *See E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). The EEOC argued that the former partners were employees because, among other things, they did not discuss or vote on management issues and all major decisions were made by an unelected executive committee. *Id*. Ultimately, the lawsuit was resolved with the firm paying $27.5 million.

Age Discrimination Claims

A 2018 survey conducted by the American Association of Retired Persons found that 61% of workers over the age of 45 reported witnessing or experiencing age discrimination. Rebecca Perron, ***The Value of Experience: Age Discrimination Against Older Workers Persists***, American Association of Retired Persons. The percentage is even higher for female (64%) and Black (77%) workers. *Id*.

A study by the Urban Institute and ProPublica similarly found that 56% of workers over the age of 50 have likely been pushed out of longtime jobs before the individual would have otherwise chosen to retire. ***If You're Over 50, Chances Are the Decision to Leave a Job Won't Be Yours***, ProPublica (Dec. 28, 2018).

Fifty years ago, shortly after the passage of federal legislation banning age discrimination in employment in the United States, it was typical for the EEOC to receive a few thousand charges alleging age discrimination per year. In 2021, the EEOC received approximately thirteen thousand charges alleging age discrimination, which accounted for over 20% of all charges of discrimination filed with the EEOC that year. Given the increase in older workers, a concomitant increase in age discrimination claims is anticipated as well.

Potential Employer Responses to ADEA Claims

It is not unlawful under the ADEA for an employer to take adverse action against an older employee if it is "based on reasonable factors other than age." 29 C.F.R. § 1625.7(a). However, as the regulation later explains, an employment practice that adversely affects older individuals is discriminatory unless the "*practice is justified by a reasonable factor other than age.*" 29 C.F.R. § 1625.7(c) (emphasis added.) Caution is still warranted, however, as even if an employment practice is justified by a reasonable factor other than age, the ADEA prohibits this defense from being used when age is a limiting criterion, such as with a mandatory retirement policy. 29 C.F.R. § 1625.7(b).

To establish this "based on reasonable factors other than age" defense, "an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." 29 C.F.R. § 1625.7(e)(1). The relevant considerations include, but are not limited to, the extent to which factor, other than age, is related to the employer's stated business purpose; the employer defined the factor accurately and applied it fairly and accurately; the employer limited a supervisor's discretion to assess an employee subjectively; the employer assessed the adverse impact of the employment practice on older workers, and took steps to reduce the harm, in light of the burden of undertaking such steps. 29 C.F.R. § 1625.7(e)(2).

Whether an employer's "cost cutting" measures constituted a reasonable factor other than age has been the subject of frequent litigation. *See e.g., Aldridge v. City of Memphis*, 404 F. App'x 29 (6th Cir. 2010) (upholding an employer's practice of demoting employees of a certain seniority status for cost-saving operational considerations.) If an employer determines, based on an objective measurement, that a higher paid employee is not as productive as employees who are paid less, the higher

paid employee can likely be terminated or demoted to reduce costs. In the absence of measurements of productivity, however, employers should be cautious to not use cost cutting as a proxy for age discrimination by replacing older, higher paid workers with younger, lower paid workers.

Employers should also keep in mind that they are always entitled to terminate an employee under the ADEA for "good cause." 29 U.S.C. § 623(f)(3). This may apply if an employment decision was made in the exercise of good faith business judgment for a legitimate, nondiscriminatory reason, such as the poor performance of an employee.

An Alternative to Mandatory Retirement

Some employers decide to offer their most senior employees an early retirement package to encourage, but not require, that older employees retire. Early retirement packages must be carefully planned, preferably with the advice of legal counsel. Employers that are considering developing an early retirement incentive program should review the guidance published by the EEOC concerning employee benefits. ***See Section 3 Employee Benefits***, U.S. Equal Employment Opportunity Commission.

Among other considerations, employers should be careful that their incentive programs do not cross the line into forced retirement by punishing individuals who decline offers of early retirement, or that the employer runs afoul of the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, or the Employee Retirement Income Security Act of 1974.

If successfully implemented, however, a voluntary early retirement incentive program can reduce claims of age discrimination, reduce the potential need for layoffs, increase employee morale, encourage healthy employee turnover, and ultimately save the organization money.