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How to Avoid Age-Discrimination Claims When Downsizing Your Staff



A recent U.S. Supreme Court ruling about age discrimination in the workplace, an aging workforce, and an increasing number of layoffs in the face of worsening economic conditions all are creating an environment ripe for a surge of age-discrimination lawsuits, many business leaders say.



Central to the concern of many is the high court's recent ruling in the Meacham vs. Knolls Atomic Power Laboratory case. The case tested a provision of the Age Discrimination in Employment Act (ADEA) that allows employers to take otherwise-prohibited actions if they are "based on reasonable factors other than age." The court found that the employer shoulders the burden when it comes to providing a reasonable explanation other than age when older workers are disproportionately affected by an employer's decision or action.



Many believe this ruling may invite more age-discrimination cases against employers, and as a result, lead to more challenging and costly court battles.

In tandem with the recent U.S. Supreme Court decision, experts also point to the fact that an increasing number of employees now are covered under the ADEA, which applies to workers 40 and older. And as some point out, many of those workers are choosing to remain in the workplace for longer periods of time.

These factors, in addition to a sluggish economy, may contribute to an increasing number of age-discrimination lawsuits, experts say. In fact, EEOC statistics show that age-discrimination claims tend to increase during tough economic times.

Companies – in an effort to cut costs – sometimes can get into trouble when laying off employees, said **Antoinette S. Gilbert**, an associate labor and employment law attorney with **Karen Smith Kienbaum & Associates** in Detroit. The problem is that companies sometimes don't do effective workforce planning and succession management, often resulting in automatic annual pay increases and pay rates that are far above what certain jobs merit pay-wise. And during layoff periods, companies tend to look at positions that represent the most expensive salaries and benefits.

But the problem is that these same positions often belong to older workers – especially if a company has a pay scale based on automatic annual increases and has ineffective succession management and workplace planning, Gilbert said. So when companies begin laying off employees, the decision sometimes has an undue impact on older workers, she said. As a result, the layoff decision “. . . doesn't pass the sniff test.”

While it's not possible to prevent employees from taking age-discrimination cases to court, Gilbert says you can take steps to reduce the likelihood that age-discrimination issues crop up in the first place. She and **Rae Vann**, general counsel with the Washington, D.C.-based **Equal Employment Advisory Council** offer some tips:

- **Review job descriptions and pay scales:** Be proactive, take a close look at your company's job descriptions, and do a compensation analysis, Gilbert said. "You don't want to try to fix it later" once a problem arises. Look at the responsibilities associated with each job, and pay attention to industry trends and standards related to those positions. In some cases, it may make sense to set maximum pay rates for certain positions, she said. This means that employees are unable to earn above a set amount, regardless of their length of service.
- **Be honest in performance reviews:** Make sure that managers are properly trained in how to give objective, fair, and consistent performance reviews, said Vann. Evaluation criteria need to be

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standardized and properly communicated to supervisors, Gilbert said. "And be sure that performance reviews are done on a regular basis and in an honest fashion." When making cutbacks, make sure that decisions are based on reasons other than age.

- **Base decisions on positions, not people:** Make sure that you are basing layoff decisions based on the need to eliminate certain positions, not specific people, Gilbert said. "If you're making business decisions based on the position and not the person, you'll keep yourself out of a lot of trouble," she said. "It's always about the position, not the person."
- **Train managers:** Make sure managers and supervisors are well-trained in appropriate selection criteria when it comes to layoff decisions – especially if they are involved in identifying employees for layoffs, Vann said. It is important that they know the law, the EEOC, and the recent U.S. Supreme Court ruling. The key is to minimize impact on any protected group, and if necessary, look at alternative solutions to avoid disparate impact on older workers and other employees who are covered under anti-discrimination laws, Vann said.
- **Establish a review process:** Before laying off employees, it's a good idea to benchmark against other companies to find out how they have managed similar layoffs, the process they used, and the criteria they used to make their decisions, Vann said. It's also a good idea to establish an independent internal review board to evaluate the list of employees under consideration for layoffs. Managers – or those involved in developing the list – should then have to defend their layoff decisions in front of the board. This could help avoid litigation down the road, she said.
- **Consult an attorney:** Before going forward with any reduction in force, consult a labor and employment attorney and review the list of employees, Gilbert said. Make sure you evaluate whether you are affecting an inordinate number of older workers or employees in other protected classes. And be sure that you have reasonable and legitimate reasons for laying off specific workers, Vann said.

Employers also should view all decisions and actions through the lens of potential litigation, said **Nancy Hammer**, manager of regulatory and judicial affairs for the **Society for Human Resource Management**. The recent ruling still does not define "reasonableness" when it comes to what is considered "reasonable factors other than age" in employment decisions. More than likely, it will mean that employers will have to supply more evidence to support their decisions and actions in age-discrimination cases. "And at this point, it's important for HR to mindful of that," Hammer said.

Written by Jenny Cromie, certified human resources specialist (CHRS)

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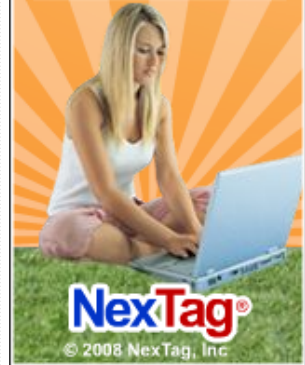
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