THE TOP TEN ISSUES IN EMPLOYMENT DISCRIMINATION LAW:

AGE DISCRIMINATION
DISPARATE IMPACT CLAIMS
AND REDUCTIONS IN FORCE

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I. **THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)**

A. **Application of ADEA**

1. Protects all employees over age 40.

2. Frequently combined with other claims of discrimination--Title VII (race, sex, national origin, religion), ADA (disability), etc.

3. “Baby boomer” generation reaching 50s.

4. Employees working longer.

B. **Fundamental Precepts of ADEA**

1. **Coverage:** 20+ employees (compare: Title VII and ADA).

2. **Prohibitions:** Essentially same as Title VII (hiring, wages, promotion, discharge, benefits, terms/conditions/privileges of employment).

3. No segregation or classification of employees on basis of age.

4. No retaliation based on opposition to discrimination or participation in ADEA proceedings.

5. No age-based advertising (“age 25 to 35,” “young boy,” “girl,” “college student,” “recent college graduate”).

6. Permits mandatory age-65 retirement of “high-ranking officials and policymakers.”

   a. Exception applies only to high-level employees such as the head of a local or regional operation of a business, not to mid-level managers. Must possess management responsibilities, discretion, etc.

   b. May also apply to those without a line of authority, such as a chief economist, research scientist, or other high policy-making position.

   c. May be involuntarily retired at age 65 if:

(1) In position two years or more; AND

(2) Entitled to receive an unreduced pension of at least $44,000 per year.
II. REDUCTIONS IN FORCE

A. Introduction

1. RIFs are inevitable aspect of current economic downturn.
   a. January/February 2008: 152,000 jobs lost.
   b. March 2008: 80,000 jobs lost.
   c. Wall Street: 34,000 jobs lost in last nine months.

2. Goal often is to save money/reduce costs.

3. But ADEA suits often can reduce or eliminate savings.

B. Considerations in Structuring a Workforce Reduction

1. In advance of implementing a reduction in force or of making decisions affecting individuals, study and document the forces leading to the decision to reorganize and/or downsize: e.g., economic, organizational (such as staff duplications following merger or acquisition), etc.
   a. Consider using a participative employee committee in the planning process.

2. Plan and document objectives to be accomplished by the RIF, which are linked to the reasons for the RIF.
   a. How many employees will be affected? Is the goal to reduce the overall number of employees? To reduce numbers of employees in or eliminate particular jobs, categories of jobs, departments, plants, locations, or lines of
   b. Which locations will be affected? Will entire plants be closed?
   c. How quickly must the reorganization be effectuated? (Affects issues such as WARN Act compliance and notice required under OWBPA if releases are used.)
   d. How much will the reorganization cost? How much is the employer willing to spend to effectuate the reorganization?
   e. Consider methods to achieve the desired objectives:
      (1) Freeze or reduce hiring; natural attrition.
      (2) Transfer surplus employees to other positions that need to be filled.
(3) Offer exit incentives (including voluntary early retirement).

(4) Layoffs.

(5) Offer exit incentives followed by layoffs, if necessary. (May help to avoid adverse impact of layoffs on older workers.)

(6) Offer exit incentives simultaneously with layoffs.

3. Select criteria to be used in implementing the cuts: e.g., performance/forced-ranking, seniority, peer review, job held, etc.

a. Avoid age-related criteria such as salary or benefits levels. Several courts have held that use of such criteria creates an inference of discrimination based upon age.

b. Does any company philosophy or tradition conflict with the chosen criteria?

c. If performance-related criteria are selected, do existing personnel records support current performance assessment? Are new evaluations needed, and if performed, will they be viewed as after-the-fact pretext of age discrimination?

d. Consider who will make the decisions based upon the established criteria. (May affect matters such as the scope of disclosures required under the OWBPA, the scope of discovery, and plaintiff’s proof of pretext.)

e. Stick to the criteria.

f. Be aware of the possible selection of “whistleblowers” or persons about to vest in pension or retiree health benefits.

g. Are there any employment contract, labor contract, or layoff policies constraining use of particular criteria?

h. Will “bumping” be permitted? If so, how will it be administered?

4. Study the statistical impact of the planned reduction on employees over age 40 (and other protected groups) before finalizing layoff decisions.

a. Requires significant data collection and processing, as well as time, which should be factored into the RIF process.

(1) Attorney-client privilege can shield data from future discovery if statistical analysis is supervised by counsel.
b. If statistical studies show that criteria will have adverse impact on basis of age, criteria should be adjusted, OR employer must demonstrate that use of criteria is job-related and consistent with business necessity.

5. Decide on/create forms to be used to document decisions.

C. The Exit Incentive (Voluntary Early Retirement/Severance Pay) Option

1. Decide benefits to be offered, and costs of same.
   a. Severance pay (lump sum or salary continuance).
   b. COBRA health coverage continuation.
   c. Retirement benefit enhancements.
   d. Social Security supplements.
   e. Health coverage.
   f. Vesting of pensions/stock options.
   g. Outplacement assistance.
      (1) Beware of integrating severance benefits with retirement benefits; ADEA generally prohibits denying severance benefits to persons because they are eligible for retirement benefits.
      (2) OWBPA does not interfere with employer’s ability to choose to offer, choose not to offer, or select among possible employee benefits.
      (3) Unsettled whether no violation of ADEA for employer to offer mutually exclusive options of severance pay (retaining normal vested retirement benefits) or early retirement benefits.
      (4) If the employer provides a lesser benefit to older workers, it must prove that the amount of the payment made or the costs incurred is no less than that made or incurred on behalf of younger employees.

2. Study concerns arising from participation eligibility.
   a. Eligibility typically is based on identification of positions or facilities with surplus staffing and the nature of the exit incentives to be offered.
b. If exit benefits are paid from a tax-qualified retirement plan, tax issues may arise:

(1) Plan qualification may be endangered if eligibility group is disproportionately highly compensated.

(2) Can company retain the right to reject participation of essential employees?

3. Voluntary early retirement programs generally are permissible under the ADEA.

4. Voluntary early retirement program must be, and be publicized as, voluntary.

a. Limiting participation to “surplus” employees who otherwise would be terminated will be viewed as constructive discharge, likely having adverse age impact.

b. Voluntary early retirement program may be appropriate if a performance-based layoff which otherwise would be utilized would have a disparate impact, or if company traditions militate against layoffs.

5. Exit incentives may be offered to some employees whom the company wants to retain.

a. Tailor eligibility for exit incentives carefully.

b. Retain the right to reject applicants (except as to qualified retirement plan incentives, for qualifications reasons).

6. Train managers who will implement the early retirement option.

a. Human resources personnel.

b. First-line supervisors.

c. Designate person(s) to answer specific questions.

7. Provide truthful information without coercion or intimidation.

a. Possibility of involuntary layoffs if not enough voluntary attrition.

b. Risk of fraudulent or negligent misrepresentation claim if employee given unfounded assurances of continued employment.

b. “[T]ruth” may be challenged as pressure to retire.
d. Express no opinion regarding whether an individual employee should or should not accept early retirement, but provide accurate information regarding future retirement and benefits eligibility.

e. Assure employees they are free to decline.

f. Give employees ample time to consider options (typically one to three months).

D. Considerations in Involuntary Reductions in Force

1. Forced ranking

2. Use of employee evaluations

3. Direct and indirect evidence of discrimination

4. Disparate impact analysis

E. Comply with WARN Act

a. For many plant closings or layoffs, employer must give 60 days’ advance written notice.

b. For noncompliance, employees can recover pay and benefits for the period during which notice was not given, up to 60 days.

c. If employer provides pay/benefits in lieu of notice, minimizes damages available under WARN.

F. Carefully draft releases