

Employer Reduction in Force Strategies

The Age Discrimination in Employment Act, 29 U.S.C. ' 151 et seq. (A~~A~~DEA~~@~~), generally prohibits discrimination on the basis of age in employment decisions. Subject employers (those with 20 or more employees for each working day in each of 20 or more calendar weeks during the current or preceding calendar year that are engaged in an ~~A~~industry affecting commerce~~@~~) should conduct any reduction in force (A~~R~~IF~~@~~) in order to minimize ADEA exposure. Further, employers who offer severance incentives, either in connection with a RIF or as an alternative to a RIF, also typically secure from terminating employees a comprehensive release of claims as a quid pro quo. Such releases, to the extent they cover ADEA claims, must meet very specific statutory requirements, including a 45 day period in which to consider and sign the release (a 21 day period applies if there is no ~~A~~group or class~~@~~ of employees being offered the incentive/release package).

ADEA exposure will be presented any time an employee subject to a RIF can prove a prima facie case by showing:

- \$ that he was within the protected age group (age 40 and over);
- \$ that he was performing in accordance with the employer's legitimate expectations;
- \$ that he was terminated; and
- \$ that others not in the protected class were treated more favorably. Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988).

As in other Title VII cases, the employer must rebut a prima facie case by articulating a legitimate non-discriminatory reason for its action. If the employer does so, the plaintiff must then demonstrate that the employer's justification is a pretext in order to prevail.

Employer strategies to minimize ADEA exposure generally fall in the following categories:

- (i) Action taken pursuant to a ~~A~~bona fide seniority system~~@~~ is exempt by statute from ADEA liability so long as the action is not a subterfuge to evade the purpose of the ADEA. 29 U.S.C. ' 623(f)(2)(A). If layoffs are done on a ~~A~~last hired, first fired~~@~~ basis, no ADEA liability should attach. However, this pattern is usually inconsistent with the employer's business goals.
- (ii) An employer's decision to eliminate departments, shifts or job categories instead of selecting individuals for layoffs can usually be justified as an exercise of business judgment which courts are reluctant to second-guess. See,

e.g., Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), wherein it is stated that the ADEA was not intended as a vehicle for judicial review of business decisions, and courts will not inquire into the defendant's method of conducting its business. . . . To the extent the company may tie its RIF to the elimination of product lines or staff departments, this defense may be of some value.

(iii) Employers can establish specific RIF procedures to identify employees to be laid off on a performance basis. Normally this is a two step procedure involving written performance appraisals based on procedures stressing objective criteria with review by a specially established RIF committee empowered to compare performance appraisals and make final RIF decisions. Once the RIF committee prepares a performance based list of employees who are not to be retained, the list should be reviewed to determine whether it adversely impacts any group by sex or race. An adverse impact based on age may be tolerated, at least in the Seventh Circuit. See Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 n. 6 (7th Cir. 1986), quoting with approval Laugesen v. Anaconda Co., 510 F.2d 307, 313 (6th Cir. 1975) as follows:

in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in.

(iv) Bona fide executives or high policy makers for two years before retirement may be subject to compulsory retirement at age 65 if they will receive at least \$44,000 in annual retirement benefits, or the equivalent. 29 U.S.C. ' 631(d)(1).

(v) ADEA exposure can be reduced or eliminated with a severance program or other incentives to induce employees to voluntarily terminate employment. An employer is specifically permitted by the ADEA to observe the terms of a . . . voluntary early retirement incentive plan, 29 U.S.C. ' 623(f)(2)(B) (ii), although such programs should not exclude any employees on the basis of a maximum age, such as age 65.

The above presents a full plate of options and issues, independent of any consideration of the structure of a severance or retention program, which is beyond the scope of this article.

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