

# LEGALLY SPEAKING

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Spring 2007

## What Every Employer Should Know About Age Discrimination

### **The Claim from Nowhere**

Nothing can surprise or damage a business as quickly or suddenly as an unexpected claim of age discrimination by a former employee. Litigation can be extremely costly, disruptive and time consuming. It can affect your relationships with your present employees and the way you run your business.

Like anything, an ounce of prevention is invaluable when dealing with these matters. Employers should identify and address potential issues of age discrimination before they take on a life of their own. There are both Federal and state laws which govern age discrimination cases. The New Jersey Law Against Discrimination (“LAD”) provides that all persons shall have the opportunity to obtain employment without discrimination because of age. The Federal law protections are found in the Age Discrimination in Employment Act (“ADEA”), which

provides that it is unlawful for an employer to fail or refuse to hire or discharge an employee because of the individual’s age, or to limit, segregate or classify employees in any way which would deprive or tend to deprive employees of opportunities because of their age.

### **The New Old ... or Young**

While the LAD and ADEA are similar in theory, they offer different age thresholds for membership in a protected class. The ADEA only provides protection to older workers, defined as an employee who is 40 years or older. These are the classic age discrimination cases, where an older employee claims that he was treated unfairly because he was older, and that he was treated less favorably as younger employees.

By contrast, under the LAD, all persons who are 18 years and older are protected. New Jersey provides additional layers of rights even for younger workers who can also claim

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“reverse age discrimination.” In an important case under the LAD, the New Jersey Supreme Court ruled that a 25 year-old bank employee could claim age discrimination because he was treated less favorably than an older employee because he was younger. While these complaints of the younger employee are relatively rare and difficult to prove, the employer must take note of its action when making termination decisions involving differently aged workers.

On the flip side are very old employees. The LAD was amended in 1985 and does not protect employees who are older than 70 from denial of employment or promotions, but does protect those workers from being terminated based on age. In comparison, the ADEA has no maximum age to maintain claims against an employer, including even refusal to hire cases.

There are funky situations that employers may not envision age discrimination laws to encroach. For instance, the LAD provides age discrimination protections to not only employees of the employer, but even to independent contractors of the organization.

As far as the applicability of these statutes, the New Jersey LAD applies to every single employer, regardless of the number of persons employed. On the other hand, the Federal ADEA

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applies only to employers who employ at least 20 employees in each working day for 20 or more calendar weeks in the current or preceding calendar year. In New Jersey, but not under the ADEA, a supervisor may be held individually liable for age discrimination for aiding and abetting an unlawful act.

## **Err on the Side of Caution**

The ultimate question in any age discrimination case is whether the employee was somehow treated differently because of age. There are a variety of ways this can be shown: where age played a role in the decision-making process, where age made a difference in the outcome, or where age was a determinative factor in the employment decision in question. When a judge or jury makes a determination, an employee does not have to prove that age was the sole reason for the employer’s decision, so long as age made a difference in the outcome.

So the question is what kind of evidence is used to prove age discrimination? An employer must be wary of both direct evidence and indirect (circumstantial) evidence. Direct evidence is not very common and consists of statements such as that an employee is not being selected for promotion because the employee is too old. This is direct evidence that a negative result has come about because of a person’s age. This type of evidence is very damaging to an employer and the

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source of significant potential  
liability.

Circumstantial evidence is much more common and is the usual way that employees show evidence of age discrimination. An employee can do this by showing that a seemingly facially neutral policy has an adverse disparate impact on older workers. In an important U.S. Supreme Court case, a city gave pay increases to all police officers, with proportionally greater raises to officers with less than five years of experience to retain the younger personnel. A group of older officers prevailed, claiming that most of the officers over the age of 40 had more than five years of service, and therefore suffered an adverse impact and age discrimination on a seemingly neutral policy.

Both the ADEA and LAD are fee-shifting statutes, which means that if the employee should win a lawsuit against the employer, the employer will be responsible for not only its

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own attorney's fees and costs, and not only for whatever compensatory damages and potentially punitive damages are awarded against the employer, but also the employee's reasonable attorney's fees and costs.

There is a great deal at stake in these cases. Age discrimination cases must be prevented at all costs, and immediately addressed should a claim arise. Informed management, specialized training, and effective competent counsel are absolutely necessary. You work too hard to build your business to do anything otherwise.

**–Charles Z. Schalk, Esq.**

***Mr. Schalk is a partner at MSC&G  
who concentrates his practice in  
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