



AVOIDING AGE DISCRIMINATION IN REDUCTIONS IN FORCE

A reduction in workforce is, unfortunately, a common task that many employers must undertake from time to time. In making decisions about which employees to lay off, it is understandable that employers may want to select those who are the least productive. However, when older employees are chosen for layoff or termination, employers may face one or more charges of age discrimination. Most often, these charges are based on a claim of disparate treatment, whereby the employee asserts that he or she was intentionally selected for an adverse employment action based on his or her age. However, employees may also file charges based on disparate impact, which involves a claim that the employer's practice or policy caused an adverse impact on proportionately more older workers than younger workers.

On April 30, 2012, in an effort to clarify aspects of the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Employment Opportunity Commission (EEOC) issued a Final Rule on "Disparate Impact and Reasonable Factors Other Than Age (RFOA)". The EEOC has long contended that the ADEA prohibits policies and practices that adversely affect older employees more than younger employees, even if the impact was unintentional. However, in considering workforce reductions, the EEOC acknowledges that employers may have a valid defense when such a policy or practice was "reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers."



Anne McKnight....

"The EEOC guidance is designed to clarify the law as to what may constitute a reasonable factor other than age, at least in disparate impact cases involving older workers."

In its Final Rule, the EEOC discussed the factors that will be used to assess reasonableness of such a policy or practice, which include:

- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer assessed the adverse impact of its employment practices on older workers; and
- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

While the EEOC and the courts will analyze these factors to determine employers' liability in age-related disparate impact cases, employers do not need to account for every factor for the defense to succeed. Rather, the aforementioned considerations merely describe the most common characteristics of reasonable practices.

Another key point to be taken from the Final Rule is that employers do not have to prove their policies or practices were based on "business necessity," but need only prove that the policy or practice was based on a reasonable factor other than age. The EEOC guidance is designed to clarify the law as to what may constitute a reasonable factor other than age, at least in disparate impact cases involving older workers.

Some supervisors or managers may wonder how they can ever terminate an older employee who wants to work into his or her seventies, eighties, or beyond. The short answer is that such older employees should be **Continued on page 4** ▶▶

TENNESSEE SUPREME COURT ALLOWS RETALIATORY DISCHARGE CLAIM TO GO FORWARD, EVEN THOUGH PLAINTIFF SIGNED RELEASE DISCHARGING "ALL CLAIMS"

The Tennessee Supreme Court recently decided a case that highlights the importance of carefully tailoring releases when settling an employment dispute.

In *Perkins v. Metro Government of Nashville and Davidson County*, decided August 22, 2012, the plaintiff, Ms. Perkins, was discharged from her job with a Metro government agency. Prior to her termination, she had filed two EEOC charges stemming from an unrelated incident, which were pending at the time of termination. Following her termination, she filed a third EEOC charge alleging retaliatory discharge.

Ms. Perkins appealed her termination through the civil service system and entered into a settlement with Metro eighteen months after the termination. The release agreement that Ms. Perkins signed stated that, in exchange for \$45,000, she was releasing Metro "from any and all actions, claims and demands . . . which may hereafter arise out of allegations described below." The Supreme Court's opinion does not include the part of the release describing the allegations, but presumably the allegations were connected with Ms. Perkins's termination. Ms. Perkins also agreed to dismiss with prejudice two pending lawsuits, one of which was based upon the first two EEOC charges. Critically, the release also provided that "Ms. Perkins' complaint filed with the EEOC is not a part of this agreement."



Cathy Shuck

"The Perkins case shows the danger of relying on boilerplate releases when settling an employment dispute."

Seven months after executing the settlement, Ms. Perkins filed another lawsuit against Metro. The new lawsuit alleged retaliatory discharge in violation of Title VII and the ADEA, as stated in her third EEOC charge. Specifically, Ms. Perkins alleged that her termination was in retaliation for filing the EEOC charges and for filing the lawsuit against Metro that she had dismissed with prejudice as part of the settlement.

The trial court and court of appeals held that Ms. Perkins's retaliation claim could not go forward because, since she had settled the civil service claim arising from her allegedly wrongful termination, she could not show an adverse action that was retaliatory. The Supreme Court disagreed, however, and remanded the case for trial.

Applying the "materially adverse action" standard set forth by the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. v. White*, the Tennessee Supreme Court concluded that Ms. Perkins had suffered a materially adverse action that could sustain her claim of retaliation. The Court reasoned that, like the plaintiff's 38-day unpaid suspension in *Burlington Northern*, the plaintiff's termination and 18 months of uncertainty prior to the settlement was a materially adverse action, irrespective of the fact that she eventually settled the claim.

Admittedly, the release that Ms. Perkins signed could not release her ADEA claim, because the release did not contain the specific language necessary to release an ADEA claim. (The ADEA must be identified by name and the individual releasing claims must have 21 days to review the offer and seven days following execution to revoke it.) However, the Court held that the general discharge of "all claims" did not bar Ms. Perkins's Title VII retaliatory discharge claim, because the general "all claims" language was trumped by the provision in the release that saved out Ms. Perkins' "complaint filed with the EEOC." The Court did not distinguish between the EEOC charge, which cannot be released, and the subsequent lawsuit based upon the charge, which could have been--and probably was intended to have been--released.

The Perkins case shows the danger of relying on boilerplate releases when settling an employment dispute. Because the release did not specifically distinguish between Ms. Perkins's right to bring an EEOC charge and her right to pursue damages, and because the release did not correctly release the ADEA claim, the employee's lawsuit was permitted to go forward. Employers should be careful to tailor releases to the specific circumstances at hand, and should not hesitate to involve counsel. This is one clear example of how a little more time and effort on the front end can pay off big in the long run.

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NEW-HIRE GUIDELINES:

DON'T TRIP AS YOU'RE GETTING OFF ON THE RIGHT FOOT

As our colleague Suzanne Roten used to say, the employment cycle is like the life cycle: it starts with the hiring process, which is a little like a birth. A new hire is a joyous occasion, with everyone happy to have the new employee on board. Amidst all that excitement, though, it is important not to overlook more mundane issues like workplace policies and non-compete agreements, particularly if the new-hire happiness later turns to buyer's remorse.

Cathy Shuck

"Whether you call it orientation, onboarding, or just getting started, make sure to check in with your new hire frequently for the first several weeks."

The Offer

After the interviews, reference checks, and other pre-hire chores are completed, the offer letter or other communication should lay the foundation for a smooth new-hire process. The offer should contain all basic terms of employment, including the position title, start date, and compensation. The offer should also spell out any contingencies, such as successfully passing a drug screen or job-related physical (if applicable) and presenting documentation of authorization to work in the U.S.

If you plan to require the new hire to sign a non-compete or other restrictive document, the basic terms should be stated in the offer, if they have not been discussed previously. The offer should also state that the employment is at will, unless there is an employment contract for a definite term.

Finally, there should be no surprises on the first day of work. Let the new-hire know what to expect. In addition to detailing the position and compensation, tell her when and where to arrive, what to bring, and generally what is in store for the first day. If you have a formal job description and have not previously shared it with the new hire, you might enclose that as well.

Forms and Policies

Signing piles of forms is an unavoidable rite of passage for new hires. At the inception of employment, new hires should complete the federal tax withholding form (W-4), personal and emergency contact information, and the federal I-9 form (the employee and employer portions of the I-9 must be completed within three days of starting employment). As of January 1, 2013, all employers with six or more employees must comply with the Tennessee Lawful Employment Act's requirements for new hires. Tennessee employers must also report new hires to the State within twenty days.

Provide your new hire with benefits information, and if any benefits or insurance coverage take effect immediately, ensure that the appropriate forms are completed. If the forms can be turned in later, be sure the new hire knows the deadline so that she is enrolled promptly upon satisfying any waiting periods.

The start of employment is also the best time to familiarize your new employee with all of your company policies, particularly your anti-harassment, EEO, confidentiality, social media/electronic communications, computer use, business expense, and personal appearance policies. Consider giving your new hire time on the clock to sit down and read the employee

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KNOW YOUR ATTORNEY

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TERRI L. BERNAL is a Senior Associate in the Nashville, Tennessee office of the Firm, which she joined in November 2010. Her law practice includes an emphasis on general liability defense, government liability defense, workers' compensation defense, and employment law. Terri graduated *cum laude* with a B.S. in Political Science from the University of Tennessee at Chattanooga. She obtained her Doctor of Jurisprudence degree from Baylor University School of Law in Waco,



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“AVOIDING AGE DISCRMINATION”

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treated, and if necessary, terminated, in the same manner as a younger worker - based on job performance. If an older worker is to be terminated, he or she should have received the same type of warnings, counseling, and performance appraisals as his or her younger counterparts. Failure to maintain consistent treatment among both older and younger workers may result in a finding of disparate treatment discrimination.

Employers may also consider extending voluntary severance and release offers to older employees who have performed well, but whose job performance is deteriorating, especially in situations where a disciplinary firing or lay off may not be appropriate. It is important to note, however, that before executing such a plan, employers are best advised to seek the advice of counsel.

The EEOC's attempts to clarify these aspects of the ADEA certainly do not provide employers with all of the answers, but this commentary does provide helpful guidance that employers can use to prevent and defend against age discrimination claims.

“NEW HIRE GUIDELINES”

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handbook and other policies, and to complete the acknowledgment(s) stating that he has read and understood the policies. I know, I know—you're busy and you needed the person to start last week and you really don't have an extra two hours to let the guy just sit around and read. But it will be time well spent in the long run.

If you will be requiring the new hire to sign a non-compete agreement, the sooner it is signed, the better. Courts virtually always find that the inception of employment is adequate consideration to support a non-compete agreement.

“Onboarding”

The process formerly known as “employee orientation” has been replaced by the more fashion-forward term, “onboarding.” According to the Society for Human Resources Management (SHRM), onboarding is the “process by which an organization assimilates its new employees.”

Although this may conjure vague images of the Borg from Star Trek, the point is that the process of integrating new employees should ideally take place over time. Too often new employees are given a cursory tour, subjected to a barrage of introductions, given a computer password and directions to the bathroom, and then left to fend for themselves.

Instead, have a plan for the new hire's first few days and weeks, and share that plan with the employee. This should include little things: have someone take the new hire to lunch on her first day; have someone give her a tour and explain where everything is and who to ask if she can't find something; make sure she knows the routine for office equipment, telephone and e-mail, kitchen supplies, and parking. It should also include the big things: try to plan what training will be provided, when and by whom; go over the job description and requirements in detail; identify who the employee should ask if she doesn't know how to do something; and explain how performance will be evaluated and monitored.

Moving Forward

Whether you call it orientation, onboarding, or just getting started, make sure to check in with your new hire frequently for the first several weeks. If problems arise, address them promptly and clearly—otherwise, you may find yourself going through the whole process again with a new new hire.



***Best wishes for a wonderful
holiday season from your friends
at Wimberly Lawson***

