

Getting old: It's a drag but not a legal basis for discrimination

by Boyd A. Byers

“What a drag it is getting old.” □ The Rolling Stones

“Hope I die before I get old.” □ The Who

“Will you still need me, will you still feed me, when I'm 64?” □ The Beatles

As baby boomers age, the number of older Americans will swell. That will raise a number of labor force issues, both practical and legal. We are now beginning to see a number of those issues pop up, and we wanted to tell you about two of them.

The ‘Kansas City cleanout’ (or, keep working, get punished)

It must have seemed like a good idea at the time. The Hickman Mills C-1 District in the Kansas City metropolitan area wanted to encourage older employees to leave, allowing others to move up the ranks. To accomplish that, the school district adopted a series of early retirement incentive plans, which were in place from 1989 through 1996.

The original plan provided that a teacher or administrator who was otherwise eligible would receive a lump-sum bonus equal to 50 percent of her final base pay if she retired at age 55. The benefit would be decreased by five percent for every year the employee continued to work until age 65, when she would fail to receive any benefits on retiring.

Under the revised plans in effect from 1992 to 1996, teachers and administrators were eligible for full retirement if they were: (1) 60 years old with at least five years of credited service; (2) 55 years old with at least 25 years of credited service; or (3) any age with at least 30 years of credited service. If eligible, the employee would receive a benefit in the amount of 50 percent of his base salary if he retired when he was first eligible for full retirement. The benefit decreased by 10 percent each year the employee continued to work. If he continued to work for five years after he first became eligible to retire, he would not get any benefit.

The school district had similar plans for its support staff. All of the plans contained language stating that they were designed to “provide for a more balanced staff age blend.”

The Equal Employment Opportunity Commission sued the school district after a number of former employees filed age discrimination complaints with the agency. Last year, a federal judge ruled that the school district violated the Age Discrimination in Employment Act (ADEA) by reducing the retirement incentive benefits as employees became older. The court held that the 1990-1991 plan was discriminatory on its face. It also found that the 1992-1996 plans, which did not tie incentive amounts to the age of the employee but to retirement eligibility under the plan, nevertheless violated the

ADEA. The plans' stated purpose to "provide for a more balanced staff age blend" demonstrated an intent to discriminate against older workers, according to the court.

Earlier this year, the school district settled the lawsuit for a total of \$458,354 to be distributed to 50 former employees. That amount represented the difference between benefits actually received and those the employees would have received but for their age.

Lordy, lordy, look who's 40 (or, this is only a test)

The New York City Transit Authority (TA) decided it would be a good idea for all station supervisors to take an EKG test when they turned 40. (For the members of our reading audience who don't watch *ER*, an EKG is an electrocardiogram; it tells you how well your "ticker" is doing.) According to the TA, it wanted to make sure its supervisors were not having heart attacks while at work.

The problem, of course, was that the TA operated on a generalization. As the court noted in striking down the mandatory EKGs, some people under 40 are as likely as those over 40 to be at risk for coronary problems. The statistical difference is not so great as to justify imposing a mandatory job-related test on those 40 or older. In the absence of some connection between an individual's possible heart calamity and the TA's business necessity, the court said, an age classification is to be shunned even if its use can be described as rational.

Legal early retirement incentives

There are certain safe harbor provisions that allow you to offer early retirement incentives without violating the ADEA. For instance, the Act does not prohibit imposing a minimum age requirement before an employee can take advantage of an early retirement incentive. As long as the retirement incentives are offered on the same terms to everyone over a given age, there is no violation of the ADEA.

You also can offer early retirement "bridge" payments that span the gap between an employee's age on early retirement and the age at which he or she becomes eligible to receive social security benefits, even though younger workers could receive greater benefits than older workers because of the length of time they receive the payments. You must, however, comply with certain statutory criteria, including that the payments not exceed those that the retiree is likely to receive once he or she is eligible for social security benefits.

Age-old advice about old age

Rolling Stones front man Mick Jagger, in his youth, quipped, "I'd rather be dead than singing 'Satisfaction' when I'm 45." Jagger, now in his late 50s, is still singing the song to the satisfaction of sold-out stadiums on both sides of the Atlantic. The point? Don't make assumptions about a person's capabilities based on his age.

Any time you are considering a policy for an early out or one that on its surface treats employees over a certain age differently than those under that age, imagine a big red stop sign. Put the brakes on the plan, and get legal counsel. What seems like a good idea may actually be legally wrong.