

Employers at Higher Risk of Age-Discrimination Litigation with Changing Worker Demographics

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According to a report released by the Equal Employment Opportunity Commission (EEOC), employers are at an increased risk of age-discrimination litigation due to changing workforce demographics. The June 2018 report, titled "The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)," highlights a number of important considerations for employers with regard to older workers.

The report notes that older workers, specifically those in the 65+ category, are expected to remain in the workforce for longer, at greater numbers, and are the segment of the workforce expected to grow the fastest through 2024. As a result of the increased presence of older workers in the workforce, the EEOC report warns against employment discrimination based on age, representing that "[u]nfounded assumptions about age and ability continue to drive age discrimination in the workplace."

Importantly for employers, the report suggests that the risk of litigation involving the ADEA is high, and that this risk it is likely to increase over the coming years. In a 2017 study cited by the report, "more than 6 in 10 workers age 45 and older [said] they [had] seen or experienced age discrimination in the workplace." With the increased presence of older workers in the workplace, employers should exercise caution to ensure there is not a perception of age discrimination. The report notes that in the years leading up to 2017, "more charges were filed by workers ages 55-64 than the younger age cohort," with retaliation being the most frequent statutory basis alleged in all discrimination charges filed. An increase in EEOC charges often means an increase in corresponding litigation by either the employee or the EEOC, which may bring a lawsuit against the employer itself.

With these considerations in mind, employers should be careful to enforce their non-discrimination policies, including anti-retaliation measures, strictly. To keep pace with the changing demographics of the workforce, it is crucial that employers provide adequate training and guidance to its workforce on best practices in recruiting, hiring and evaluating employees. Some practical considerations for employers include:

- Ensure recruitment efforts are not focused on a younger candidate pool. The EEOC's report cites the Commission's prior meeting on "Promoting Diverse and Inclusive Workplaces in the Tech Sector," at which experts testified about "micro-targeting practices seeking to recruit younger workers." In fact, recent litigation has alleged that recruiters are advertising open positions on social media in a way that only shows up in the news feeds of younger candidates.
- Train employees to dispel any assumptions or stereotypes about age and corresponding ability in making hiring and promotional decisions, or when completing performance evaluations.
- Review existing employee retention strategies, or consider adopting such strategies, to ensure retention of older workers is part of the analysis.
- Develop age diversity and inclusion programs.

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Employers should also be aware of the impact that changing demographics may have on future litigation. If you have any questions about this report or its implications on your workforce, please contact your Miller Canfield Employment and Labor attorney.