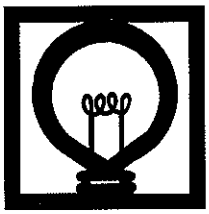

PRACTICE TIPS

Will Law Firm RIFs Lead to More Age Discrimination Litigation?

To the extent that most lawyers are aware of the Age Discrimination in Employment Act (ADEA) in the law firm context, it is in connection with the subject of mandatory retirement for partners. Many firms have taken notice of the Sidley & Austin settlement of an age discrimination case last year and the American Bar Association's Board of Governors recommendation to cease using age as a basis for requiring attorneys to retire.

Increasingly, labor lawyers are finding that employers carrying out reductions in force (RIFs) in a manner that has a rational basis may nonetheless be running afoul of the ADEA despite the absence of any malevolence or discriminatory intent on the part of law firm management against older attorneys when formulating its retention policies.

This situation exists due to the concept of "disparate impact" — that lawyers above age 40 are more negatively impacted by a policy than lawyers below this threshold. Disparate impact can be demonstrated by statistical methods. There is no "safe harbor" due to an absence of malice. Consequently, law firm management does not have absolute discretion to implement the termination of employees, including lawyers.

Under the ADEA it is unlawful for an employer, *inter alia*, (i) "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"; or (ii) "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." The ADEA regulates employers with more than 50 employees; nonetheless it should not be overlooked that some state statutes have set lower thresholds or are silent on the subject.

In situations involving personnel RIFs under the ADEA, plaintiffs can establish a prima *facie* **case** if (i) they are members of a protected group (i.e. persons above age 40), (ii) younger workers are treated more favorably than older workers, particularly if a more qualified older worker is fired when a less qualified worker is retained, and (iii) older workers are replaced by younger workers or their responsibilities are shifted to younger workers — not withstanding that there was no intention to engage in age discrimination. The more substantial the age difference between older and younger workers, the easier it is for the plaintiff to illustrate quantitatively and ultimately to prevail.

Under the ADEA and many state statutes, if a law firm lacks a reasonable factor other than age (RFOA) to end the individual's employment; the employer may be on the receiving end of a lawsuit. Since it is increasingly difficult for RIFed lawyers to find new positions, they may be more tempted to explore whether they might have a legal claim against their former employer. Ironically, increasingly employers will not give out references concerning their former employees' performance out of fear of triggering a defamation claim. Yet such a policy at times may prove counterproductive in today's job market.

If attorneys or staff above age 40 lose their jobs at a time when younger workers are hired or assigned the new duties of their former colleagues, legal problems may arise, even though the younger workers earn less money than those individuals who have lost their jobs. The greater the age differential between terminated and the current work force, the more problematic it becomes for employers. This is particularly the case if the law firm emphasizes its youthfulness or vitality.

Before management terminates a worker, it is advisable for it to inquire whether the individual might be willing to work for less money or, if

appropriate, be transferred to a different office. Employers who hire new workers below age 40 at the same time or subsequently, when workers enjoying statutory protections are being terminated, are also exposing themselves to potential liability. If persons over age 40 who have consistently had positive job evaluations are willing to work at jobs for which they may be regarded as "over qualified," it may be problematic to hire or retain younger, less experienced workers, as this is likely to be viewed as evidence of age discrimination.

Even when law firms as a whole are experiencing economic difficulties, it is not uncommon that particular practices within the firm may continue to have a high volume of work and may even want to add new personnel having the appropriate expertise. Bankruptcy and litigation are two such areas. If law firms are hiring new lawyers in this area, they need to be cognizant of certain potential pitfalls. Law firm management has many options to meet its clients' needs. It may decide to hire contract lawyers directly or through temporary placement services. Alternatively, management may choose to enter into a teaming arrangement with other law firms or outsource the work.

Nonetheless, in light of the present economic conditions in the country, there is a surplus of unemployed or under-utilized lawyers. In addition, there may be lawyers who work for the government and wish to enter private practice. If these individuals are above age 40, they must be seriously considered for appropriate openings at the law firm. Furthermore, many experienced lawyers are willing and able to practice in new areas. Law firms must consider during the hiring process whether those already at the law firm can be reassigned to new practice areas and given new responsibilities.

Law firms seeking attorneys in these times may receive literally hundreds of applications for a single or small number of positions. Ultimately, if law firms hire attorneys who do not enjoy protections under the ADEA or state law, and disproportionately consider only lawyers under age 40, they are likely to expose themselves to legal liability. The younger the new hire, the greater the potential risk for the law firm. As a result, it is advisable to interview all qualified candidates if possible or at least in a proportion of 40+ and lawyers below this age threshold. Otherwise, they expose themselves to claims based on the disparate impact theory.

Consequently, the use of objective, non-age related criteria when making job retention or hiring decisions is advisable. Especially important is that the law firm in its job announcement in newspapers or on its website not provide what can be viewed as a cap on experience (e.g. 5-7 years as opposed to at least 5 years), positions should not be described, for example as "third-year associate needed for environmental group," or the year of law school graduation should not be mentioned. So even if there was no intent to discriminate based on age, it may not appear to be so to the relevant fact finder. The younger the individuals hired the greater risk employers may face in age discrimination cases.

Under the ADEA as well as Maryland and D.C. law (Md. Ann. Code art. 49B, § 16 — Unlawful Employment Practices and D.C. Code § 2-1402.11 — Prohibitions, respectively), plaintiffs can rely on two legal theories to show that their committed age discrimination: (i) disparate treatment and (ii) disparate impact. Disparate treatment is the most common variety of age discrimination case, but because it requires to show an intent to discriminate unlike the disparate impact theory. In practice, we know that this is often difficult to establish disparate treatment since it is the rare instance that plaintiffs can produce direct evidence of discriminatory practices. Nonetheless, adequate circumstantial evidence of age discrimination will shift the burden of proof to employers requiring them to prove it is more likely than not that age was not a factor in personnel termination decisions.

As briefly mentioned above, showing discrimination by demonstrating disparate impact on older workers is a more recent development. The U.S. Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005) resolved a conflict among the U.S. Courts of Appeals whether it was permissible to use quantitative methods to show that older workers were disproportionately harmed by the employers' actions. If this is shown to exist, then employers must show that their employee termination policies were not inextricably linked to age or that their termination policies were based on reasonable factors other than age.

All employers, including law firms, must now take a hard look at their personnel practices or face the risk of violating the ADEA and relevant state legislation. Furthermore, law firms with overseas offices must not overlook the rules governing employees in foreign offices. Ironically, as law firms are taking on the characteristics of their clients, they increasingly learn the importance of understanding employment law and the growing role of quantitative methods in cases where employers cannot show the existence of RFOAs. ⚖

By Ethan S. Burger

Mr. Burger is Senior Counsel with the law firm Maxwell & Barke LLC (www.maxlaw.us), *where he is active in its litigation and employment law practice. He may be contacted at* ethansb@maxlaw.us.