

COMPLIANCE OVERVIEW

Provided by Touchstone Consulting Group

Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act (ADEA) is a federal law that protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA applies to employers with 20 or more employees on each working day in each of 20 or more calendar weeks in a current or prior calendar year. The law also applies to employment agencies and labor organizations.

The Equal Employment Opportunity Commission (EEOC) enforces the ADEA and may assess fines and other penalties against employers that violate the law. The EEOC may also award compensatory and punitive damages to individuals who are adversely affected by an employer's ADEA violation.

This Compliance Overview provides a summary of the ADEA's requirements for employers.

LINKS AND RESOURCES

- Text of the [Age Discrimination in Employment Act](#)
- EEOC [webpage](#) on age discrimination
- [Regulations](#) relating to age discrimination

HIGHLIGHTS

ADEA BASICS

- The ADEA prohibits age discrimination against employees and applicants age 40 and older.
- Age limits and preferences for workers under 40 are prohibited unless an exception applies.
- An age-neutral employment practice may violate the ADEA if it negatively affects individuals age 40 and older.
- Older individuals may be favored over younger ones, even if the younger ones are 40 or over.
- Employees may voluntarily waive their rights under the ADEA.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

BACKGROUND

Congress enacted the ADEA in 1967 to encourage employers to hire older individuals based on ability rather than age and to prohibit arbitrary age discrimination in employment. The law prohibits both intentional discrimination and the adoption of seemingly neutral practices that have a disparate impact on workers who are age 40 and older.

In 1990, the [Older Workers Benefit Protection Act](#) (OWBPA) amended the ADEA to specifically prohibit employers from denying certain benefits to employees who are age 40 and older. The OWBPA also amended provisions that allow employees to voluntarily waive their ADEA rights and claims.

PROHIBITED PRACTICES

Under the ADEA, the following employment practices are illegal if they are motivated in any way by the fact that an individual is age 40 or older:

- Discriminating against the individual with respect to compensation, terms, conditions or privileges of employment;
- Discharging or failing or refusing to hire the individual;
- Limiting, segregating or classifying the individual in any way that would deprive or tend to deprive the individual of employment opportunities or otherwise adversely affect his or her employment status; and
- Reducing another employee's wage rate in order to comply with the ADEA.

In addition, the ADEA prohibits employers from:

- Including age preferences, limitations or specifications in job notices or advertisements;
- Retaliating against an individual for opposing discriminatory employment practices or for making formal or informal complaints about age discrimination under the ADEA; and
- Establishing or maintaining an employee benefit plan that costs less for or provides lesser benefits to employees age 40 and older because of their age.

Disparate Impact Discrimination

Any employment practice that adversely affects individuals age 40 and older, as a group, is also illegal under the ADEA. These practices are known as “disparate impact” discrimination. A practice that has a

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disparate impact on ADEA-protected individuals is unlawful even if an employer does not intend for the practice to have that effect. For example, a practice may apply to all employees regardless of age but still result in a negative impact on individuals who are 40 and older.

Disparate Treatment Discrimination

In contrast to disparate impact discrimination, disparate treatment discrimination occurs when an employer **intentionally** treats an ADEA-protected individual differently, based on his or her age, from individuals who are under age 40.

PERMITTED PRACTICES AND DEFENSES

The ADEA allows employers to favor older individuals over younger ones, even if the younger individuals are age 40 or older. For example, an employer may treat a 60-year-old individual more favorably, based on his or her age, than it treats a 50-year-old individual. Likewise, employers may state preferences for or limit employment opportunities to ADEA-protected individuals, even if it adversely affects younger ADEA-protected individuals. For example, a job advertisement may state that a job opening is limited to candidates over age 60.

In addition, the ADEA provides exceptions that allow employers to engage in otherwise prohibited practices under certain circumstances. In other words, employers may treat ADEA-protected individuals less favorably than they treat individuals who are under age 40, or may engage in practices that have a disparate impact on ADEA-protected individuals, if they meet specific requirements relating to the practices. These ADEA exceptions are available to employers as defenses against age discrimination claims.

Bona Fide Occupational Qualifications

An age limit for employment or other age-based employment decision may be permissible if age is a bona fide occupational qualification (BFOQ) for a specific job.

To establish a BFOQ defense, an employer must prove:

- ✓ That the age limit or preference is reasonably necessary to the essence of its business; and
- ✓ Either:
 - That all or substantially all individuals excluded from the job involved are in fact disqualified; or
 - That some of the excluded individuals have a disqualifying trait that cannot be ascertained except by reference to age.

If an employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice actually effectuates that goal and that there is no acceptable alternative that would better advance it or equally advance it with less discriminatory impact.

Bona Fide Seniority Systems

An employer may base employment decisions on an ADEA-protected individual's age in order to observe

To be "bona fide," a seniority system must, at minimum:

- ✓ Use length of service as the primary basis for allocating employment opportunities among younger and older workers;
- ✓ Not be a subterfuge to evade the purposes of the ADEA; and
- ✓ Not require or permit involuntary retirement of ADEA-protected individuals based on age.

the terms of a bona fide seniority system.

Reasonable Factors Other Than Age

A practice that has a disparate impact on ADEA-protected individuals may be permissible if it is justified by reasonable factors other than age (RFOA). This defense is *not* available for practices that involve age

To be justified by RFOA, a practice must be both:

- ✓ Reasonably designed to further or achieve a legitimate business purpose; and
- ✓ Administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

limits for employment or for ADEA claims involving disparate treatment.

When determining whether an employment practice meets the RFOA criteria, the EEOC may consider several factors, including the degree of harm inflicted on ADEA-protected individuals, the number of ADEA-protected individuals affected by the practice and the extent of the employer's efforts to assess and reduce the harm.

Bona Fide Employee Benefit Plans

The ADEA, as amended by the OWBPA, recognizes that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those

To be “bona fide,” an employee benefit plan must, at minimum:

- ✓ Have been accurately described in writing to all employees;
- ✓ Actually provide the benefits in accordance with the terms of the plan; and
- ✓ Not be a subterfuge to evade the purposes of the ADEA.

greater costs might create a disincentive to hire older workers. Therefore, the law allows employers to reduce or provide lesser benefits to ADEA-protected individuals under a bona fide employee benefit plan, as long as the employer’s cost of providing the reduced benefits to ADEA-protected workers is no less than the cost of providing benefits to younger workers.

The ADEA defines an employee benefit plan as a plan, such as a retirement, pension or insurance plan, that provides employees with what are frequently referred to as “fringe benefits.” It does not include wages or salary.

ADEA WAIVERS

An employer may ask an employee to waive his or her rights or claims under the ADEA. These waivers are common in settling ADEA discrimination claims or in connection with exit incentive or other employment termination programs. However, specific minimum standards must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- ✓ Be in writing and understandable;
- ✓ Specifically refer to ADEA rights or claims;
- ✓ Not waive rights or claims that may arise in the future;
- ✓ Be in exchange for valuable consideration in addition to anything of value to which the individual is already entitled;
- ✓ Advise the individual in writing to consult an attorney before signing the waiver; and

- ✓ Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

The requirements for a valid waiver are more extensive if an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program.

RECORDKEEPING REQUIREMENTS

The ADEA requires employers to make and keep certain records and to allow the EEOC to inspect these records during regular business hours. The required records must be kept safe and accessible at the place of employment or business where the individual to whom they relate is employed or has applied for employment. Employers that maintain records at a central recordkeeping office must make records available **within 72 hours** after receiving a request from the EEOC. The following table provides an overview of the ADEA’s recordkeeping requirements.

Record	Details	Retention Period
<i>Payroll and other records for each employee</i>	Must include each employee’s name, address, date of birth, occupation, pay rate and compensation earned each week	At least three years from the date of creation
<i>Personnel action records</i>	Includes any records relating to: <ul style="list-style-type: none"> • Employment inquiries; • Employee promotions, discharges and other job changes; • Employment tests or physical examinations; and • Advertisements and notices of job openings and other employment opportunities. 	At least one year from the date of the personnel action to which each record relates
<i>Employee benefit plan records</i>	Includes any records relating to: <ul style="list-style-type: none"> • Pension plans; • Insurance plans; and • Seniority systems. 	The full period the plan or system is in effect and at least one year after its termination

The EEOC may order an employer to keep certain records for longer periods of time if the employer is under investigation for an ADEA violation.

POSTING REQUIREMENT

Every employer that is subject to the ADEA must post the ["EEO is the Law"](#) poster in a place and format that is accessible to applicants and employees.