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## BLOGS

Archives;Class Action & Litigation;Discrimination

# Take Care When Succession Planning To Avoid Age Discrimination Claims

I've had succession planning on my mind this week following the release of a [research poll](#) that indicates that about half of older Americans are delaying retirement plans to work longer. The poll, which was conducted by the Associated Press-NORC Center for Public Affairs Research, indicates that over eighty percent of older Americans plan to work during their retirement years and almost fifty percent expect to delay retirement. Eleven percent of those surveyed indicated they don't expect to ever retire. These survey results may stem from a number of factors. The recent recession has taken a tough economic toll on our nation, causing some older workers to delay retirement while trying to recover from their losses. In addition, [population projections](#) show a marked increase in our nations aging population, and older Americans are generally becoming healthier. Faced with the possibility of living longer and in better health, more workers may choose to delay retirement in favor of earning additional income for their later years.

In the face of this fundamental shift in retirement planning, companies need to be more careful than ever to avoid age discrimination claims when conducting succession planning. I've seen many a smart business leader embark on succession planning out of a concern about an aging workforce and about potential key employee retirements. While potential retirements are certainly one reason to consider succession planning, age discrimination laws make it risky to make assumptions about an older workers potential retirement plans and to focus too narrowly on age when succession planning. Forced retirement is almost always unlawful under age discrimination laws, and it is also unlawful to discriminate against older workers in the terms and conditions of their employment. As such, employers should be thoughtful about how to discuss, plan, and implement succession planning measures. Some practical tips for reducing the risk of an age discrimination claim when succession planning include the following:

- Companies can reduce legal risks by focusing their succession planning on employees in key positions rather than age. The goal behind succession planning is to plan in advance for and be prepared to quickly address a key employees departure to avoid business disruption or loss. This is a neutral concept unrelated to age. Key employees of varying ages may leave a company for a number of reasons apart from retirement, such as to pursue another job, to relocate, to care for an aging parent or ill family member,

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due to termination by the company, or due to an unexpected disability or death. As such, it makes good business sense to focus succession planning on employees of all ages, which, in turn, reduces the risk of an age discrimination claim.

- Companies should avoid making age-based stereotypes when succession planning. As demonstrated by the Associated Press-NORC poll, more workers are choosing to work longer, and it dangerous to make assumptions that an older worker is planning to retire or reduce his or her schedule based on age.
- In gathering information for succession planning, companies should not focus solely on older workers. If information is sought from employees for succession planning, the company should consider gathering information from a cross-section of employees of different ages and diverse backgrounds.
- In talking with employees about succession planning, companies should be cautious in asking about potential retirement plans, as this could be interpreted as age-based stereotyping. A safer approach is to ask employees of varying ages open-ended questions about their future plans, such as asking about the employees goals and plans for their position in future years and whether they are anticipating any changes in their role or work schedule in future years. If someone volunteers information about retirement plans or otherwise requests a status or schedule change, the company can follow up to get more information and to discuss plans for a smooth and successful transition. The company should still take care, however, not to appear to be suggesting, encouraging or pushing an employee to retire.
- Succession planning efforts or activities should not focus on or result in only younger workers being considered for future leadership roles. Instead, the focus should be on training, mentoring, and grooming workers in lower-level positions, regardless of age, for future leadership and higher-level positions in the company.
- Companies should take care not to discuss succession planning or to announce new leaders in a way that directly or indirectly suggests that the age of an employee matters. For example, discussing the next generation of leaders or talking about new leaders as being fresh, young, new blood, or energetic, can cause a perception that age factored into an employment decision.
- Finally, companies should pay attention to how older workers who might be replaced as part of succession planning are treated during the planning and implementation process. Companies should take care not to engage in any acts that might be perceived as involuntarily pushing an older worker to the side or otherwise treating them differently based on age or any other protected class.