

# Age Discrimination Act

## Age Discrimination in Employment Act

Anti-Discrimination Law Webinar Series  
October 17<sup>th</sup>, 2018



# Age Discrimination Act

**42 U.S.C. 6101**  
**34 CFR Part 110**



*No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*



# Overview

- **Prohibits** age discrimination in programs or activities that receive Federal Financial Assistance
- **Applies** to entities receiving Federal financial assistance
- **Protects** students
- **Enforced** by Office of Civil Rights in the Department of Education



# Exception

- A recipient is permitted to take an action otherwise prohibited if the action reasonably takes into account age as a factor necessary to the **normal operation** or the achievement of any **statutory objective** of a program or activity.

- Normal operation** means the operation of a program or activity without significant changes that would impair its ability to meet its objectives

- Statutory objective** means any purpose or program or activity expressly stated in any Federal statute, state statute, or local statute or ordinance adopted by an elected general purpose legislative body.



# Exception

- A recipient is permitted to take an action otherwise prohibited that is based on a factor other than age, even though that action **may have a disproportionate effect on persons of different ages**. An action may be based on a factor other than age only if the factor **bears a direct and substantial relationship** to the normal operation of the program or activity or to the achievement of a statutory objective.



# Requirements

- **Designation of coordinator:** at least one employee
- **Notice:** required to notify beneficiaries, in a continuing manner. Must identify the coordinator by name or title, address, and telephone number.
- **Grievance procedure:** Recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints.



# Age Discrimination Act Coordinator

The Age Discrimination Act requires each recipient to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities.

## Responsibilities

- Monitoring changes in the law
- Updating and creating new policies/grievance procedures
- Conduct complaint investigations and hearings



# Notice

- School must notify its students and applicants, in a continuing manner, of information regarding the act and the regulations
  - **Continuous Manner** = repetitive. Required to be in all recruitment materials but should also be posted on your website, in your student handbook, and on any materials that are widely disseminated to your student body and parent body.
- Identify the compliance coordinator by name, title, address, and telephone number

# Sample Notice of Non-Discrimination Policy



•The (Name of School) does not discriminate on the basis of disability, age, race, creed, color, sex, sexual orientation (including gender identity), national origin, religion, ancestry, need for special education services or any other class protected by state or federal law. The following person(s) has been designated to handle inquiries regarding the non-discrimination policies:

#### Title IX Coordinator

- Name and/or Title
- Address
- Telephone No.
- Email

#### Age Discrimination Act Coordinator

- Name
- Address
- Telephone No.
- Email

#### Section 504 Coordinator

- Name
- Address
- Telephone No.
- Email

#### McKinney-Vento Liaison

- Name and/or Title
- Address
- Telephone No.
- Email

#### SPED Coordinator

- Name and/or Title
- Address
- Telephone No.
- Email

Any other concerns may be brought to [Name and contact information].



# Grievance Procedure

- **Grievance procedure:** Recipient shall adopt and publish grievance procedures providing for **prompt and equitable** resolution of complaints.

- **Considerations**

- Prompt: No legal definition but should provide an initial response within at least five days.
- Equitable: Who is conducting the investigation, how is it being conducted



# Investigation

## •Investigation

- Prompt. While there is no legal requirement, courts have generally agreed that investigations should be completed within 60 days of the complaint being filed.
- Equitable. Consider who is conducting or gathering evidence, how that is being collected, and if everyone involved is treated using the same process.

## •Post-Investigation

- Notify the complainant and the accused of the outcome and the rationale for it.
- Remedies, if any
- Appeals process

# Resources

- [Retaliation](#)
- [Notice of Non-Discrimination Overview](#)
- [Age Discrimination Act](#)



# Age Discrimination in Employment Act

29 U.S.C. 621 et seq.  
29 C.F.R. Part 1625 et seq.



*It shall be unlawful for an employer to fail to hire or 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.*



# Overview

- **Prohibits** unlawful employment practices
  - Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's age;
  - To limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age
- **Protects** employees and applicants 40 years old or older
- **Enforced** by Equal Employment Opportunity Commission (EEOC)



# ADEA v. State Law

- ADEA applies to employers with 20 or more employees
- Colorado State law prohibits discriminatory practices based on age in employment regardless of the number of employees
  - Discharge, discipline, suspension, harassment, terms and conditions, failure to accommodate, and retaliation.



# ADEA at 50

- In the last 25 years, the share of workers age 55 and older doubled.
- The cohort of workers age 65+ is projected to grow by 75 percent by 2050. The group of workers 25 to 54 is only expected to grow by 2 percent over the same period.
- Women age 55 and older are projected to make up over 25 percent of the women's labor force by 2024. This is double from 2000.
- Retirement age and viewpoints have shifted. One study stated that 40 percent of workers planned to work until age 70 or later, however only 4 percent actually do.



# Exceptions

## • **Bona Fide Occupational Qualification (BFOQ)**

- Employer must be able to prove that an age limit is necessary for the job.
- Age limit is reasonably necessary to the essence of the business and either
  - All or substantially all individuals excluded from the job involved are in fact disqualified or
  - That some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.
- Claiming “public safety” as a goal: employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.



# Exceptions

- **Reasonable Factor Other than Age**

- An employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a “reasonable factor other than age.”

- An employer must show that the employment practice was 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.

- **Considerations**

- Extent to which the factor is related to the employer’s stated business purpose
- Extent to which the employer defined the factor accurately and applied the factor fairly
- The extent to which the employer assessed the adverse impact of its employment practices on older workers
- Degree of the harm to individuals within the protected age group

# Administrative Requirements



- **Notice**

- Every employer shall post and keep posted in a conspicuous place upon its premises a notice to be prepared or approved by the EEOC

- 29 U.S.C. 627

- **No designated coordinator** required

- **Grievance Procedure:** Provide prompt and appropriate corrective action for complaints



# Notice

## **AGE**

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.



# Notice – In Policy

## •**Equal Employment Opportunity and Unlawful Harassment**

- The School is dedicated to the principles of equal employment opportunity. We prohibit unlawful discrimination against applicants or employees on the basis of age 40 and over, race, sex, color, religion, national origin, disability, sexual orientation (including gender identity), creed, ancestry, marital status, or any other status protected by applicable state or local law.



# No Designated Coordinator Required

The ADEA does not require an employer to designate a coordinator. However, an employer should have a staff member or HR person who is knowledgeable about the ADEA and be able to handle complaints.



# Grievance Procedure

- **“prompt and appropriate corrective action”**

- **Prompt**

- Should provide an initial response to a formal complaint as soon as possible, 3-5 days or less.
- Investigation should likely happen within 60 days of filing a complaint

- **Appropriate corrective action**

- Remedies if complaint turns out to be valid
- Ensure you bring in your attorney
- Involve insurance company
- Corrective action can relate to hiring practices, employee policy revisions, providing backpay to an employee



# Grievance Procedure

## **Considerations**

- An explanation of what constitutes unlawful harassment
- A description of the complaint process to be used
- An assurance to protect confidentiality to the extent practicable
- A statement of non-retaliation
- The employer's commitment to conduct an investigation
- An assurance that corrective action will be taken when it is determined that conduct violates the policy has occurred



# Example

## **EEO Harassment**

•The School strives to maintain a work environment free of unlawful harassment. In doing so, the School prohibits unlawful harassment because of age 40 and over, race, sex, color, religion, national origin, disability, sexual orientation (including gender identity), creed, ancestry, marital status, or any other applicable status protected by state or local law will not be tolerated. Prohibited behavior may include but is not limited to the following:

- Written forms such as cartoons, e-mails, posters, drawings, or photographs.
- Verbal conduct such as epithets, derogatory comments, slurs, or jokes.
- Physical conduct such as assault, or blocking of an individual's movement.

•This policy applies to all employees including managers, supervisors, co-workers, and non-employees.



# Example

## **Complaint Procedure**

- If you believe there has been a violation of the EEO policy or harassment based on a protected class please use the following complaint procedure. The School expects employees to make a timely complaint to enable the School to investigate and correct any behavior that may be in violation of this policy.
- Report the incident to (Specify person by job title) who will investigate the matter and take corrective action. Your complaint will be kept as confidential as practicable. If you prefer not to go to this individual with your complaint, you should report the incident to (specify person by job title).



# Example

## **Complaint Procedure**

- The School prohibits retaliation against an employee for filing a complaint under this policy or for assisting in a complaint investigation. If you perceive retaliation for making a complaint or your participation in the investigation, please follow the complaint procedure outlined above. This situation will be investigated.
- If the School determines that an employee's behavior is in violation of this policy, disciplinary action will be taken, up to and including termination of employment.



# Investigation

- **Purpose**
  - Neutral, objective, precise, and thorough
  - Fair and even-handed to protect alleged victims and those accused.
  - Allegations of bias come from both sides.
- **Deflect Complaints about the Investigator**
  - Restrict publication of report and supporting documentation to those with a legitimate need to know
  - Retaliation
  - The more serious the allegation at issue, the greater the employer's burden to investigate and the greater the burden to support its findings before publishing the information



# Investigation

- **How to Prepare**
  - Determine the goals of the investigation.
  - Choose an investigator
    - Honest and credible and is perceived as such
    - Investigator must understand their purpose
    - Can this person adequately represent the employer and the investigation before a judge or jury if litigation results?
    - Knowledgeable about policies and procedures
    - Capable of handling difficult and sensitive conversations and information
  - Identify potential witnesses
  - Identify sources of relevant evidence
  - Construct an investigation strategy
  - Maintain investigation documents in a confidential and secure location



# Investigation

- **Interviewing Witnesses**
  - Determine a non-restrictive environment
  - Do not conduct group interviews
  - Be factual in questioning
    - Refrain from “Do you think the complainant has been subject to a hostile work environment?”
  - Do not make promises to witnesses
  - Do not promise confidentiality
  - Where an interview becomes emotional or confrontational, take a break



# Investigation

- **Documenting Interviews**
  - Provide a written summary of an interview to a witness to sign. Instruct the witness to review the statement carefully for accuracy and thoroughness
- **Investigation Report**
  - Organize notes and evidence into a investigation report
  - No precise format but address the timeline, allegations at issue, evidence to corroborate each allegation, and credibility assessments
- **Complete the Investigation**
  - Take prompt, corrective action where appropriate
    - Discipline, up to termination
    - Be consistent with past practices
  - If no clear determination of the facts can be made, the complainant and the accused should be notified and explain
- **Follow Up**
  - Follow up with participates to ensure absence of retaliation against a complaining employee



# Investigation

- **If you find yourself in an situation where you think this investigation is beyond you or your school's abilities, contact you attorney as soon as possible.**
- **Contact Employer's Council**
- **Contact insurance company**



# Discriminatory Practices

- Discriminatory Discharge, Terms and Conditions, and Harassment
  - Most common practices alleged in ADEA charges
- Age Discrimination in Hiring
- Mandatory Retirement and Discriminatory Denial of Benefits

# Discriminatory Discharge, Terms and Conditions and Harassment



## •Harassment

- Derogatory, dismissive, or abusive comments that reduce a worker to her/his protected characteristic
  - Supervisor calling an employee “old man” every day for a year
- Comments based on negative stereotypes and assumptions about older workers.
  - Older age does not indicate a decrease in work performance

## •Discriminatory Discharge

- Retaliation

## •Terms and Conditions

- Making assumptions about training – older employees are left out of training/PD



## Hypo #1

- Colorado Charter School has been facing some tough times financially. A grant it was depending on fell through and its October Count was not what it hoped. The school is attempting to make it through the school year. One option is to lay off a number of employees to cut costs. The Head of School decides to lay off five employees. To save the most money, Head of School decides to lay off five employees with the highest salaries at the school.



## Hypo #1

- Those five employees happen to be the five employees with the most experience. They all are also over 50.
- Younger people tend to be cheaper due to inexperience.
  - You cannot base discharge decisions based on age alone.
- BUT, I'm not basing discharge on age, I'm basing it on cost!
  - Courts will not look favorably. Big companies tend to try to do mass layoffs to clean house and use it as a cover to get the older employees out and bring new employees in.
- Your discharge should be based on concrete reasons that are well thought out and communicated to the employee.



# Discrimination in Hiring

## Help Wanted Ads or Notices

- Cannot contain terms and phrases that limit or deter the employment of older individuals
  - “age 25 to 35”, “young”, “college student”, “recent college graduate”, “boy”, “girl
  - Employers may post help wanted notices or address expressing a preference for older individuals with terms such as “over age 60, retirees, or supplement your pension”
- Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate ADEA. But this may tend to deter older individuals from applying, or otherwise indicate discrimination against older individuals.



## Hypothetical #2

Colorado Charter School is expanding their computer science program and posted an opening for a wide range of employees including administrative staff, IT support, and teachers who can provide coding and web design instruction. Their ad contained the following language:

“We are excited to expand our school and bring in new talent. We are looking for digital natives. We are a school who wants to provide you a place to grow and to help future generations grow in the technology field.”

The online application included areas to list date of birth or graduation dates in fields that cannot be bypassed.



# Hypothetical #2

## **Micro-Targeting**

- “digital natives v. digital immigrants”

## **Asking about birth date/graduation date**

- Can but cannot require a person to fill those out



# Mandatory Retirement and Discriminatory Denial of Benefits

- Forced retirement age or mandatory retirement age is generally unlawful
  - It is legal to offer incentive packages for employees to retire
    - Must be voluntary and otherwise comply with federal and state law.



# Mandatory Retirement and Discriminatory Denial of Benefits

## •Reducing or denying benefits in a discriminatory way is unlawful

- Older Workers Benefit Protection Act (OWBPA) – requires employers to pay the same amount for each benefit provided to an older worker that is paid to a younger worker
  - Benefits cannot be reduced because you are older.
  - Benefits should generally be the same for those over 40 and younger employees
  - Providing a benefit that “costs the same” but different is only permitted when:
    - The benefit becomes more expensive with age (health, life, disability)
    - Benefit is part of a bona fide employee benefit plan
    - Plan requires lower benefits
    - The actual amount of payment made or cost incurred on behalf of an older worker is the not less than what is made/incurred for a younger worker
    - The benefit levels for older workers are reduced only to the extent necessary to achieve approximate cost equivalence for older and younger workers.



## Next Steps

- Ensure review of non-discrimination policy
- Utilize Employer's Council
- State who is going to act and be responsible for certain duties during a complaint process
  - Training



## Employer's Council Training

- **Discrimination in the Workplace: The Law of EEO**
  - January 10, 2019 – Denver
  - April 18, 2019 – Denver
  - May 30, 2019 – Colorado Springs
  - June 21, 2019 – Denver
  - July 24, 2019 Loveland
  - October 2, 2019 – Denver

<https://www.employerscouncil.org/discrimination-in-the-workplace>

# Resources

- [EEOC Age Discrimination in Employment](#)
- [Sample EEOC Notice](#)
- [EEOC at 50](#)



## Next Webinar

- **Americans with Disabilities Act**
  - November 7<sup>th</sup> at 9am



Thanks!  
Any questions?

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