

THE ADA, AGE DISCRIMINATION, AND WORKER HEALTH DURING THE COVID-19 PANDEMIC—

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OLDER WORKERS AND COVID-19: SOME CONTEXT

- The reopening plans of many states, as well as the one issued by the White House, state that vulnerable populations and older adults must stay home unless absolutely necessary.
- The CDC has made it clear that age is a significant risk factor for serious health consequences of exposure to COVID-19.
- A large share of older people are in jobs that cannot be done from home. See Farrell, Chris, “Working from Home, the Great Divide: Why Coronavirus is a Double Whammy for Older Workers,” MarketWatch, April 28, 2020.
<https://www.marketwatch.com/story/working-from-home-the-great-dividewhy-coronavirus-is-a-double-whammy-for-older-workers-2020-04-28>
- Older workers have historically borne the brunt of layoffs in economic downturns most recently in the Great Recession of 2008. See https://www.aarp.org/content/dam/aarp/ppi/2015-2/AARP953_LongTermUnemployment_FSFeb2v1.pdf
- In the current environment, older workers may be targeted for all the usual reasons – higher salaries/cost of benefits – but now employers may be concerned about additional costs in terms of insurance or paid time off. Or the employer may hold stereotypes about older workers being less likely to work in a virtual/remote setting that requires a comfort level and skills with new technology.
- Mass layoffs have begun
 - Boeing announced yesterday it is laying off 6,700 employees as part of a plan to cut 10% of its workforce
 - Chevron will cut 10 to 15% of its 45,000 employees worldwide
 - Other companies that have announced mass layoffs include IBM, Airbnb,
- Once unemployed, older workers face much longer periods of unemployment than younger workers and that will probably be exacerbated by employer concerns about older people being more susceptible to the virus along with the stereotypes/assumptions that older employees are not tech savvy enough for the new world of telework.

- The unemployment rate for individuals age 55 and older jumped from 3.3 percent to 13.6 percent in April. Schramm, J. (April 2020). *Employment data digest*. AARP Public Policy Institute. <https://www.aarp.org/content/dam/aarp/ppi/2020/05/april-data-digest.pdf>
- An AARP survey showed that 30 percent of older workers have had a reduction on income because of a job closure or job loss.

LEGAL ISSUES/QUESTIONS CONCERNING COVID-19 AND OLDER WORKERS

THE OLDER WORKER WHO WANTS TO RETURN TO THE OFFICE ALONG WITH HIS/HER COWORKERS BUT THE EMPLOYER PROHIBITS THEM FROM RETURNING TO THE WORKPLACE.

This would be a clear violation of the Age Discrimination in Employment Act (ADEA) and in fact would be facially discriminatory. Employers may not ban older workers from the workplace, either requiring them to use leave or take unpaid leave, nor can they require them to telework due to their age, despite the CDC's conclusion that such employees are at higher risk for complications from COVID-19.

- Since the policy would be facially discriminatory, the employer would be liable under the ADEA absent an affirmative defense.
- Unlike the ADA, there is no direct threat defense under the ADEA.
- These facts would be governed by the Supreme Court's decision in *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991).
 - In *Johnson Controls*, the employer barred women of childbearing age from certain jobs due to potential harm that could occur to a fetus.
 - The Court ruled that the employer's restriction against fertile women performing "dangerous jobs" constitutes sex discrimination under Title VII. The Court further rules that the employer's fetal protection policy could be justified only if being able to bear children was a bona fide occupational qualification (BFOQ) for the job.
- The Court also concluded that the beneficence of an employer's purpose does not undermine the fact that an explicitly sex-based policy is sex discrimination and may only be defended as a BFOQ.
- The seminal case on the BFOQ defense under the ADEA is *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).

THE OLDER WORKER WHO FEARS RETURNING TO WORK AND REQUESTS PERMISSION TO CONTINUE TO TELEWORK BUT THE REQUEST IS REFUSED.

- There is no reasonable accommodation requirement under the ADEA and so employers are not required to accommodate the fact that older employees are at higher risk of becoming seriously ill from COVID 19 by allowing them to telework or adopt any other safety precautions. As a result, older workers who are not given the option to telecommute and who refuse to return to the workplace because they fear risking their own health, or that of a spouse or other family member, do risk termination. Employers do not have to indefinitely keep an individual on leave.
- However, if an employer is allowing other comparable workers to telework, for example a younger worker with child care issues, it should give the same opportunity to older employees. And if they don't, there is a potential ADEA claim.
- COVID has seemed to have sparked an early retirement wave and it could be explained in part by older workers' fear of returning to work without adequate safety measures.

THE EMPLOYER CHOOSES TO PROVIDE GREATER SAFETY MEASURES FOR ITS OLDER EMPLOYEES THAN ITS YOUNGER EMPLOYEES.

- While there is no reasonable accommodation requirement under the ADEA, the ADEA does not prohibit employers from extending more favorable treatment to its older workers.
- This was the holding in *General Dynamics v. Cline*, 540 U.S. 581 (2003).
 - In *Cline*, the employer eliminated retiree health insurance for workers under age 50. Employees ages 40 to 49 challenged the action as a violation of the ADEA.
 - The Supreme Court ruled that the ADEA does not prohibit an employer from favoring older employees over a younger ones, including those in the ADEA's protected class.
 - So, under *Cline*, an employer could move younger employees out of office with doors and give them to employees age 55 and older; or allow older employees to telecommute but not younger employees. However, the employer could not require the older workers to telecommute if they didn't want to.
 - Such policies may, however, run afoul of some state age discrimination laws that prohibit discrimination at any age.

OLDER WORKERS TARGETED IN COVID-RELATED LAYOFFS.

- Courts are reluctant to question an employer's need to reduce its workforce, and in these times that will be even more true. The key is to scrutinize the employer's process for deciding WHOM to terminate.

- *Hazen Paper Co. v. Biggins* 507 U.S. 609, 613 (1993), has made it immensely more difficult to challenge RIFs based on factors correlated with age – even highly correlated with age – such as high salary or years of service. The plaintiff must produce evidence that the employer supposed a correlation between age and the other factor and acted upon it.
- If the employer asks laid off workers to sign a waiver of their rights and claims under the ADEA in order to receive severance benefits – and they almost always do – the Older Workers Benefit Protection Act (OWBPA) requires them to provide disclosures of the job titles and ages of those being terminated along with the same information for those not being terminated. The purpose of these disclosures is for the older workers, or their attorney, to eyeball that information to see if it looks like the terminations were based on age.
- Although disparate impact claims are available under the ADEA to challenge reductions-in-force that have a greater adverse impact on older works, they are rarely, if ever successful. The principal reason is that under the ADEA, the burden an employer must satisfy to defeat a disparate impact claim under the ADEA – that the alleged discriminatory policy or practice was based on a reasonable factor other than age (29 U.S.C. § 623(f)(1)) is easily satisfied.
 - For example, *Pippin v. Burlington Resources Oil & Gas, Co.*, 440 F.3d 1186 (10th Cir. 2006) – the RFOA standard was satisfied by the employer’s desire to honor its commitment to hire employees fresh out of school in order to protect its hiring reputation at the schools.
 - *Powell v. Dallas Morning News*, 776 F. Supp. 2d 240 (N.D. Tex. 2011). The employer’s RIF practices were clearly related to the employer’s goal of offsetting declining resources.
- Given that the reasonableness standard was already ridiculously easy to meet – it will probably be even easier in the context of a pandemic.
- One positive note in the ADEA disparate impact space – which could be important to a COVID-related disparate impact claim is that the Third Circuit has ruled that subclasses – such as those 65 and older – can be used in an ADEA disparate impact case. *Karlo v. Pittsburgh Plate Glass Works, LLC.*, 849 F.3d 61 (3d Cir. 2017). *See also Cerjanec v. FCA US, LLC*, 2018 WL 3729063 (Aug. 6, 2018, E.D. Mich).
- Under some state laws omnibus employment discrimination statutes where age is one of several protected classes, disparate impact age claims are subject to the higher business necessity standard. *See, e.g., Scamman v. Shaw’s Supermarkets, Inc.*, 2017 ME 41 (March 23, 2017).