

## ***What is age discrimination in employment?***

Age discrimination in employment means that an employer treats a person unequally because of the employee's age. Examples include firing older workers in an attempt to keep them from qualifying for a pension; laying off older workers whose salaries are high in favor of inexperienced younger workers whose salaries are lower; denying promotions or salary increases to older workers while offering them to younger workers, etc.

## ***What is the Age Discrimination in Employment Act (ADEA)?***

The ADEA is a civil rights law that promotes and protects employment of older persons based on ability and not on age. The purpose of this law is to arbitrary age bias by employers.

## ***Which employees are protected by the ADEA?***

Employees who are at least 40 years old or older are protected by the ADEA unless they work for a very small employer. The ADEA does not protect independent contractors. However, some employers improperly claim that people who perform the duties of employees are independent

contractors. An attorney familiar with employment law can help you decide if you are covered by this law even if you are called an independent contractor.

## ***Which employers have to follow the ADEA?***

Private employers are covered if they have 20 or more employees. All federal government entities and all state or local government entities are employers covered by the law. In addition, labor organizations and employment agencies are covered. Small employers, elected officials, the military, independent contractors and bona fide business partners are not covered.

## ***What employer actions are illegal under the ADEA?***

The ADEA says it is illegal for an employer to:

- hire or fire employees because of their age
- advertise job openings in a discriminatory manner
- retaliate against an employee if he or she complains about discriminatory treatment based on age.
- offer different terms, compensation, conditions, and privileges of employment based on

the age of applicants and employees.

### ***Are non-citizen employees protected by the ADEA?***

The ADEA protects non-citizens who were hired in the United States and are working in the United States.

### ***How does an employee prove age discrimination?***

An employee may prove age discrimination by showing “disparate treatment” or “disparate impact.” Disparate treatment is direct discrimination that occurs when:

- an employee is age 40 or older;
- the employee is qualified for his or her position;
- the employer made a personnel decision that harmed the employee; and
- the employee was treated worse than someone who is “substantially younger.”

There may be some variations to this situation when there are no other employees who are substantially younger. If an older employee is in a situation with these requirements, then his or her employer offer a legitimate, non-biased reason for its decision. If it does offer a reason, the employee may then have to prove that

the reason the employer gave is not true.

Disparate impact refers to an employer policy that does not appear to target employees age 40 or older but which, nevertheless, has a significantly larger impact on older workers. If an employee or group of employees can show this kind of result from a policy, the employer then has to defend the policy by proving the policy is for a legitimate business purpose and that there was no alternative policy that would have caused less harm to the older employees.

### ***What can I do if I think I have been discriminated against at work because of my age?***

If you work for the federal government, you must either file an age discrimination complaint with the agency itself or notify the Equal Employment Opportunity Commission (EEOC) that you intend to file suit in court. Workers who are not federal employee may file a complaint either with the EEOC or with the New Mexico Human Rights Division of the Department of Labor. You can file the complaint for free, and the agency will conduct an investigation. You do not need to file a claim with both the EEOC and the

state; a claim in either one is filed automatically in the other.

### ***How long do I have to file a complaint?***

You must file your claim at one of the agencies within 300 days of the most recent incident that you believe was discriminatory. Not all employers have to keep personnel records that long, so it is important to keep copies of personnel manuals and policies, job performance evaluations, records of raises, and any other information that might be useful to your claim.

### ***What happens after I file a complaint with one of the agencies?***

The agency has a duty to investigate the complaint. Both agencies have so many cases to review that sometimes they do not investigate within their own time limits. When the time to investigate is up, the agency will send you any information its investigation uncovered. If the agency concludes that discrimination occurred, it will invite you and the employer to mediate a solution to the problem. Neither you nor the employer has to agree to mediate, but the procedure often saves a great deal of time in solving the problem. If you decide to mediate, it is a good idea to have a lawyer with you at the medi-

ation sessions. If the agency doesn't have time to investigate or if it didn't find evidence of unlawful discrimination, it will send you a report along with a "right to sue" letter. When you get this letter, you then have only 90 days to file a court case (in either state or federal court) if you decide to keep going with your complaint.

Although you must file your complaint first at an agency, you do not have to wait for the agency to finish its investigation before you file a claim in court. An employee other than a federal employee may ask the agency for a "right to sue" letter at any time after 60 days after filing the agency complaint. Once the letter arrives, the lawsuit can be filed. A federal worker may sue 30 days after he or she files a charge with the EEOC and obtains a right to sue letter.

### ***What will a court award me if I win my case for age discrimination in employment?***

Under both state and federal law, you may be entitled to back pay, "front pay" (the earnings you would be entitled to if the employer denied you a promotion or a raise), compensatory damages, and attorney fees. You also may be entitled to get your old job back.

