Age Discrimination During COVID-19
Live Webcast, July 15, 2020 from Noon to 1:00 PM

Learn about employers' obligations to their older employees when it comes to furloughs, layoffs, and severance packages that are compliant with the Older Workers Benefits Protections Act (OWBPA) and the Age Discrimination in Employment Act (ADEA). Understand the EEOC's recent guidance on federal anti-discrimination laws related to COVID-19.

Matthew Custardo, *Custardo Law LLC*, Lisle

Matt started Custardo Law, LLC in 2020. He has focused his practice on employment and labor law, complex civil litigation, and estate planning. Matt's employment and labor law practice includes representing individuals against their employers in wrongful termination matters related to discrimination, retaliation, whistleblower matters, wage and hour disputes, and other worker's rights issues. Matt received his J.D. from the John Marshall Law School in 2017, and he currently resides in Lisle, Illinois.

Faculty Contact Information:
Matthew Custardo
Custardo Law, LLC
650 Warrenville Rd., Ste. 100
Lisle, IL 60532
331-215-8996
matt@custardolaw.com

IICLE Illinois Institute for Continuing Legal Education

Age Discrimination During COVID-19

EMPLOYERS' OBLIGATIONS TO THEIR OLDER EMPLOYEES

CUSTARDO LAW, LLC

1

MATTHEW R. CUSTARDO

Started Custardo Law, LLC in 2020

EDUCATION

- THE JOHN MARSHALL LAW SCHOOL | December 2017
- LEWIS UNIVERSITY | May 2012

BAR ADMISSIONS

- Admitted to the Illinois State Bar, November 2018
- Admitted to the United States District Court for the Northern District of Illinois, December 2018

LEGAL COMMUNITY INVOLVEMENT

- American Bar Association; DuPage County Bar Association; Chicago Bar Association; Illinois State Bar Association | 2015 — Present
- Chicago Bar Association, Labor and Employment Law Committee, 2020 — Present
- Chicago Bar Association, Federal Civil Practice Committee, 2020 — Present
- Chicago Bar Association, Employee Benefits Committee, 2020 — Present
- Illinois State Bar Association Labor and Employment Law Committee, 2020 — Present
- Illinois State Bar Association, Employee Benefits Committee, 2020 — Present

2

Summary of Topics Covered in Webcast

RECENT EEOC GUIDANCE ON COVID-19 AND DISCRIMINATION

FURLOUGHS, LAYOFFS, AND SEVERANCE PACKAGES COMPLIANT WITH FEDERAL AND STATE LAW

WHAT TO DO IF YOUR CLIENT HAS BEEN DISCRIMINATED AGAINST

3

Summary of Topics Covered in Webcast

RECENT EEOC GUIDANCE ON COVID-19 AND DISCRIMINATION

FURLOUGHS, LAYOFFS, AND SEVERANCE PACKAGES COMPLIANT WITH FEDERAL AND STATE LAW

WHAT TO DO IF YOUR CLIENT HAS BEEN DISCRIMINATED AGAINST

4

Basic Definitions and Acronyms

- **EEOC** = Equal Employment Opportunity Commission
- **ADEA** = Age Discrimination in Employment Act
- **ADA** = Americans with Disabilities Act
- **OWBPA** = Older Workers Benefits Protections Act
- **IDHR** = Illinois Department of Human Rights
- **IHRA** = Illinois Human Rights Act
- **CDC** = Center for Disease Control
- **Older Worker** = 40 years old and over
- **RIF** = Reduction In Force

Recent Information from the EEOC

If the Employee is physically **present at work**

- Employer can ask if:
  - Employee has COVID-19;
  - Employee has COVID-19 symptoms; or
  - Employee had a COVID-19 test.
- Employer can:
  - Bar Employee from workplace if:
    - Employee refuses to answer the above questions; or
    - Employee refuses to allow their temperature to be taken.

Recent Information from the EEOC

If the Employee is physically **present at work**

- Employer cannot ask:
  - A specific employee to undergo COVID-19 testing, or
  - Work from home – **unless** Employer has:
    - Reasonable belief that Employee may have COVID-19;
    - Based on objective evidence.
- Employer cannot:
  - Disclose Employee's positive diagnosis of COVID-19 to other employees.
  - Ask older employee to work in a different area or take lunch breaks separately
  - Take other precautionary measures not required of all other employees

Recent Information from the EEOC

If the Employee is **working remotely** from home

- Employer cannot ask if:
  - Employee has COVID-19;
  - Employee has COVID-19 symptoms; or
  - Employee had a COVID-19 test.
- Employer cannot:
  - Disclose Employee's positive diagnosis of COVID-19 to other employees; nor
  - Postpone the start date or withdraw a job offer because the individual is 65 years old.
    - HOWEVER, the employer can ask if the employee **wants** to postpone the start date.

Recent Information from the EEOC

If the Employee is **65 years old and over**

- Employer cannot:
  - Exclude Employee from the workplace just because the CDC says that persons 65 years old and over are more likely to contract COVID-19 than other age groups; nor
  - Make Employee work remotely or place them on involuntary leave.
- **Sign of Discrimination**
  - Employer did not make younger employees work remotely but made older employees work remotely.

Recent Information from the EEOC

Question: Must Employee grant older employee's request to work remotely?

Answer: No, the ADEA does not have an accommodation provision like the ADA. Therefore, Employer is not required to grant an older employee's request to work remotely just because an older person is more at risk of contracting COVID-19.

- However, if Employer is allowing younger employees to work remotely, then Employer must also allow older employees to work remotely from home, too.

Notable Recent Example of Age Discrimination

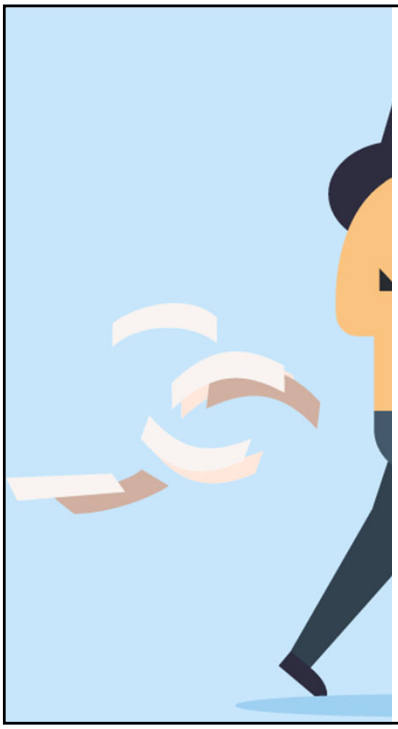
- The National Basketball Association (NBA) Commissioner's Comments on Older Coaches
  - NBA season was suspended in March 2020 and its Commissioner, Adam Silver, announced season would resume in late July 2020, but in an interview in early June 2020, Silver stated that older coaches may not be able to sit with their teams on the sidelines during games "in order to protect them."
  - However, singling out older workers in an effort to "protect" them may leave employers susceptible to age discrimination lawsuits.

Summary of Topics Covered in Webcast

RECENT EEOC GUIDANCE ON COVID-19 AND DISCRIMINATION

FURLOUGHS, LAYOFFS, AND SEVERANCE PACKAGES COMPLIANT WITH FEDERAL AND STATE LAW

WHAT TO DO IF YOUR CLIENT HAS BEEN DISCRIMINATED AGAINST



ADEA and OWBPA Compliant Severance Packages

Basic Facts about ADEA

- The ADEA is a federal law that protects employees and job applicants age 40 and over from age-based discrimination in all aspects of employment.
- The law applies to:
  - Employers with at least 20 employees (*Note: Illinois is different);
  - Employment agencies;
  - The federal government;
  - State and local government (though remedies are often limited); and
  - Labor organizations with at least 25 members.
- **Does not apply** to elected officials, independent contractors, or military personnel.
- **Does not outlaw "reverse discrimination."** In other words, the law does not prohibit employers from discriminating against employees who are younger than 40.

Basic Facts about ADEA

- The ADEA prohibits age discrimination in decisions about hiring, firing, layoffs, pay, benefits, promotions, demotions, performance reviews, or any other condition of employment.
- Under the ADEA, employers **cannot**:
  - Mention age or say that a certain age is preferred in job ads and recruiting materials;
    - *Note: it is questionable but not automatically illegal to ask for date of birth or graduation on a job application;
  - Set age limits for training programs;
  - Retaliate against you if you file charges of age discrimination or help the government investigate charges;
  - Force you to retire at a certain age (*Note: there are a few narrow exceptions).
    - Military personnel, airline pilots, public safety officers, bona fide occupational qualification (BFOQ)

Basic Facts about ADEA

- The law also prohibits policies and practices that have a "disparate impact" on older workers. These are policies that appear to be age-neutral but fall more harshly on older workers.
- Under the ADEA, you can't be denied the opportunity to participate in your employer's benefit plans because of your age. Employers also can't reduce benefits based on age, unless the cost of providing the benefit increases with age. In these instances, the employer must incur the same cost for providing the benefits to older workers as it does for younger workers in order to comply with the ADEA.

Basic Facts about OWBPA

- The OWBPA was passed to help protect workers aged 40 years old and older from giving up their rights under the ADEA without fully understanding what they're doing.
- It's focused on situations in which employers ask employees to sign a release of claims in exchange for severance pay.
  - Thus, where employees aged 40 years old and over are being terminated voluntarily or involuntarily and are asked to release any age discrimination claims they may have in exchange for some consideration—usually, severance pay—employers must comply with the OWBPA.

Basic Facts about OWBPA

- The OWBPA equally applies to early retirement plans, exit incentive programs, involuntary terminations, and RIFs– but it is important to note that the law applies only to the waiver of federal age discrimination claims under the ADEA – it does not apply, for example, to state law age discrimination claims.
- A release cannot prohibit an employee from filing a charge with the EEOC or participating in an EEOC investigation.
- A "group" termination program subject to the OWBPA's enhanced notice requirements occurs whenever more than one employee is terminated during a six (6) month period as part of the same decision-making process.
- If an employer neglects or fails to do what the OWBPA requires, any release in the severance agreement signed by a protected employee will be void as to ADEA claims. Non-ADEA claims are not affected, but an employer may face a federal age discrimination claim even though the employee has been paid to release such a claim.

Severance Package Requirements

1. All release agreements that waive an employee's federal age discrimination claims under the ADEA must comply with the OWBPA.
   - Specifically, the OWBPA requires that older workers provide a "knowing and voluntary" waiver of their age discrimination claims.
2. In order to comply with this requirement, a release must, at a minimum:
   - Be in writing;
   - Be written in a manner reasonably calculated to be understood by the employee;
   - Specifically refer to the ADEA;
   - Not require the worker to waive claims that may arise after the date of execution;
   - Be in exchange for something of value, in addition to which the employee is already entitled;
   - Advise the worker to consult an attorney before executing the release;
   - Allow the worker 21 days to consider the offer; and
   - Allow the worker 7 days to revoke the agreement after execution.

Severance Package Requirements

3. The OWBPA imposes additional requirements on employers when the release is sought in connection with a Reduction In Force (RIF) of two or more employees over the age of 40:
   iii. First, the time period that a worker must be given to consider the agreement increases from 21 to 45 days.
   iv. Second, the employer must provide the over-40 employee with detailed information about the RIF. Specifically, an employer must disclose, in writing:
   - The class, unit or group of individuals covered by the exit program;
   - The eligibility factors for the exit program;
   - The job titles and ages of all individuals eligible for or selected for the program; and
   - The ages of all employees in the same class who were not eligible or selected for the program.

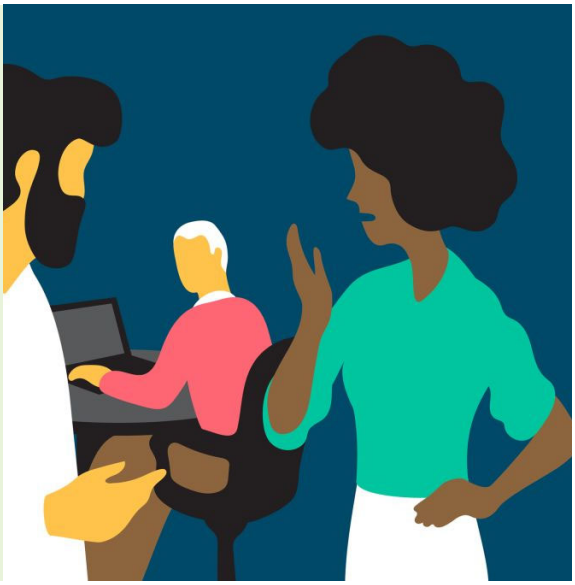
How to Determine Severance Benefits

- Pay → Severance pay generally is not required by law unless:
  a. The employer previously has committed to pay it (by employment contract, collective bargaining agreement, or severance pay plan);
  b. There is a state or local requirement; or
  c. It is being paid as "consideration" to obtain an employee's signature on a release/waiver of claims against the employer.
- Similarly, the amount of severance typically is within the employer's discretion;
  - Many employers use a "two weeks' pay for every year of service" rule of thumb, with minimum and maximum amounts. Employers should be careful of "special deals"
    - Enhanced severance benefits for a select few employees can generate discrimination lawsuits.
    - Different severance packages for different ages is a red flag.

How to Determine Severance Benefits

- Other Benefits
  - There are other separation benefits that can be provided, including, but not limited to:
    1. Reimbursement of employees' premiums for continuing group health coverage (COBRA coverage);
    2. Outplacement assistance or jobs training;
    3. Eligibility for recall to work; or
    4. More-than-neutral letters of reference.
- If departing employees have continuing obligations to the company (e.g., transition assistance, confidentiality, non-disparagement or non-competition) then employers should note that paying severance in installments over time rather than in a lump sum will encourage compliance with the ongoing obligations.
- Employers should also determine whether the severance scheme (particularly any installment payout protocol) is a "plan" governed by the federal Employee Retirement Income Security Act (ERISA) and, if so, comply precisely with its requirements.

Legally Compliant Furloughs and Layoffs



23

Furloughs vs. Layoffs

- **Furlough**
  - Temporary and unpaid period of time off from work initiated by the employer, with mutual expectation of reinstatement. Employee still on payroll and remains eligible for benefits, including health insurance coverage.
- **Layoff**
  - Termination of employee's employment without any right to be recalled and reinstated if business conditions improve. Benefits, including health benefits, typically are terminated when the Employee is laid off– subject to employee's right to continue that coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA).

24

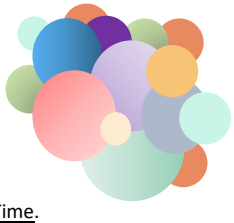
Furloughs

- Nonexempt employees only need to be paid for hours they worked under the Fair Labor Standards Act (FLSA).
- FLSA does not mandate payment of vacation or paid time off at the time of termination, furlough, or temporary layoff. The Illinois Wage Payment and Collection Act requires payment upon "separation," which is not implicated by a furlough. 820 ILCS 115/5 (2020).
- "White collar" exemptions (executive, administrative, and professional) must be paid full salaries for each week they perform any work.
  - If employer wants to avoid the obligation to pay exempt employees their weekly salary, employers should tell exempt employees that they are not authorized to perform any work during any furlough, and that any work requires prior approval.
- Employees on H-1B status must still be paid their full salary if furloughed. Unpaid leave is not an option for any such employees. Employers must pay the required wage for the duration of the H-1B petition or until there is a bona fide termination of the H-1B worker's employment.
- Can Employer furlough union employees? Depends on the provisions in the Collective Bargaining Agreement (CBA).
  - The CBA will likely discuss layoffs, layoff procedures, recall rights, continued benefits, retention of seniority, etc.

Furloughs

- If the employee is furloughed or quarantined, the employee may use paid leave or vacation time for any partial weeks not worked so long as the employee is paid the equivalent of their full weekly salary. The employee may also be entitled to paid sick leave under the employer's policies or state and local law.
  - An employer can force employees to use paid time off (PTO, vacation, personal days, etc.) during a furlough. Likewise, there is no general requirement that PTO benefits provided under employer policy continue to accrue during a furlough period. In the case of paid sick leave mandated by state or local law, most laws require accrual only based on ***hours worked***. *But make sure to consult with local ordinance to confirm.
  - In Illinois, receipt of vacation pay will delay the employee's eligibility to receive unemployment insurance benefits.
- An employer can reduce the salary of an exempt employee consistent with FLSA if certain requirements are met. The reduction must be on a (1) future basis, and (2) notice should be communicated to the employees ahead of time.

WARN Act



- The Worker Adjustment and Retraining Notification Act of 1988 (WARN Act)
  - Applies to businesses that employs 100 or more employees. Considerations for Full Time vs. Part Time.
    - Part Time employees can be excluded, as well as employees hired within previous 6 months.
  - WARN Act requires that employer provide 60 days' advance written notice to affected employees and state and local government officials of a "plant closing" or a "mass layoff."
  - Mass Layoff = at least 50 employees and 33% of employees at the site suffer an "employment loss;" or alternatively, at least 500 employees suffer "employment loss," regardless of percentage affected.
  - **Furloughs** – WARN Notice provisions not required when the furlough lasts less than 6 months.
  - Reductions in employees' hours = the WARN Act's definition of "employment loss" only applies reduction in hours of more than 50% each month for six consecutive months.

WARN Act

- There are **three exceptions** to the full 60-day notice requirement; however, the notice must be provided as soon as practicable, even when these exceptions apply, and the employer must provide a statement of the reason for shortening the notice requirement in addition to fulfilling other notice information requirements. These three exceptions are:
  - **Faltering company:** When, before a plant closing, a company is actively seeking capital or business and reasonably, in good faith, believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone the shutdown for a reasonable period;
  - **Unforeseeable business circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required (i.e., a business circumstance caused by some sudden, dramatic, and unexpected action or condition beyond the employer's control, such as unexpected cancellation of a major contract); or
  - **Natural disaster:** When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave or the similar effects of nature. In such cases, notice may be given after the event. **COVID-19.**
- Exceptions are often claimed by employers in bankruptcy cases, and bankruptcy courts must often determine how the WARN Act applies. Generally, the WARN Act's requirements and penalties apply when an employer continues to run the business in bankruptcy, rather than close the business, and also when an employer plans a closing or mass layoff before filing bankruptcy. The WARN Act does not apply to a trustee in bankruptcy whose sole function is to close the business.

WARN Act

- Penalties
  - An employer who violates WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days.
  - The liability may be reduced by the period of any notice that was given and any voluntary payments that the employer made to the employee, sometimes referred to as "pay in lieu of notice."
- U.S. district courts enforce WARN requirements.
  - Workers, representatives of employees, and units of local government may bring individual or class action suits. Courts may allow reasonable attorney's fees as part of any final judgment. The U.S. Department of Labor is responsible to educate and inform employers and employees about WARN, and to provide assistance in understanding the regulations, but is not responsible for enforcing WARN.

Illinois Mini WARN Act

- The Illinois WARN Act requires employers with 75 or more full-time employees to give workers and state and local government officials 60 days advance notice of a plant closing or mass layoff.
- An employer that fails to provide notice as required by law is liable to each affected employee for back pay and benefits for the period of the violation, up to a maximum of 60 days. The employer may also be subject to a civil penalty of up to $500 for each day of the notice violation. This law does not apply to federal, state, or local governments.
- Mass Layoff = at least 250 or more employees at a single site, regardless of percentage; or an employment loss of 25-249 and 33% of employees at that site.

Illinois Mini WARN Act

- Like the federal WARN Act, there are **exceptions** to Illinois' 60-day notice requirement.
  - These exceptions are found in Section 15 of the Illinois Worker Adjustment and Retraining Notification Act, 820 ILCS 65/15. Basically, they are:
    - At the time that notice would have been required, the employer was actively seeking capital or business and Department of Labor determines that the need for a notice was not reasonably foreseeable at the time the notice would have been required.
    - The plant closing is of a temporary facility or the plant closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or (2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this Act.

Illinois Mini WARN Act

- **Additional Information Regarding COVID-19:** The Illinois Department of Labor (IDOL) recognizes the unprecedented challenges posed by the COVID-19 pandemic, including unexpected business closures. If a covered employer is forced to close or significantly reduce its workforce in the form of a mass layoff, the WARN Act, 820 ILCS 65/1 et seq., will apply.
  - IDOL will provide individual determinations to employers who seek an exception under Section 15 of the Act. To request the determination, the employer must provide IDOL with a written basis describing the basis for reducing the notification period. IDOL will then make an individual determination in an expedited manner. If the request is approved, an employer must provide as much notice as soon as practicable.
- The WARN Act already recognizes that there are instances where the need to provide notice may not be reasonably foreseeable. Any investigation conducted by IDOL of an employer who has already closed or significantly reduced its workforce in the form of mass layoff, without providing the requisite notice, will be analyzed as if the employer had sought a determination under Section 15 of the Act. If an unexpected event caused your business to close, please provide as much information as possible to IDOL about the circumstances of your closure so the Department can determine if an exception to the WARN Act applies.

CARES Act PPP Loans and Employees

- Congress passed Coronavirus Aid, Relief, and Economic Security (CARES) Act that established the Paycheck Protection Program (PPP), a loan fund for employers that is fully forgivable so long as employers meet the loan's forgiveness terms.
- PPP loans allow employers to borrow funds to help cover payroll costs, mortgage interest, rent, utilities, and interest on any other debt obligations incurred before February 15, 2020.
- Eligible businesses could take out a maximum loan amount equal to the lesser of:
    a. $10 million dollars, or
    b. 2.5 times the average total monthly payroll costs incurred by the employer over the one-year period before the date of loan origination (with employee salaries or wages capped at $100,000 annualized per employee).
- PPP Loan forgiveness gave employers until June 30, 2020 to restore full-time equivalent employment and salary levels for any reductions made between February 15, 2020 and April 26, 2020.

CARES Act PPP Loans and Employees

- Loan is forgivable if:
    - Employer uses the loan proceeds fully within 8 weeks of disbursement to pay:
        - Payroll costs;
        - Interest on mortgages incurred before February 15, 2020;
        - Rent obligations under lease agreements in force before February 15, 2020; or
        - Utilities for which service began before February 15, 2020.
            - NOTE: any amount paid for interest on any other debt obligation, while an allowable use of PPP loan proceeds, is excluded from forgiveness.
    - At least 75% of the funds go toward payroll costs;
    - Does not decrease employee salaries (for those who made $100,000 or less annualized in every pay period during 2019) by more than 25%; and
    - Does not decrease its number of full-time equivalent employees.

CARES Act PPP Loans and Employees

- Where an employer has failed to maintain 100% of its full-time equivalent workforce over the eight-week period and seeks forgiveness, the forgiveness will be reduced proportionally rather than all together.
  - **Exemptions** → (1) employee fired for cause, (2) employee resigned, or (3) employee requested less hours.
- Employers should rehire furloughed employees they let go at the beginning of COVID-19.
  - U.S. Department of Treasury has stated that an employer will not see a decrease in the amount of its loan forgiveness if the employer's **good faith** offer to reemploy a furloughed worker (at same salary/wage and number of hours) was rejected.
  - Therefore, an employer should make **written offers** to re-employ furloughed workers in case the U.S. Department of Treasury seeks documentation at a later date. Additionally, employer must have documentation of the employee's rejection of the offer. Must report rejection within 30 days to IDES.

PPP Loans and Employees

- What is the PPP interest rate?
  - 1.00% fixed rate.
- When does the employer need to start paying interest on its loan?
  - All payments are deferred for 6 months; however, interest will continue to accrue over this period.
- When is employer's loan due?
  - In 2 years.
- Can employer pay its loan earlier than 2 years?
  - Yes. There are no prepayment penalties or fees.

PPP Loans and Employees

- Does employer have to hire same employees?
  - No, all they have to do is keep their headcount the same– they can hire different/new people.
- Can employer use PPP loans for employee bonuses?
  - Yes.
- Once PPP loans run out, can employer make layoffs again?
  - Yes, if after the funds run out and the company's financial situation has not improved, the employer is able to furlough or lay off employees as necessary. Employee would be eligible to claim unemployment benefits again.
- Can employer keep employees furloughed but use the PPP loan to pay furloughed employees' health plans?
  - Yes, if employer has more than 100 employees.

Summary of Topics Covered in Webcast

RECENT EEOC GUIDANCE ON COVID-19 AND DISCRIMINATION

FURLOUGHS, LAYOFFS, AND SEVERANCE PACKAGES COMPLIANT WITH FEDERAL AND STATE LAW

WHAT TO DO IF YOUR CLIENT HAS BEEN DISCRIMINATED AGAINST

What To Do If Your Client Has Been Discriminated Against Based On Age

- What are some possible signs of discrimination?
  - How employer might try and get employee out in a sneaky manner:
    1. Job elimination;
    2. Layoff;
    3. Unfavorable performance ratings;
    4. Threats against employee's pension;
    5. Reducing job functions → reducing authority or causing humiliation;
    6. Exclusion from business and company-related functions;
    7. Cutting back hours;
    8. Skipping over employee for promotions or raises;
    9. Employer did not make younger employees work remotely but made older employees work remotely.
  - Illegal manner:
    1. Harassment; or
    2. Setting mandatory retirement (*where not exempt)

What To Do If Your Client Has Been Discriminated Against Based On Age

1. <u>Tell them to apply for Unemployment Benefits</u>
   a. Have them contact the Illinois Department of Employment Security (IDES)
2. <u>Negotiations with Employer</u>
   a. Settlement with waiver and full release of all potential claims
3. <u>EEOC / IDHR Process</u>
   a. Online Inquiry
   b. EEOC / IDHR Interview
   c. File a Charge of Discrimination online
4. <u>Litigation</u>

What To Do If Your Client Has Been Discriminated Against Based On Age

Negotiations with Employer

- Send Demand Letter to the Employer, begin negotiations
- Tell client to document remarks by their managers and others that they perceive as discriminatory. Tell them to keep all emails and any other documentation that helps their case.
- Personnel Record Review Act, 820 ILCS 40/ *et seq*.
  - Under the Act, employees (and former employees) have the right to make two inspection requests in a calendar year, and the employer is required to provide the employee with an opportunity to inspect and/or copy their personnel records within seven (7) working days after the request is made.
- Send a Litigation Hold Notice Letter

What To Do If Your Client Has Been Discriminated Against Based On Age

Pursuing a Claim with the EEOC

- Instruct your client to make sure they document remarks by their managers and others that they perceive as discriminatory. Tell them to keep emails, texts, and any other documentation that helps their case.
- File a charge with the federal Equal Employment Opportunity Commission (EEOC).
  - EEOC Statute of Limitations = 180 days from date of discriminatory action or when your client first became aware of the discriminatory action, whichever occurred first.
  - In some states, including Illinois, the time limit for filing a charge is extended to 300 days. However, filing within 180 days is recommended, to be on the safe side.
- Investigation → Mediation → Conciliation (process can take between 180 and 270 days)

What To Do If Your Client Has Been Discriminated Against Based On Age

Pursuing a Claim with the IDHR

- The Illinois Human Rights Act, 775 ILCS 5/ *et seq.* ("IHRA") is administered by the Illinois Department of Human Rights ("IDHR").
- The IHRA applies to all individuals, and in part makes it unlawful for an employer (with one or more employee*) to subject an employee to an adverse employment action based on age (amongst other things).
  - Examples of adverse employment actions include constructive discharge, termination, refusal to hire, demotion, discrimination or harassment, and exposure to a hostile work environment.

What To Do If Your Client Has Been Discriminated Against Based On Age

Pursuing a Claim with the IDHR

- In order to bring a civil claim under the IHRA, an injured employee must first exhaust the administrative remedies by filing a charge with the IDHR. From the date of the adverse action, employees have 180 days to file at the IDHR. Once the IDHR has progressed through investigation, and issued a finding, the employee may file a lawsuit in state court or proceed to the Human Rights Commission.
- Smaller employers can now be sued in state court on such claims.

What To Do If Your Client Has Been Discriminated Against Based On Age

Litigation

- **Legal Standards For Age Discrimination And Pretext Claims**
  - ADEA is the key federal law that prohibits age discrimination in employment.
  - To win, a plaintiff "must prove by a preponderance of the evidence that age was the 'but-for' cause of the challenged employer decision." *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 177-178 (2009).
  - Circumstantial evidence, as opposed to direct evidence of discrimination (which is less frequently available to plaintiffs), is analyzed under a three-part test created by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
    - Note that the Supreme Court clarified that federal employees have a less onerous legal burden to prove in age discrimination claims as compared to private sector employees. *Babb v. Wilkie*, 589 US _ (2020) [No. 18-882 (2020)].

What To Do If Your Client Has Been Discriminated Against Based On Age

Litigation

- The *McDonnell Douglas* framework for an ADEA claim for layoff due to age discrimination is as follows:

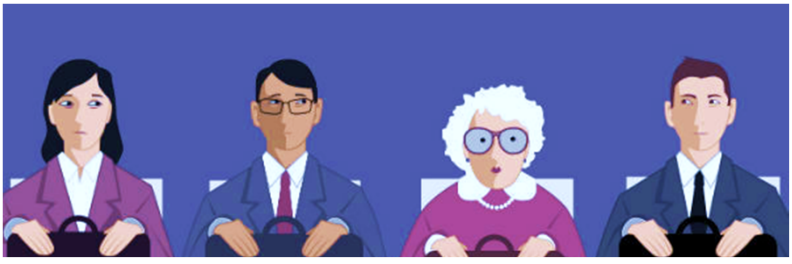
❑**STEP 1**/prima facie case (burden on plaintiff)
- They belong to a protected class (older than 40 years old);
- They were qualified for the job and performing in accordance with the expectations of their employer;
- Employer terminated their employment; and
- The employer replaced plaintiff with an individual who was comparably qualified to the plaintiff, but substantially younger, or that they were laid off under circumstances that give rise to an inference of age discrimination.

❑**STEP 2** (burden on defendant)
- Employer must produce evidence that its actions were the result of legitimate and non-discriminatory reasons.

What To Do If Your Client Has Been Discriminated Against Based On Age

Litigation

- The *McDonnell Douglas* framework for an ADEA claim for layoff due to age discrimination is as follows:
  - ❑**STEP 3** (burden on plaintiff)
    - Employee must prove that the non-discriminatory reason(s) offered by the employer in Step 2 were not true reasons but were a pretext for discrimination based on age.
      - The Supreme Court held that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146-7 (2000). Also, *Reeves* allows the trier of fact to consider the evidence used to establish a *prima facie* case of discrimination (first prong of *McDonnell Douglas*) when they are deciding the final prong of *McDonnell Douglas* framework. How the employer treats similarly situated (but younger) employees plays a key role in age discrimination cases.



Questions?

Thank You.

CUSTARDO LAW, LLC

650 Warrenville Road, Suite 100

Lisle, IL 60532

Office: 331-215-8996 | Fax: 331-215-8997

matt@custardolaw.com

www.custardolaw.com