



Be Mindful of Legal Obligations When Implementing an Age-Positive Culture

By Karen S. Elliott

In *The Intern*, one of the millennial employees interviewing Robert De Niro asks him, “So where do you see yourself in 10 years?” De Niro looks at him and asks somewhat incredulously, “You mean when I’m 80?” Although a work of fiction, the movie highlights the new reality of older workers staying employed longer or seeking new employment opportunities after turning 60.

Just 23 years ago, Gallup reported the average age of retirement for U.S. workers was 57. In 2014, the polling firm found that the average retirement age had risen to 62. Such documented aging of America’s workforce is a popular topic. Much ink flows, and many studies flourish about strategies businesses need to begin developing for retaining and/or hiring the older worker.

But what is the specific age of reference for this “older” worker of concern? Is it the newer, higher average age of retirement of 62 as reported in 2014 by Gallup? Is it the age at which the current workforce will be able to obtain full Social Security benefits? That is currently 66, but the age will soon become 67 for those born in 1960 and after.

Or is it simply anyone over 50? Obviously a 50 year old may have different issues than a 67 year old. And what about the reverse side of this issue? What if an organization has an aging workforce at the top of the pay scale tapping out its budget and stifling its progress in real or perceived ways?

Is it, as another millennial in *The Intern* exclaims, the case that “Grey is the new green!” Or are, as claimed in a recent age discrimination lawsuit involving Ohio State University, older workers “an extraordinarily change-averse population of people almost all of whom are over 50, contemplating retirement (or not) and it’s like herding hippos.”

Regardless of whether the focus is on the brain drain, the budget, five generations working peacefully together or the older guy or gal who refuses to retire, the strategies of dealing with aging workers gives rise to a host of legal concerns.

Communication Pitfalls

Humor is a great communication tool. So are compliments. But as your organization implements an age-positive culture, be sure to take the ageist challenge.

This is not a verified assessment tool, but reflect on how many times you hear comments such as “Give him a break, he started working before computers were even invented.” or “You look great. You don’t look your age at all!” or “I want to be you when I grow up.” None do much to effectively bridge the age gap. Nor do observations such as “He’s too old to learn how to use the computer.” and “She’s old; she’s at least 50!”

Each of those quotes come from people who took the challenge. Add up enough of those kinds of remarks in one workplace, and they likely support a claim under the Age Discrimination in Employment Act (ADEA) that will survive early motions to dismiss.

The ADEA applies to employees who are 40 or older. In the absence of direct evidence of discrimination, an employee can make an initial case by showing that he or she is at least 40, a termination or an adverse job action occurred, the employee was performing in accordance with the employer’s legitimate expectations at the time of the termination or adverse job action, and the employer replaced the employee with a substantially younger person. Replacing an age protected employee with someone just three years younger has been held by at least one court to suffice as being replaced by a “substantially younger” individual.

Another common issue older workers, particularly men, face is that they emulate the behavior of their younger male colleagues to their detriment. Older individuals often see their younger counterparts flirting with colleagues of a similar age and erroneously believe that similar flirting is welcome. While seemingly an unfair double standard, a 55-year-old man will often be perceived to be harassing

a 25-year-old woman whereas a 29-year-old man will not. Employers need to update their antiharassment training to make sure it covers realistic situations and takes into account the reality of age differences.

Declining Performance of Mature Workers

One of the more common issues employers must address is a mature worker earning a high salary who will not (or cannot for financial reasons) retire despite no longer performing at 100 percent on the job. Termination is not an attractive option when that employee possesses critical knowledge and skills. A common question from managers then becomes, “Can I transfer this employee to a lower-paying, redefined position to reflect the work being performed?” The answer is “Maybe.”

First, except for exceptions set forth in the ADEA and, possibly, state laws for, for example, airline pilots and certain executives, employers may not mandate retirement for older workers. Thus, suggesting that the employee opt for retirement may elicit an age discrimination claim because, by definition, the word “retire” suggests an age motivation. Rather than examining the reasons why the employer believes the person has been in the job too long, the employer should focus instead on the tasks the individual in the position has failed to accomplish and deal directly with the expectations and not the age of the person in the position.

Job realignment as a strategy to retain knowledge and skills works great when the employee voluntarily seeks fewer hours and, consequently, lower pay. But if the employer has not previously posted the position and the employee has not voluntarily inquired about it, then the change should be made only with careful advance planning. Without advance planning, the employer may be handing the employee a discrimination claim under the ADEA, the Americans with Disabilities Act (ADA) or even the Family and Medical Leave Act (FMLA) depending on what reasons drive the performance issues.

When declining performance becomes problematic, older workers should be treated just like any other workers. If a mature worker has held a particular position for a long time, the employee could be assumed to have the requisite knowledge, skills and ability. Some other cause may need to be identified. The focus should be on the facts observed, not on the observer’s assumption of what the underlying problem may be.

Rather than jumping right into disciplinary mode, an initial relaxed performance review meeting may be a good place start the conversation. Also make sure an up-to-date and realistic job description exists and is known to the employee. Review the essential position requirements and expectations with the employee and use the meeting to discover issues and to determine if they can be resolved quickly and easily. Do not spend the time repeating variations of “You are not making the mark.” Ensure that the manager, who may be 30 years younger than the worker, properly

communicates expectations. Sometimes addressing the issue might be as simple as closing a communication gap. Younger workers like to communicate via e-mail and text. Mature workers tend to prefer face-to-face interactions. Reverse prejudice—“Why am I taking orders from someone so young?”—may also be in play.

During the initial discussion, if it becomes clear that the employee understands the job expectations and that falling performance does not stem from miscommunication, the question becomes why the employee is not meeting expectations.

Employers sometimes perceive performance issues as technology-related. Older workers often get criticized for not having the technological skills of their younger counterparts. However, employers should consider giving all employees a technology challenge. Devise a basic skills test on the electronic systems used to perform job tasks. Employers may be surprised at how many younger workers fail.

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Younger managers might also assume that declining job performance is a natural result of aging. Age is not a disease, but health issues may be at the root of the problem for anyone with performance issues. Again, whether it is a young worker or older worker, declining performance issues should be treated similarly.

If medical issues are known or easily observed, or if the employee cites health issues as the reason for falling performance, ADA regulations and case law require the employer to engage in an interactive process to identify and implement reasonable accommodations. Moreover, the Equal Employment Opportunity Commission expects employers to engage in a sincere and rigorous interactive process once it is known that medical issues may be impacting work performance. When dealing with mature—or any—workers, employers must first deal with known health issues that must legally be accommodated.

Note that a manager can ask, “Is there anything we need to know about why you cannot meet our expectations?” and “Are there any issues we are not aware of that we can work with you on that will help you meet our expectations?” If the employee answers no to both questions, however, the discussion ends. Under no circumstances may an employer inquire further into health issues.

Examples of reasonable accommodations include a standing desk, a different starting time, magnifying screens for computers and establishing a work schedule that permits adequate time to attend to aging parents. A small thing like that may be all that is necessary to improve performance. In an instance where an employee has absences related to giving care to a family member, FMLA may become applicable.

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teams will be successful. Honest and trustworthy connections are things that have been earned and which add to the maturation of a team.

5. Create Team Culture Intentionally

With each new assignment, it is worth revisiting which team norms are needed to accomplish goals and objectives, as well as the behaviors that support interpersonal connections, trust and information sharing. Most teams default to having unquestioned assumptions turn into norms that drive behavior, but do you prefer to create your own culture or have it created for you and your team?

6. Foster Action Learning

I once read that if you want productivity, get people who know the process into a room and ask them to improve it. Following this advice, if you want innovation, invite those who think differently. Action learning harnesses the power of different perspectives to solve complex organizational problems by getting people to ask powerful questions and share experiences. By engaging in action learning, team members build intelligence collaboratively.

7. Develop Team Resilience

In complex, fast-paced and, oftentimes, disconnected workplaces, employees can succumb to pressure. They must cultivate

resilience, which can be understood as the ability to move past setbacks and reframe challenges as opportunities to make productive changes. Helping individuals and teams recognize stress points and barriers to change can spur resilience and enhance supportive relationships by getting them to see situations differently, become aware of their own pressure triggers and better manage their own reactions.

Reflect on Your Organization's Teams

To complete increasingly challenging projects, work teams become ever larger and more virtual, diverse and composed of highly educated specialists. Existing assumptions that carefully spelling out the process to reach the team's goals will suffice cannot hold. Executives must also create and maintain conditions that ensure collaboration among team members.

Teams are more than collections of people. To function optimally, team members must share and be aligned to a common vision. They also must feel empowered and committed. Executives and senior managers create the conditions for success by being present and engaging with teams. So, what is your number one way of building teams in your organization? —*N*

Introducing Dr. Andrew Rahaman

IPMA-HR welcomes Andrew Rahaman, Ed.D., as HR News' newest columnist. Leadership Roadmap will run every three months.



Rahaman has worked nationally and internationally with leaders and organizations of all sizes in the public and private sectors. He also worked for the U.S. government for 26 years and is currently an executive in residence at American University, where he teaches graduate courses on organizational learning for the university's Key Executive Education Programs. Rahaman is also on the staff of the Center for Creative Leadership, chairs the U.S. affiliate of the World Institute for Action Learning and has his own consulting firm specializing in executive coaching, onboarding, organizational culture assessment and delivering leadership development programs. He can be reached at andrew@organizationalstrategiesgroup.com or Rahaman@american.edu.

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The FMLA allows for caregiver leave, but many employees may be unaware of this. Also, older workers in particular may be reluctant to request extended leave. A final problem can be that employers believe an employee must initiate a request for FMLA-designated leave. However, FMLA regulations clearly state that if an "employer acquires knowledge that an employee's [absence] may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstance." Thus, if the employer knows the employee is taking leave to care for an aging parent who just had a stroke, the employer is required to initiate the FMLA leave process.

An employer should only offer a job with lower pay after declining performance has been well documented and all options for keeping the employee in his or her current position are exhausted.

Also, the only two remaining choices should be reassignment or termination. If accepting a new position means earning less pay, it can be a good idea to have the employee sign a waiver of claims agreement that covers all the time up to the date of the signature on the waiver. Legal counsel should be consulted regarding the effectiveness of such a release under state law because securing a valid signature may require granting a consideration such as extra days of leave. Conditions like the waiver not taking effect until waiting and revocation periods stipulated in the Older Worker Benefit Protection Act have expired also need to be understood.

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