

Navigating Business Succession Planning: Strategies to Avoid Age and Other Discrimination Claims

In today's dynamic corporate landscape, business succession planning is more than just a future-proofing strategy. It's a legal minefield that requires careful navigation. As in-house counsel, understanding how to balance strategic planning with legal compliance is crucial to safeguarding your organization.

Avoiding Age Discrimination Claims

Age discrimination is a primary concern in succession planning. The ADEA and other state labor laws protect employees aged 40 and older from discrimination based on age. 29 U.S.C. § 623(a). A common misconception is that replacing an older employee with another older employee eliminates legal risk. This isn't the case. The critical factor is whether the replacement was made because of age. See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

Questions About Retirement

Understanding the retirement horizons of current employees is important in succession planning. Employers are generally permitted to inquire about their employees' retirement plans. But they should exercise care when broaching the topic to avoid any missteps. Employers should also evaluate the specific jurisdiction wherein the business operates to ensure compliance with the ADEA as interpreted in that circuit, along with any corollary state and local laws. See, e.g., *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993) ("Such musings about eventual retirement simply do not evidence discriminatory intent."); *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 247 (6th Cir. 1997) ("Asking questions about an employee's plans for the future, without referring to the employee's age, especially when rumors are circulating that the employee is planning to retire, does not amount to pressure to retire."); *Shockley v. Morristown-Hamblen Hosp. Ass'n*, No. 2:16-cv-257, 2018 U.S. Dist. LEXIS 185305, at *44 n.15 (E.D. Tenn. Mar. 14, 2018) ("reasonable inquiries into retirement are not evidence of discrimination").

The approach to retirement inquiries can become problematic, particularly if questions are asked repeatedly or in a manner that could be perceived as pressuring or discriminatory. For example, the First Circuit Court of Appeals explained, "[a] single inquiry by an employer as to an employee's plans for retirement, however, does not necessarily show animosity towards age. An employer may legitimately inquire about an employee's plans so that it can prepare to meet its hiring needs. Though repeated and/or coercive inquiries can clearly give rise to a reasonable inference of an anti-age bias (and lend support to a finding of constructive discharge)." *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 28-29 (1st Cir. 1995).

The framing of questions significantly impact perceptions and outcomes, so it is important to avoid language that may be perceived as discriminatory or biased. See, e.g., *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990) (older employee told he could be "cheaply replaced with a younger salesman"); *EEOC v. Manville Sales Corp.*, 27 F.3d 1089, 1094 (5th Cir. 1994) ("old man," "old and inflexible" and "incapable"); *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) ("at your age you cannot produce like you once could, and we are going to have to make some kind of adjustment"); *But see Shockley*, 2018

U.S. Dist. LEXIS 185305, at *44 n.15 (“When an employer asks about an employee's plans for retirement in ‘friendly inquiry,’ it is not probative of discrimination and does not otherwise violate the ADEA. . . . [S]tatements about retirement may be probative of an ageist animus, depending on the context and circumstances.”).

Bona Fide Occupational Qualifications (BFOQ)

In limited circumstances, age may be considered a bona fide occupational qualification (BFOQ). This exception allows for age-based employment decisions if age is reasonably necessary for the normal operation of the business. For example, age restrictions may be applicable in roles requiring certain physical capabilities or safety standards, such as airline pilots or certain public safety positions. However, the BFOQ defense is narrowly construed and must be justified by the employer with substantial evidence.

Protecting Against Other Legal Risks in Succession Planning

1. **Employment Agreements and Policies:** Review existing employment agreements and company policies to ensure they align with succession planning goals. Employment contracts may contain term provisions, noncompete clauses, confidentiality agreements, or other provisions that impact the transition process.
2. **Discrimination Based on Other Protected Characteristics:** Be mindful of potential claims related to race, gender, disability or other protected characteristics under federal and state laws. Ensure that succession planning decisions are based on merit and business needs rather than discriminatory factors.
3. **Retaliation Claims:** Be cautious of actions that could be perceived as retaliatory, especially if an employee has previously engaged in protected activities, such as requesting or taking protected leave under the Family Medical Leave Act (FMLA) or filing a discrimination complaint.
4. **Breach of Contract:** Ensure that any promises made during the succession planning process, whether verbal or written, are fulfilled and clearly communicated to avoid confusion. Failure to do so could result in breach of contract claims.
5. **Confidentiality and Trade Secrets:** Protecting confidential information and trade secrets is crucial during transitions. Ensure agreements and policies are in place that require departing employees to return all company property and sensitive information. Consider implementing exit interviews and reminding employees of their confidentiality obligations.

Tips for Successful Strategic Planning with Legal Awareness

Successful succession planning begins with identifying critical roles—not just leadership positions—within the company and anticipating which positions will remain essential and which new roles may emerge as the business evolves. In-house counsel can add the most value by ensuring succession planning is proactive, inclusive and legally defensible.

- Regularly evaluate your succession planning practices to ensure they do not disproportionately impact employees based on any protected characteristic or activity.

For example, offer internal leadership assessments based on clearly defined role competencies, not simply length of service or assumptions about who is next.

- Focus the plan on business strategy, such as future company needs, the transfer of knowledge, and avoidance of talent gaps. Frame these activities as protecting institutional value and addressing business needs, not preparing for an employee's exit, particularly because of outdated assumptions about age or longevity.
- Document structured succession plans before the employment decision is made. Define competencies, leadership skills and capabilities needed for key roles and use objective performance data and milestones as a basis for inclusion. Avoid using terms in plans that correlate with age, such as "next generation" or "emerging/younger leaders."
- Consider implementing a separation agreement with a release of claims when transitioning employees, provided there is adequate consideration.
- Stay informed about relevant laws, including state and local regulations that may impose stricter requirements than federal law.

By integrating a strategic approach with legal awareness, companies can effectively navigate the complexities of succession planning while minimizing the risk of discrimination claims. For further guidance, contact [Claudine Jackson](#), [Erin Malone](#), or any member of the Phelps [labor and employment](#) team.

About the Authors

A board-certified labor and employment lawyer by the Texas Board of Legal Specialization, **Claudine Jackson** has spent more than 25 years advising company management on workplace and employment law issues. Informed by experience as a former in-house employment counsel for an international corporation, Claudine helps executives make decisions with an eye on the business implications. She's often called on to defend clients in arbitration and against claims before the EEOC, Department of Labor, Texas Workforce Commission and Texas Education Agency.

Erin Malone helps corporate leadership in highly regulated industries navigate day-to-day employment compliance, workplace investigations and employee discipline. She designs proactive employment policies and defends large employers in administrative hearings and litigation involving discrimination and retaliation, union-related activities, and health and safety compliance.