KNOW YOUR LEGAL RIGHTS

**Navigating age discrimination in the workplace**

*Know Your Legal Rights* is a bi-monthly column distributed by the State Bar of Wisconsin. It is sponsored by the State Bar of Wisconsin’s Lawyer Referral Service (LRS), which connects Wisconsin residents with lawyers throughout the state. To find an attorney in your area, visit [wislaw.org](http://www.wislaw.org/).

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What happens when you experience discrimination in the workplace because of your age? What is “age discrimination” under the law? How do you show age discrimination occurred? How fast do you need to act and what are your options? While you may want to take immediate legal action, there are necessary steps before going that route.

**What is Age Discrimination?**

State and federal law protects workers age 40 or older from employment discrimination. Federal law covers state and local government employers and private employers with at least 20 employees. Wisconsin law covers most all employers with at least 1 employee.

Age discrimination is discrimination because of a person’s age (40+) and can happen during:

* Recruitment;
* Hiring;
* Promotion;
* Firing;
* Layoff/reduction in force;
* Compensation;
* Benefits;
* Job Assignments;
* Training.

Note: Employees can also experience age discrimination via sustained and/or severe age-related harassment and retaliation.

Another place where age discrimination can occur is in a severance agreement or early retirement package. If you’re 40+ and get one of these contracts, check that your employer has included the following (if not included it could be age discrimination via contract terms):

* References the Age Discrimination in Employment Act (ADEA) and Older Workers Benefit Protection Act (OWBPA) rights or claims;
* Does not waive your rights or claims that arise after the contract is signed;
* Advises you to consult an attorney before signing;
* Gives you at least 21 days to consider the contract before signing (often called the “consideration period”); and
* Gives you seven days after signing to “take back” their signature (often called the “revocation period”).

**Proving Age Discrimination**

If you decide to pursue legal action against your employer for age discrimination, you have the job of first showing:

* You are 40+ years old;
* You were qualified for the position or were meeting your employer’s performance expectations;
* You experienced an “adverse employment action” (such as demotion, firing, or change to your benefits);
* A younger worker was given the position you applied for or was treated better than you under similar circumstances (he or she was not terminated for the same issue as you or was given a promotion or job instead of you).

Once you provide these four pieces of information, the employer then has the opportunity to explain why they took the action. At this stage, employers often bring up past performance issues to showcase that prior performance informed their decision and not age. Employers do have the ability to make decisions based on poor performance, regardless of age. Further, employers may have obligations under the law to provide reasonable accommodations for an employee’s disability so that an employee can perform essential job duties.

However, age alone is not a disability, and employers are not required to provide reasonable accommodation based solely on age. The analysis gets more complicated when an employee experiences a disability related to aging and then suffers workplace discrimination.

After the employer shares their rationale, you have the opportunity to show that the employer’s explanation was “pretext” or a false reason to cover up their age discrimination.

The key question for the administrative agency and/or court is whether your age was a determining factor in the employer’s action.

**Exceptions to Age Discrimination**

There are some jobs where employers are allowed to legally discriminate because of age. For example, pilots, law enforcement, and firefighters are all jobs where employers are allowed to set a maximum age because the job itself involves physical danger and/or is hazardous. Another example is school bus drivers.

**Timeline and Process**

Employees bringing employment discrimination claims must first file a complaint with an administrative agency like the Wisconsin Equal Rights Division and/or the U.S. Equal Employment Opportunity Commission (EEOC) before they can bring a lawsuit against their employer in court.

For Wisconsin employees, once you experience an event of alleged age discrimination, you have 300 days to file an administrative claim with the Wisconsin Equal Rights Division and/or the EEOC.

Example: On January 2, 2024, you met with your boss who told you that you were being fired, effective Feb. 1, 2024. The clock starts on the date your boss informed you of your firing, during a phone call, in-person meeting, or via email.

You have 300 days from the date you were told you were being fired, not your last day of work. In this example, until Oct. 28, 2024, which is 300 days from the date your boss told you about your termination.

Once you go through the administrative agency process, then you have a right to sue your employer in court.

**ABOUT THE AUTHOR**

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