

# Risk Monitor



## U.S. Supreme Court Strengthens Employers' Hand Against Age Discrimination Claims

The American workforce is growing older and the economy is struggling. These two factors indicate that, as companies lay off workers to cope with a slow economy, older workers who lose their jobs may increasingly take their former employers to court for alleged age discrimination. However, a recent decision of the U.S. Supreme Court may make it harder for workers to win those lawsuits.

Jack Gross, a 54 year-old claims administration director for a financial services firm, was reassigned in 2003 to the position of claims project coordinator; some of his duties were transferred to a person in her forties whom he formerly supervised. Because he lost some of his duties, he considered the move a demotion and sued his employer a year later, claiming a violation of the Age Discrimination in Employment Act of 1967. At trial, the judge instructed the jury that it must find in Gross's favor if he proved that he had been demoted and that age played a part in the employer's decision. The jury did return a verdict in his favor and awarded him lost wages. An appeals court reversed the ruling, saying that the judge's instructions were incorrect, and Gross appealed to the U.S. Supreme Court.

On June 18, 2009, a divided court ruled against Gross. Writing for the majority, Justice Clarence Thomas said that a person suing for a violation of the ADEA must prove that the employer would not have taken the action if not for the person's advanced age. The employer does not have the burden of proving that it would have taken the action regardless of the employee's age, even when the employee has evidence that age was one factor in the decision. He also wrote that the ADEA requires the employee to show that age was the primary reason for a demotion, not just one of multiple reasons. He noted that Congress had the opportunity to prohibit considering age among other factors and neglected to do so.

Justice John Paul Stevens denounced the majority's interpretation of the ADEA as "an unabashed display of judicial lawmaking." Noting that the court had interpreted other anti-discrimination laws to prohibit discriminatory actions based partly on a protected characteristic, he said it was inconsistent and arbitrary for the court to apply a different standard to ADEA violations. He pointed to a previous decision where the court held that an action was illegal if discrimination against a protected characteristic was "a motivating factor" in the decision. Justice Stephen Breyer added that to apply the majority's standard "is to engage in a hypothetical inquiry about what would have happened if the employer's thoughts and other circumstances had been different." The answer, he wrote, will often be far from obvious.

This decision should be good news for employers and their insurance companies. Employment Practices Liability Insurance policies normally cover employment terminations, demotions, decisions not to hire or promote, and denials of employment benefits based on factors such as age, sex, race, religion, sexual orientation, and others. This decision should result in fewer successful lawsuits against employers for alleged age discrimination, with a corresponding drop in payments under EPLI policies for these actions. While insurance companies will still incur the cost of legal defense, they are less likely to pay for judgments against employers.

Because the court based its reasoning on Congress's failure to clearly prohibit actions based even in part on age, members of Congress may seek to change the law. Employers should continue to avoid any actions that older workers could perceive as unfairly discriminatory. If that proves to be unworkable, they should work with their attorneys and insurance agents to ensure that their practices are legal and their insurance coverages adequate.

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# Keep on the Right Side of the Law When You Hire Employees

In the current weak economic environment, competition for jobs is intense. There may be dozens of candidates for each job opening, and hiring companies will have their pick. Even in times like these, however, employers must be vigilant about obeying the law when they make hiring decisions. Charges of illegal discrimination in hiring may become more likely during a tough job market. It is essential that employers follow federal and state laws that regulate what factors they may consider in the hiring process. Those who focus on the wrong things may find themselves the targets of government inquiries.

Several federal laws address discrimination in hiring:

- The Age Discrimination in Employment Act prohibits an employer from refusing to hire, firing, or otherwise discriminating against employees age 40 or older, solely on the basis of age. For example, it is illegal for an employer to offer a benefit such as vision insurance to younger workers but not to older ones.
- The Americans With Disabilities Act of 1990 forbids discrimination against disabled workers or job applicants. Under this law, an employer cannot refuse to hire a person who has difficulty walking solely on that basis; the employer must have another, legitimate reason.
- The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, national origin, religion, sex, pregnancy, sex stereotyping, and sexual harassment of workers. Decades ago, an employer could fire a woman for becoming pregnant. The Civil Rights Act outlawed such actions.

Although these laws have been in effect for several years, some employers still try to get around them. In 2008, the federal Equal Employment Opportunity Commission leveled penalties against employers in the amount of \$83 million for age discrimination; \$57 million for discrimination against disabled workers; \$12 million for discrimination against pregnant women; \$79 million for race discrimination; \$109 million for sex discrimination; and \$25 million for discrimination on the basis of national origin.

What are valid considerations for an employer to use in hiring decisions? Instead of focusing on an applicant's age, the employer should look at her track record of performance, accomplishments and continuous learning. Rather than assuming that she won't work at a fast rate or will be slow to adopt new technology, the employer should find out through job simulations, reference checking, and testing. Instead of looking at an applicant's disabilities (difficulty walking, for instance), the employer should look at his job skills, such as ability to calm angry customers and quickly troubleshoot problems. Rather than ask an

applicant whether she is a Christian or a Wicca or an adherent of any other religion, ask what she did to generate leads and close sales when the economy slipped into recession.

Prior to conducting interviews, employers should review with all involved personnel the legal restrictions on what they may ask or say when speaking with applicants. If necessary, training on effective and legal interviewing techniques should be given to these employees beforehand. It should be emphasized that interviewers need to focus on the tasks involved in the job and the applicant's ability to perform them.



No matter how much preparation and training an employer does, things can still go wrong. It is important that businesses carry employment practices liability insurance from a financially strong insurance company. A good insurance agent can obtain multiple coverage quotes, give advice on the various coverage features, and discuss the claims-handling performance of different companies.

Hiring new employees is always a difficult and uncertain proposition. Finding the right person for the job can be tricky. Complying with legal parameters can be trickier, but it is essential. By avoiding illegally discriminatory practices, employers can build a strong workforce and stay out of regulators' cross-hairs.

# Cut Jobs, End Up In Court?



The recession that began in December 2007 has been unusually severe. Through March 2009, employers shed more than five million jobs. In January 2009 alone, businesses took more than 2,000 mass layoff actions (actions affecting more than 50 workers.) Some affected workers have responded by claiming that their employers illegally discriminated against them. The federal Equal Employment Opportunity Commission reported a 15 percent increase in discrimination claims in 2008, bringing the number of claims to a record level. The largest increases were in the areas of retaliation and age discrimination.

These lawsuits can cost businesses dearly. A 2008 report showed that, between 2001 and 2007, almost half of all court verdicts favoring employees exceeded \$250,000, and almost a third exceeded \$500,000. Half of all age discrimination verdicts exceeded \$250,000, and almost a fifth exceeded \$1,000,000. By 2007, almost two-thirds of age discrimination suits resulted in plaintiff victories. Even more dangerous for employers are retaliation claims: More than a quarter of judgments against them exceeded \$500,000. Forty percent were for amounts between \$100,000 and \$500,000.

How can businesses lower the chances that they or their insurance companies will end up on the hook for these payouts? They can start by considering a number of factors before making job cut decisions.

- What will be the criteria for choosing affected workers? Will the decision be based on seniority with the employer? Work performance? Job function? Employment status (part-time, temporary, etc.)? Department profitability? Some combination of these? The criteria must be such that a reasonable person would not find them to be unfairly discriminatory.

- How will the employer select the workers to be let go? Will it apply the criteria strictly, or will it allow managers to use some judgment and flexibility in making selections? How will the employer ensure that all affected areas follow a consistent process? Lack of consistency could increase the employer's vulnerability to successful discrimination suits.
- Assess the risk of adverse impact on classes of employees protected by law, such as older employees or those with disabilities. Because older employees with long tenures with a firm are likely to be highly compensated, they may be attractive targets for a layoff action. However, an action that has a disproportionate impact on these employees may leave the firm open to successful age discrimination suits.
- Early in the process, review the precedents and lessons learned from any prior workforce reductions. An ability to show that it followed precedent in making layoff decisions will give the employer a strong defense in court.
- Obtain claim waivers and general legal action releases from employees to whom the firm will pay severance. Federal law requires these releases to meet certain requirements for workers over age 40.
- Depending on the number of employees affected, the firm may have to comply with a federal law that requires advance notice of the layoff. Employers must give 60 days advance notice of a plant closing, termination of 500 or more employees or termination of fewer employees if they amount to one-third or more of the workforce. Certain employees are exempt from being counted in these figures, so employers should consult with labor attorneys to determine whether the law covers them.

In addition to risk management steps, employers should obtain Employment Practice Liability Insurance to finance those losses that do occur. An insurance agent experienced in placing EPLI and other types of professional liability insurance is a good resource for information and assistance in obtaining coverage. Loss control and proper insurance will help a firm survive a very difficult business decision and any challenges that occur in the aftermath.

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stances or environments were also lower in 2007. All of the sub-categories within this type of fatality showed decreases except for one. The death toll from drowning/submersion increased by 13%

The data also revealed some other key findings:

Overall, 9 out of 10 fatal work injuries involved workers in private industry. Service-providing industries in the private sector recorded 48 percent of all fatal work injuries in 2007, while goods-producing industries recorded 42 percent.

- In the construction industry, fatalities fell. However, con-

struction continued to produce the most fatalities of any industry in the private sector.

- The four occupations with the highest fatality rates per 100,000 workers were fishers and related fishing workers with a fatality rate of 111, logging workers (86), aircraft pilots and flight engineers (67), and structural iron and steel workers (46).
- Thirty states reported lower numbers of fatal work injuries in 2007 than in 2006, 19 states and the District of Columbia reported higher numbers, and one state was unchanged.

# BLS Census Shows Top Reasons for Fatal Workplace Injuries

The Department of Labor's BLS National Census of Fatal Occupational Injuries for 2007, released in August 2008, showed that highway incidents were still the primary cause of on-the-job deaths, accounting for almost one out of four fatal work injuries. Although they remained the most frequent type of work-related fatality, the number of highway incidents fell by more than 3% percent in 2007, the lowest level since 1993.

Falls were again the second leading cause of workplace death. The number of on-the-job falls increased three percent in 2007, with 835 employees dying in this manner. Falls have increased by 39% since the census began in 1992. The increase in falls was driven by increases in falls on the same level as well as falls from non-moving vehicles. However, fatal falls from roofs fell from 185 fatalities in 2006 to 161 in 2007.

On-the-job homicides rose from the fourth to the third leading cause of death, claiming the lives of 610 workers. Just over 80 percent of those workers were victims of a shooting. However, the number of workplace homicides in 2007 declined by 44 percent from the high of 1,080 reported in 1994.

Being struck by objects ranked fourth, with 504 fatalities. The number of employees who were fatally injured from being struck by objects represented a sixteen percent decline from

2006, marking the second year of a downward trend in this category.



Deaths from fires and explosions decreased from 202 in 2006 to 151 in 2007, representing the lowest totals ever since the census began. Fatalities caused by exposure to harmful sub-

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