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SMITH MOORE LLP
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Mandating Retirement: Time for the Gold Watch?

Contrary to popular belief, as a general rule, it is not legally permissible for an employer with 20 or more employees to mandate that employees retire once they reach a certain age. Similarly, it is a violation of the Age Discrimination in Employment Act of 1967 (the "ADEA") to refuse to hire a candidate based on estimates of the time the candidate will remain in the workforce. Before 1986, the ADEA prohibited discrimination against applicants or employees between the ages of 40 and 70. In 1986, however, the ADEA was amended to lift the maximum age limit. Now, if the ADEA applies, all individuals are protected from age discrimination once they reach age 40 for as long as they remain in the workforce.

While the ADEA restricts mandatory retirement based on age, the Act permits the following:

- Employers may require that certain employees age 65 or older retire if they: (a) are employed in a "bona fide executive" or "high policy-making position" for the two years immediately before retirement; and (b) are entitled to an immediate, nonforfeitable annual retirement benefit of at least \$44,000.00 from the employer's pension, profit-sharing, savings or deferred compensation plan (or any combination of these plans).
- An employer may discriminate on the basis of age (generally favorably) if the employer is observing the terms of a *bona fide* seniority system, but the seniority system cannot mandate involuntary retirement.
- Employers may consider age where it is a "bona fide occupational qualification" ("BFOQ") necessary to the normal operation of the business, but this exception is extremely narrow and has been applied successfully only to a few safety-sensitive jobs (e.g., commercial pilots). Even then, the exception is controversial and has generated litigation.

TIP

While imposing a mandatory retirement age is generally not permissible under the ADEA, properly structured early retirement incentive programs are legally permissible as long as the decision to retire is purely voluntary.



TIP Author - Julianna C. Theall
Smith Moore LLP
Labor and Employment Team
Greensboro Office

Labor and Employment Team Members

| | | | |
|----------------------|----------------|---------------------|----------------|
| Allen Buckley | (404) 962.1042 | Alex Maultsby | (336) 378.5331 |
| Laura Deddish Burton | (336) 378.5566 | Jerry Oliver | (919) 755.8710 |
| Will Burton | (336) 378.5421 | Patti Ramseur | (336) 378.5304 |
| Denise Smith Cline | (919) 755.8734 | Barbara Ruby | (336) 378.5294 |
| Martin Erwin | (336) 378.5327 | Beth Brooks Scherer | (919) 755.8790 |
| Mike Kelly | (336) 378.5336 | Ed Sharp | (336) 378.5259 |
| Caroline Lock | (336) 378.5341 | Julie Theall | (336) 378.5256 |
| Travis Martin | (336) 378.5277 | Jeri Whitfield | (336) 378.5270 |

To send individual email: firstname.lastname@smithmoorelaw.com

For additional information on this or any other labor and employment topic, please contact any member of the Labor and Employment Team.

The firm restricts its practice in the labor and employment area to the representation of management.



www.smithmoorelaw.com

ATLANTA

One Atlantic Center
Suite 3700
1201 West Peachtree Street
Atlanta GA 30309
404.962.1000
404.962.1200 {FAX}

GREENSBORO

300 N. Greene Street
Suite 1400
Greensboro NC 27401
336.378.5200
336.378.5400 {FAX}

RALEIGH

2800 Two Hannover
Square
Raleigh NC 27601
919.755.8700
919.755.8800 {FAX}

WILMINGTON

300 N. 3rd Street
Suite 301
Wilmington NC 28401
910.251.7001
910.251.7007 {FAX}

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