

**Fourth Study Commission
Public and Social Law**

**QUESTIONNAIRE 2009
AGE DISCRIMINATION**

**Submitted by: Federal Judges Association, USA
Hon. Bernice Donald**

Introductory remarks:

The following Questionnaire deals with different topics of labour law, with a special focus on age discrimination. One of the main objectives of this questionnaire is, to obtain some impressions of the approach of national labour law systems regarding age discrimination. It is also important to keep in mind that there may be different provisions for different groups of employees for example civil servants and other persons working for government or public authorities under ordinary contracts of employment or farm laborers, persons working on board of ships or for religious communities or teachers. Exceptions or specific provisions regarding these groups should be mentioned. Statutory or other differences in treatment of men and women concerning age discrimination should also be mentioned.

1.a. General, are there rules against age discrimination which have constitutional status? What do these rules say precisely, and how do they work at lower levels of law making?

No constitutional protection exists against age discrimination in private employment. Additionally, courts in the United States have with near unanimity found that there is no constitutional protection against age discrimination in federal employment. These courts have found that the Age Discrimination in Employment Act (ADEA), which will be discussed in the following sections, provides the comprehensive remedy for discrimination on the basis of age in federal employment. Additionally, the Civil Service Reform Act of 1978 provides some protection for federal employees and promotes overall fairness in federal personnel actions.

Regarding the question of employment with state governments, the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court has held that age is not a suspect classification under the Equal Protection Clause, but this does not mean that individuals are not protected against age discrimination under the Equal Protection Clause. It only means that the level of scrutiny given to such claims is on the "rational basis" level – the lowest level of scrutiny.

1.b. Which international agreements and conventions dealing age discrimination has your country ratified?

Not Applicable.

1. c. *What are the main sources of law against age discrimination?*

The main federal statutory source of law dealing with age discrimination is the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621-34. The ADEA prohibits discrimination in public and private employment against individuals who are at least 40 years old. Protection under the ADEA covers not only individuals working within the United States, but also U.S. citizens who are employed overseas by U.S. corporations or their subsidiaries.

The ADEA does have certain restrictions. First, it only covers private employers who employ "20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b). Second, the ADEA does not protect uniformed personnel in the active or reserve armed forces. Finally, the ADEA does not protect against age discrimination for independent contractors and partners in a bona fide partnership.

1. d. *Are collective agreements bound by this provision?*

Yes. A labor organization may be held jointly liable with the employer if a collective bargaining agreement provision violates the ADEA.

1. e. *Which groups are protected by these provisions, young employees, older employees or is it just forbidden to consider age as a decisive factor for working conditions?*

The ADEA only protects individuals who are at least 40 years of age.

2. *Please specify, what are the criteria according to which it is determined that it is an unlawful age discrimination (i.e., relevancy of the age to the nature of the job) ?*

The person alleging discrimination must be in the protected class (over 40 years old), and in most cases, the individual must have been replaced by someone or treated differently than someone outside of that class. There is no protection against discrimination on the basis of age for individuals of less than 40 years of age.

3. *Do you have provisions stating minimum or maximum age for hiring employees?*

Yes. The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., provides the minimum age for most non-farm employment at 16 years of age. Children aged 14-15 may work outside of school hours in certain occupations and under certain conditions. Children 16 and 17 years old may perform any job not declared hazardous by the Secretary of the Department of Labor and are not subject to restrictions on hours. Individuals 18 or older are not subject to restrictions on hours or jobs.

There is no maximum hiring age.

4. *Do you have provisions stating minimum or maximum age for entering pension funds systems?*

Individuals born after 1943 are eligible for federally funded social security and to receive full benefits between the ages of 66-67 depending on the exact year of the individual's birth. There is no such statutorily prescribed minimum or maximum age for entering pension funds systems provided by private employers.

5. *Have you got collective regulations or statutory provisions, which give certain protections or certain allowances only if the employee has achieved a certain age?. Describe them.*

An employee is only protected against discrimination on the basis of age after reaching the age of 40.

6. *Does the computation of wages depend on the age of the employee? Describe this.*

There is no federal statutory provision that pertains to the calculation of wages based on age.

7. *Does the duration of holiday or the pay during sickness depend on the age of the employee or on seniority or both?*

Increased benefits may be permitted based on a bona fide seniority system. Normally, this will benefit older employees so it would not likely be an issue in most discrimination cases.

8. *Are there any provisions for elder employees, which entitle them to a reduction of working hours? Describe them.*

No.

- 9.a. *Is it allowed to terminate an employment relationship (dismiss), due to the employees age?. If Yes –which age?.*

An employee may be made to retire involuntarily if age is shown to be a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

- 9.b. *Is it allowed to terminate an employment relationship (dismiss), because the employee is entitled to get an old-age pension?. If Yes –at which age?.*

Private employers may impose mandatory retirement at age 65 on certain “bona fide executives” or “high policymaking” employees if they are entitled to an immediate and nonforfeitable annual retirement benefit of at least \$44,000.

10. *Have you got provisions, which have the purpose to promote the vocational integration of unemployed older employees or young employees and in order to do so weaken their statutory protection?*

For instance do there exist provisions which authorises the conclusion of fixed-term contracts of employment once the worker has reached a certain age? Do such provision exist for certain groups of employees?

Not applicable.

11. *Have you got provisions which give special statutory protection in order to prevent the termination of employment contracts of older or young employees?*

None other than the general ADEA provisions.

12. *What are the rules governing the burden of proof (with special reference to evidence that there was an employment relationship, evidence that it has been terminated and evidence of any other fact or circumstance relevant to the final decision)?*

The Plaintiff in an ADEA discrimination case bears the burden of persuasion at all times. The ADEA allows for two types of claims—a **disparate treatment** claim and a claim for **adverse impact**.

To establish a prima facie case of **disparate treatment**, the plaintiff must establish that: (1) the plaintiff is a member of the protected age group; (2) the plaintiff was qualified for the position in question; (3) despite being qualified, the plaintiff was adversely affected; and (4) someone younger, with similar or lesser qualifications, received the position or job benefit denied the plaintiff.

If plaintiff establishes a prima facie case, the plaintiff gains an inference of discrimination. The defendant employer must then offer evidence of a legitimate, nondiscriminatory reason for its action. Once a defendant has established this reason, the plaintiff must offer proof that this proffered reason is mere pretext for discrimination.

To establish a case of **adverse impact**, the plaintiff must point to specific employment policy or practice of the employer which causes a significant adverse impact upon a protected group of which the plaintiff is a member.

13. *Are there any administrative or criminal penalties? Please give details.*

No.

14. *What are the most common cases at court regarding age discrimination?*

Some of the most common cases arise in stances of reductions in force (RIFs). These cases are difficult because the employee who finds himself or herself terminated likely has not been replaced by a younger work, but has had his or her work redistributed to other workers.