

Managing an Aging Workforce in California Legal Challenges & Solutions for Human Resources Professionals

By Daniel Van Bogaert, J.D.*.

“Middle age is the awkward period when Father Time starts catching up with Mother Nature” – Harold Coffin

Introduction

California employers compete for human capital in an environment where there is a trend toward non-traditional retirements, and where government plays an increasing role in the decision-making process regarding business restructures and employment terminations.

This article examines the legal challenges posed by an aging workforce and their impact on the roles of human resources professionals, with special focus on the California perspective.

Background: Aging Population and Its Impact

Advances in medicine and other contributors to longer life spans in the U.S. coincide with the growth of protections against age discrimination in employment. People in general, and workers in particular, are living longer. Responding to the aging trend, California and federal statutes have been enacted that prohibit discrimination against older workers. Starting in the 1960's era of social legislation with the enactment of the Equal Pay Act(1963)¹, Civil Rights Act (1964)² and the Age Discrimination in Employment Act (1967; “ADEA”)³, similar legislation soon followed. Note that ADEA initially only prohibited discrimination against persons age 40 to 65, but in 1987 was amended to prohibit discrimination against any person age 40 or older. The Employee Retirement Income Security Act (“ERISA”)⁴ was enacted in 1974, the Social Security Act was amended in 1983 (raising the age at which full benefits are payable in gradual steps depending upon year of birth from 65 to 67), and the Older Workers Benefit Protection Act was enacted in 1990⁵.

More recently California court cases, state statutes and regulations have reinforced the focus against potential age discrimination in the workplace. Like a ready- to-burst balloon filled with too much helium, legal protections for older workers may have reached the point of unintended consequences for California employers.

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¹ 29 C.F.R. §1620.15; amended Fair Labor Standards Act; California equivalent: AB60, Eight Hour Day Restoration and Workplace Flexibility Act.

² Public Law 92-261, as amended.

³ Public Law 90-202; Applies to all employers with at least 20 employees.

⁴ Public Law 93-406; setting minimum national standards for retirement plans and employee benefits.

⁵ Public Law 101-422; 29 U.S.C. §626(f), et al.

The fact that our population is getting older has both legal and non-legal implications for human resources management (“HRM”). Functional areas of HRM that are profoundly affected by the aging workforce include diversity management programs (to promote understanding and appreciation among multiple generations); retention management (tight labor markets); “rehirements” (rehire of experienced and skilled retirees); mentoring and training programs, “phased retirements”, redesign of employee benefits programs (more benefit choices for older workers), and restructuring of organizations

Centenarians More Common

According to the 2000 census report conducted by the U.S. Census Bureau, there are more than 51,000 Americans who are 100 or older. There are also about 1,400 so-called super-centenarians who top 110. Worldwide there are more than 210,000 centenarians according to United Nations, Population Division⁶. Interestingly, since birth certificates became standard nationwide in 1933, many persons over 100 years of age may not know exactly how old they are, and may have outlived anyone who does.

Here is a geographic breakdown of states with the most centenarians. (Note that California is on the top of the list.):*

Rank/State	110 and Older	100-109
1. California	129	5,341
2. New York	85	3,997
3. Florida	145	3,573
4. Texas	113	2,947
5. Illinois	59	2,390
6. Pennsylvania	46	2,400
7. Ohio	41	1,910
8. Michigan	40	1,535
9. Massachusetts	17	1,552
10. New Jersey	38	1,514

*Los Angeles Times study titled, *For Many, the Romanticism of Living for a Century Gives Way to the Reality*, dated August 28, 2001.

There is no question about the fact that we all living longer. According to recent Social Security Administration studies the average life expectancy for men reaching age 65 has increased nearly 4 years to age 81; for women reaching age 65, their average life expectancy has increased nearly 6 years to age 84. The average life expectancy in the U.S. in 1940 was about 65; today it is about 78. Twenty-five years have been added to our average life span between 1900 and 1990. Every year on average about three months is added to our life expectancy⁷ As a result, there may be just

⁶ February 28, 2002 report by Director Joseph Chamie.

⁷ Robert Buther, M.D., *International Longevity Center*, June 12, 2001; James Vaupel, director of the Max Planck Institute for Demographic Research in Rostock, Germany, *Science* magazine, May 2002.

two working-age persons (under age 65) paying into Social Security system for every senior citizen.⁸

Studies on aging are generally reliable because of the availability of accurate birth and death records, and elaborate labor statistics. Employers may deduce from these reliable studies that employees will continue to leave the workforce earlier, unless more creative alternative forms of retirement are made available to older workers. As the rate at which younger skilled workers entering the workforce continues to decline relative to the rate older experienced workers leave full time employment, a widening labor gap occurs. According to the Bureau of Labor Statistics, U.S. workers age 55 and older will increase 32% by 2010, while workers ages 35 to 44 will decrease to about 10%.

The consequences of older workers leaving the workforce include the loss of valuable knowledge and experience, and an increasing need of early retirees to be supported by family and taxes. In California where there is a larger population of older workers, the “labor drain” will be compounded with greater reliance by retirees on California’s healthcare system. This situation may become exasperated by the influx of immigrants from rapidly aging countries in Latin America.⁹

Global Aging

The intriguing subject of longevity has generated many U.S. studies of the main contributing factors. Genetics, advances in modern medicine, employer sponsored wellness programs, healthier life styles, and family support are factors that have significantly contributed to increases in average life expectancies in the United States. One study, for example, concluded that people who are married generally live longer than those who are divorced or single.¹⁰ Another study that took 60 years to complete, published in the June 2001 *American Journal of Psychiatry*, reported factors that predict successful aging: 1) moderate use of alcohol; 2) appropriate weight; 3) “positive coping mechanisms” e.g. supportive family, ability to control stress and manage anger ; 4) no depressive illness; 5) no smoking; and 6) economic stability. Life expectancies have been extended in the U.S. for the most part due to eradication of many infections, improved early diagnosis technologies, and advances in medications. Unwise lifestyle choices result in shorter life expectancies.

Besides the Social Security Administration studies in the U.S., the United Nations’ Population Division also compiles age statistics. Its February 28, 2002 report has some interesting findings: “16% of the U.S. population is over age 60 and is expected to rise to 27% in 2050. About 10% of the world’s population is now over age 60 and by 2050 that will double; Japan and Italy, two countries with the oldest populations have a median age of above 40. Nearly a quarter of their populations are already over 60, and will pass 40% by 2050.” Developed countries with aging populations may face a slowdown in economic growth, resulting in a fiscal strain on

⁸ Life expectancies studies shown at www.ssa.gov (2003)

⁹ As reported in the Los Angeles Times Nov. 1, 2004, quoting the United Nations *2004 Economic Commission for Latin America*, the percentage of population age 65 and older in Chile, Costa Rica, Mexico and Venezuela are projected to double between 2000 and 2025; See also *The Aging Workforce*, by Nancy R. Lockwood, SPHR, December 2003, Research Quarterly – Aging Workforce.

¹⁰ *Living To Be A Hundred*, Dr. Steven Andrew Davis, September 29, 2000. drdavis@davishealth.com.

retirement savings, assisted living facilities, and healthcare systems. There will be a higher “dependency ratio” (retired people to workforce).

Another interesting age trend that may impact the U.S. workplace is the increasing number of older women choosing to become pregnant through in vitro fertilization. Births in the U.S. to women age 45-49 nearly tripled between 1990 and 1999, and there were even 144 over-age-50 pregnancies in 1999. A recent example of the trend is a woman almost age 57 who delivered healthy twins in November 2004¹¹ The age record in 2001 for oldest woman giving birth was a 62 year old French woman.¹² (Imagine this scenario: an age 50+ female employee gives notice to her 25 year old supervisor regarding her upcoming maternity leave.)

Why An Aging Workforce is Important For HR Professionals

Knowing that the U.S. workforce is getting older, it is important that human resources professionals understand the implications. Why? Because there are more than 75 million workers in the U.S. over age 40, and the portion of the workforce eligible for retirement grows larger. There are 4.8 million full time workers over age 65.¹³ With more workers than ever eligible for retirement, employers are faced with a challenging task of anticipating the numbers of experienced employees who will be lost to retirement. The more compelling non-legal age issues that require attention are “phased retirements”, multi-generation work environments, structuring of early retirement programs, redesign of employee benefits, performance evaluation systems, and the use of replacement contingent workers.

Need For Phased (Working) Retirements

Phased retirements may be a formalized written agreement to work reduced total hours. Or, they may be informal arrangements, typically involving a reduction in work hours in a workday or workweek, extended leaves of absence, job sharing or changing to part-time status or temporary work. Most formalized phased retirement arrangements exist in organizations with 5,000 or more employees¹⁴

For California employers, an “alternative workweek” schedule may facilitate phased retirements. Basically, an alternative workweek schedule allows certain part-time employees who are otherwise subject to overtime rules to work more than eight hours per day without having to paid daily overtime. However, formal agreement and compliance with California Industrial Welfare Commission Wage Orders is required.¹⁵

Industries with employees that are older than the average, such as the federal government, health care, educational institutions and construction trades, are especially affected by insufficient numbers of younger “replacement” employees. As a result, the competition for new hires

¹¹ November 11, 2004, Los Angeles Times, page A24

¹² *It ain't ova 'til its ova* by Ken Budd, American Association of Retired Persons Magazine, May/June 2002

¹³ Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey (April 2003)

¹⁴ Watson Watt survey, January 2001 *Watson Wyatt Insider*

¹⁵ Code of Civil Procedure § 338(a); Labor Code §1194.

intensifies, more retirees and older job applicants are targeted as a source of new hires, and “phased retirements” (reduced hours) - instead of traditional “all or nothing” retirements - are becoming more prevalent.

Phased retirement arrangements offer several advantages. When integrated with succession plans and coverage under employee benefit plans are appropriately bridged, phased retirements may be a valuable strategic tool for retention of skilled and experienced employees. Other advantages are their ability to assist employees who are financially unprepared for full retirement, their flexibility to bring about needed organizational changes, and their potential for avoiding layoffs and other involuntary terminations of older workers.

The disadvantages of phased retirements relate to regulatory restrictions. The Internal Revenue Code, for example, generally prohibits plan sponsors from making in service distributions from retirement plans to workers who have not reached age 59 ½ or completed 30 years of service. This restriction complicates implementation of phased retirements due to tax penalties. However, modifications to the IRC to remove such restrictions to help employers implement phased retirements have been considered by the U.S. Congress, e.g. “Phased Retirement Liberalization Act” initially proposed in 2000 but not enacted.¹⁶

Clash of Generational Attitudes Toward Work & Ageism

Living longer has affected generational demographics within the workforce, significantly impacting employee relations. Because of longer life spans, more organizations have four generations within their work environments at the same time: sometimes referred to as “matures” (born before 1935), “baby boomers”, “generation X”, and “generation Y, (born after 1978).” For example, managers are trying to deal with generation X supervisors managing baby boomers. Because of our aging population, an employer may have a “20-something” manager supervising an experienced individual age 70.

The dynamic of multi-generational attitudes in the workplace may cause friction. Since younger employees tend to be more reliant upon technology such as cell phones, palm pilots, laptop computers, their work ethic may be very different from older co-workers. Generally, younger employees more readily question the 9 to 5 routine and even the need for a specific workplace. Younger employees may be more willing to work for short periods on different projects without feeling significant job insecurity. By witnessing layoffs of the “older generation”, they may have less of a sense of loyalty to their employers, i.e. “free-agent” mentality. Thus, human resources professionals have a greater challenge in retaining valued employees.¹⁷

Poor morale and conflicting attitudes about age differences may have to be dealt with in a more professional manner. Perpetuation of negative stereotyping of older workers may be evidenced by employees’ use of pejorative terms such as “old geezer”, “over the hill” and “old fart”. Many

¹⁶ www.ustreas.gov/press/reports/js2044_11104phasedretirementreg.pdf November 2004

¹⁷ *Workplace Visions – Changing Societal Norms, 2001, SHRM* examines this multiple generation workforce issue: “These potential generational attitudes may fit with contingent work rather than traditional notions of work, leading to wholesale changes in how we work, and the redesign of compensation and benefits policies.”

older persons are also confronted with employment barriers because of their accumulated relatively higher salary histories and perceived computer illiteracy. Yet, older workers also sometimes have a reputation for being more loyal and motivated than younger workers because of a strong work ethic acquired during the Great Depression and World War II.¹⁸ These attitudes and negative stereotypes point to a need for special training. Promotion of understanding and cooperation among co-workers of varying ages may be accomplished with an appropriately designed diversity program.

Challenge of Early Retirements (and Increased Turnover Problems)

With most retirement plans designed to permit full retirement plan benefits after age 62, and many plans with reduced retirement benefits as early as age 50, the challenge is for employers to anticipate staffing needs while unable to control voluntary turnover. Legal protections against age discrimination indirectly exacerbate this challenge because mandatory retirements – with few exceptions - are no longer legal.

Tax revenue generated from active workers pays for Social Security benefits of current retirees and other non-working beneficiaries. Aging workforces, especially when coupled with early retirement trends, cause a weakening of the support needed for the Social Security system, resulting in the government having to raise taxes and/or reduce benefit payments.

Employee Benefit Plans

The age of participants affects premium rates for employee benefit programs that are funded under insurance contracts. Examples of affected employee benefit plans include group term life insurance, health benefit plans, short term and long term disability plans, and accidental death and dismemberment plans. To the extent that more claims tend to be made under these plans by older workers, employer costs will most likely increase with an aging workforce. Similarly, the annual cost of defined benefit retirement plans, i.e. annuity and pension plans, tends to increase due to regulatory funding requirements. Also, pressure may increase to provide health care, eldercare and long term care insurance benefits for retirees.

Vulnerability of Performance Evaluation Systems

Job performance appraisal errors and bias against older workers by evaluators make performance evaluation systems ineffective and vulnerable to discrimination complaints. An aging workforce may add to the challenges that already exists in attempting to design and maintain a fair, objective and well documented appraisal system. If not done properly, performance evaluations may be used as evidence against the employer as proof of age discrimination.¹⁹

Use of Contingent and Seasonal Older Workers

¹⁸ *Older Workers: Myths and Realities*, by S. Imel, August, 2002; Educational Resources Information Center; www.ericave.org See also, Linda Wolf, www.woofflm +ageism@webster.edu

¹⁹ For example, see *Legal Update on Performance Evaluations* by Dan Van Bogaert, J.D. (2002)

The term “contingent worker” is meant to include temporary agency employees, leased or outsourced employees, part-time employees and independent contractors. Most organizations continue to utilize contingent workers.²⁰ The advantages are numerous, particularly from a cost-savings perspective. There are savings from not having to provide employee benefits (or having only to provide greatly reduced benefits) when an employer uses contingent workers. There is also the advantage of flexibility based on the relative ease with which to terminate the employment relationship with contingent workers. (Note, however, there was an effort in California to require employers to provide minimum health insurance for contingent workers, e.g. Proposition 72 (2004).)

Disadvantages

Disadvantages may include hidden costs relating to possible training needs, and the lack of loyalty and motivation on the part of independent contractors. However, these disadvantages may be avoided or minimized with proper recruiting and selection strategies.

Another potential disadvantage of the use of contingent workers is the expense that is sometimes overlooked relating to leaves of absence taken under the Family and Medical Leave Act (FMLA) and other job protection statutes. To minimize the likelihood of this potential disadvantage, contracts with temporary employees or leasing agencies should specify that due to the short term nature of work to be performed leaves of absence would be inappropriate.²¹

Another disadvantage may be the evolving complexity federal laws protecting the rights of part-time workers. These laws include the Fair Labor Standards Act, Equal Pay Act, Title VII of the Civil Rights Act of 1964, as amended, Americans with Disability Act, and the Consolidated Omnibus Reconciliation Act. Part-time workers may or may not be covered by these laws depending upon the number of employees and contingent workers in the organization. Therefore, employers need to exercise caution before entering into a contingent worker contract if the intent is to save employee benefit plan expenses.

Advantages

On balance, however, the use of contingent workers offers employers the distinct advantages of cost-savings and ability to react quickly when changes dictate.²² As “just-in-time workforces”, contingent workers offer strategic advantages for recruitment managers. For example, the use of the internet allows organizations to more effectively recruit experienced retirees and others willing and able to work on short term projects as non-employees.

²⁰ EBRI Special Reports, Brief Number 149, May 1994; Sonnenschein, Nath & Rosenthal, “The Contingent Workforce: Contractors and Temporaries”, 1997; U.S. General Accounting Office studies consistently conclude that at least 1/3 of the U.S. workforce are contingent workers.

²¹ Code of Federal Regulations, Standard 825.106. Note that most California employers must provide employees with Family Temporary Disability Insurance (SB 1661; Government Code §§ 12945.2, 19702.3) which gives partial wage replacement benefits for eligible employees who have worked at least 1,250 hours during prior 12 months.

²² Employment Policy Foundation Summary. “Part-time Work: Not a Problem Requiring a Solution”, June 2002

Employers have discretion to set the number of hours needed to be considered “full time” version of “part-time, e.g. same number of hours required for coverage when its health insurance plans. Therefore, it is generally not illegal discrimination to offer health would benefits to only full-time employees. Note that the proposed legislation, Employee Benefits Eligibility Fair Act ((2000), S 2946) would require that certain contingent workers’ service be counted for minimum eligibility and participation purposes in employee benefit plans.²³

“Rehirements” After Layoffs

Rehirements, i.e. rehiring of an organization’s retirees, may be an attractive potential source of experienced workers within a competitive labor market. The primary reason retirees return to work is financial need, but also to socialize more and to renew a sense of being valued.²⁴ For example, California aerospace engineers with prior security clearances who retired in the 1990’s are regularly being rehired by defense contractor firms such as Boeing Co. and Raytheon Corp. at \$125 per hour.²⁵

Employers, however, need to be cautious when rehiring its retirees, particularly if rehires are connected with a formal recall program. The criteria for recruiting and selecting former employees after an organization recovers from financial difficulty must be applied on a uniform and non-discriminatory basis.

A decision by an employer not to rehire a retiree may result in an actionable discrimination claim under ADEA. In *Zaccagnini v. Chas. Levy Circulating Co.*, for example, the appellate court held that once the plaintiff/older former employee established a prima facie case, the defendant/employer had the burden to prove that its decision not to rehire the plaintiff who applied for a job opening was legitimate and non-discriminatory. This holding means that a formal recall process may not unfairly exclude consideration of retiree/job applicants with qualifications similar to other job applicants for the same job opening, i.e. education, experience, performance, conduct. (Prima facie case under ADEA requires the plaintiff to show (1) membership in protected class (age forty or older); (2) application and qualification for the job opening; (3) rejection of the plaintiff by the employer; and (4) that the defendant/employer hired another similarly situated person for the job opening who is substantially younger²¹)

Formal severance pay plans meeting ERISA standards that include claims procedures offered to older workers in exchange for written releases, and meeting OWBPA standards, are some of the safer practices employers may use in layoff situations to minimize age discrimination claims²⁶.

²³ 29 U.S. 1052, sect. 202; See also *Clark v. King County WA Superior Ct.*, No. 95-2-29890, and *Esberg v. Union* (discrimination against older worker in training program); Refer to *Workforce Online*, www.workforceonline.com for details on current proposed legislation affecting benefits for temporary workers, e.g. Employee Benefits Eligibility Fairness Act, 2000.

²⁴ For example, see The Conference Board, *Voices of Experience: Mature Workers in the Future Workforce*, (2002)

²⁵ Los Angeles Times, November 15, 2004, page A1 “Tapping an Arsenal of Retirees.”

²⁶ For example, see *Firestone Tire and Rubber v. Brauch*, 109 U.S.S.Ct. 948 (1989)

Special Challenge – Retiree Health Plans

There is no federal or state law that requires private employers to provide medical insurance for their employees and retirees, except for mandatory Medicare. Since Medicare coordinates with voluntary employer-sponsored health plans for eligible retirees age 65, employers may design their medical insurance plans to trigger termination of coverage for persons who retire at or after age 65 (or for those under age 65 who are eligible for Medicare).

There is a trend of private industry employers eliminating or reducing retiree medical plan coverage because of steep rises in healthcare costs. Most employers that still sponsor retiree medical plans are searching for ways to control costs. The most favored approaches include shifting all or part of the cost to retirees, elimination of such plans, and offering substitute “Health Savings Accounts”²⁷ to new hires. For example, results of a 2002 study conducted by consulting firm Watson Wyatt concluded that 20% of the organizations surveyed eliminated their retiree medical plans.²⁸

Employers should exercise caution before implementing any of the cost-saving steps. The “anti-cutback rule” under ERISA generally prohibits reducing or eliminating certain employee benefit plans promised to employees and retirees, unless participants are properly notified of prospective changes.²⁹ The anti-cutback restriction may be circumvented – usually not without complaint from employees and retirees- if the employer-plan sponsor expressly states in the summary plan description and other written communications to participants that it “reserves the right to amend, modify or discontinue” benefits in the future.

Also, EEOC guidelines for ADEA permit employers to offer retirees different medical plan designs that incorporate Medicare coverage.³⁰ Therefore, the “anti-cutback rule”, which generally imposes an “equal-cost” standard to prevent age discrimination for other employee benefits, apparently does not apply to plans that incorporate Medicare benefits for older workers. A federal court decided prior to the EEOC’s July 2003 guidelines that ADEA requires that no reduction (“cutback”) in benefits may be made for older employees, unless there is justification for reduced benefits based on equal cost. The judicial standard would have required employers to provide equivalent benefits to Medicare-eligible employees and retirees. For example, a plan sponsor-employer could not have offered Medicare-eligible retirees an HMO and pre-Medicare retirees a point-of-service (POS) plan.³¹

²⁷ §1201 of the Medical Prescription Drug, Improvement and Modernization Act of 2003.7 and Internal Revenue Code §223. (Because of potential “adverse selection” problems, HSAs may not be an attractive cost-saving option, except for employers who intend to make the HSA the only health plan choice for employees.)

²⁸ HR Magazine, November 2002

²⁹ Internal Revenue Code 411(d)(6), and ERISA 204(g)

³⁰ On July 14, 2003 EEOC Notice of Proposed Rulemaking created an exemption for employer- plan sponsors from the prohibitions of ADEA when coordinating retiree health benefits with eligibility for Medicare (or for comparable State health benefits programs); See contra, earlier *Erie County* infra, holding that employer violated ADEA if it reduced or eliminated retiree health benefits when retirees became eligible for Medicare, unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it was expending the same costs for both groups of retirees.

³¹ *Erie County Retirees Association v. County of Erie* (No 99-3877 (2000) Third Circuit Court of Appeals)

Recent court cases have interpreted several statutes to decide important age-related issues, such as eligibility for employee benefits and coverage (e.g. California AB 1599 prohibiting age discrimination in training related programs. Employee Benefits Eligibility Fairness Act (2000), has also been proposed under S. 2946 amending Title I of ERISA), how older workers may waive their right to bring suit for an age discrimination complaint (OBPA), and workplace harassment based on age. The primary federal enforcement agency, the Equal Employment Opportunity Commission, recently also provided employers with guidelines for posting notices that explain to employees the ADEA protections.

The following are other recent lawsuits that have defined some of the legal parameters of age discrimination in employment:

- *Marks v. Loral Corp* .(57 Cal App 4th 30 (1997) essentially held that an employer may legally layoff a high salaried employee (who also happens to be an older worker) if the layoff decision is based on business necessity, and regardless of any disparate impact on older workers. “Employers may indeed prefer workers with lower salaries to workers with high ones, even if the preference falls disproportionately on older, generally high paid workers.”

The California appellate court interpreted the federal Age Discrimination in Employment Act as not providing special protection for older workers as a group (i.e. no “group rights” like under the Civil Rights Act of 1964, Title VII, as amended.) The court reasoned that there is a need to judge workers on an individual basis because there is “a wide variation within every age group in productivity.” The court’s apparent rationale is that ageism has not risen to the level of historical sex and race discrimination. The application of such seemingly sound logic favored California employers who must make difficult cutback decisions to correct financial difficulties, without having to worry about being sued for age discrimination.

The court deemed inappropriate the application of disparate impact concept to age discrimination complaints. “Disparate impact discrimination by definition involves a requirement or criterion which does not have a business justification”. In other words, a business justification exists when an organization is unprofitable and compelled to make adjustments, such as deciding to reduce high paid staff (who happen to be older) to stay in business.

Post-Marks v. Loral Corp: The California Aberration & The U.S. Supreme Court to The Rescue?

In response to the court’s decision, the usually pro-union anti-big business California legislature passed Government Code §12941.1 (SB26) effective August 9, 1999. (California is not a right to work state, and workers may legally be required to join a collective bargaining unit as a condition for employment) “The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v. Loral Corp*...and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment.” The new California statute declares that “the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if the use of that criteria adversely impacts older workers as a group...”

Paradoxically, Government Code §1, reads ..“age discrimination violates the basic principle that each person should be judge on the basis of individual merit, rather than by reference to group

stereotypes.” Note that in *Smith v. City of Jackson, Mississippi* shown below, the U.S. Supreme Court has accepted for review the issue of the availability of disparate impact under ADEA.

In legal theory, California’s legislature effectively reserves the right to approve each California employer’s restructure policies and practices, layoffs, and other employee terminations. What this means for human resources professionals in California is that staffing needs must be more carefully planned. Most California employers realize now that implementing the codified (Labor Code §2922) at-will employment doctrine to terminate employees is risky business. Any decisions to reduce staff must be based on a legitimate compelling business necessity (and/or well documented “below expectation” job performance), and comply with other related federal and California statutes, e.g. ADEA,OWBPA; CAL-WARNA, to be legal.

- *O’Connor v. Consolidated Coin Caterers Corp.* ((1996), 517 U.S. 308). Here the court held that rejection of an older job applicant on the basis of being “overqualified” may be illegal age discrimination. Older individuals may claim that the overqualified reason is often a code word for “too old.” Whether or not actionable age discrimination occurs depends upon not easy to prove discriminatory intent and pretext, and upon whether or not the adverse employment decision is based on age.³²

The lesson that employers learn from the *O’Connor* decision is that caution should be exercised when recruiting retirees for rehire. If a retiree seeks reemployment, and clearly makes it known to the prospective employer that he or she sincerely wants to reenter the workforce – regardless of over-qualification - then an employer may have difficulty in legally rejecting such job applicants. The employer may have a tough burden to prove that the older job applicant was not sincere nor committed to the job.

- *Erie County Retirees Association v. County of Erie* (No 99-3877 (2000) Third Circuit Court of Appeals)

Employers may coordinate retiree health benefits for older retirees with Medicare or a comparable state health benefits, and reduce or eliminate early retiree health benefits once a retiree becomes eligible for Medicare or state health coverage, even if the retiree does not actually enroll for those benefits program without fear of violating ADEA.

EEOC adopted the regulations in response to employer complaints that a federal court ruling in *Erie County Retirees Association v. County of Erie* would force them to reduce or eliminate health benefits for early retirees.³³The Equal Employment Opportunity Commission (EEOC) has issued final regulations exempting retiree health plans from the Age Discrimination in Employment Act (ADEA).

- *Koski v. Standex Int’l Corp.* (No. 01-3505, October 15, 2002)

The 7th Circuit Court of Appeals held that an ADEA claim was not actionable where the former employee failed to demonstrate that the defendant/employer’s stated reasons for terminating employment of the plaintiff/employee were based on pretext.

³² Also see similar cases *Taggart v. Time Incorporated* ((1991), 924 F.2nd 43); and *EEOC v. Insurance Company of North America* ((1995), 49 F 3d 1418)

³³ www.eeoc.gov/policy/regs/retiree_benefits/retiree_benefits.html (2003)

• *Olson v. Northern FS, Inc.* (No. 04-1102, 04-1464, October 22, 2004)

Here, the 7th Circuit Court of Appeals reversed dismissal of an age discrimination claim in which the defendant/employer hired a person who was substantially younger and had less experience than the plaintiff/older job applicant.

• *General Dynamics Land Systems, Inc. v. Cline* (No. 02-1080; February 24, 2004)

This “reverse age discrimination” case decided the issue of whether or not employees ages 40-50, who received less benefits than employees age 50 and older, were discriminated against in violation of ADEA. The U.S. Supreme Court held that the age –based distinction did not violate ADEA.

• *Smith v City of Jackson Mississippi* (U.S. S. Ct pending 2004 -2005; No.03-1160) The U.S. Supreme Court accepted the case in November, 2004 to consider the issues of whether or not higher pay scales for younger employees violates ADEA, and whether or not disparate impact claim is applicable under ADEA. (Note that the Court held in *Hazen Paper Co. v. Biggins* (507 U.S. 604 (1993)) that the availability of disparate impact theory of liability under ADEA was never decided, but *Adams v. Florida Power Corp.* (11th Circuit Court of Appeals, No. 99-15306, February 5, 2002) held that a disparate impact theory of liability is not available to plaintiffs suing for age discrimination under ADEA.

Conclusion

The convergence of an aging workforce with burgeoning legal restrictions poses a significant challenge for human resources professionals. This challenge is felt the most by human resources professionals domiciled in California because California has the most older citizens and workers. Adding to the challenge is the fact that many California laws provide disincentives for employers to operate in California.

Organizations must adjust to a diverse and aging workforces, while meeting strategic goals and avoiding age discrimination lawsuits in the meantime. But there are particular advantages and disadvantages, as well as legal and non-legal challenges, to an older workforce. Human resources professionals must be prepared to maximize the advantages, and minimize the disadvantages – to keep their organizations competitive and out of the courtroom.

Managing how many employees are employed and the hours they worked is a primary means of controlling labor costs. But the process is highly regulated in California. Therefore, many human resources professionals are gravitating toward the flexible use of more contingent workers.

Human resources management must continue to play a key role in helping organizations to quickly adapt to needed changes. They must also exercise professional skills to motivate diverse workforces. The growing challenges of multi-generation workforces and older workers will require special training of managers. Training will be needed facilitate understanding among co-workers to accomplish common organizational goals. Human resources professionals, particularly in California, more than ever need to keep abreast of statutes and court decisions regarding age discrimination to prevent or minimize potential complaints.