5 Age Discrimination Traps to Avoid



Age discrimination can be so subtle that you don’t even realize you’re committing.

> **In a 2020 survey, 81% of business leaders and job seekers said they believed that age is a consideration in the hiring process; only 16% said they thought it wasn’t.**

The persistence of age discrimination across Canada is one of those things that’s hard to explain. After all, it’s illegal to make hiring and other employment decisions based on a person’s age; and skilled and experienced labour is in desperately short supply. Yet, people 40 and older continue to find it harder to find and retain jobs because of their age. Ageism is so deeply rooted that organizations frequently engage in discrimination without even realizing it. Is **your** company perpetuating age discrimination?

Defining Our Terms: Ageism vs. Age Discrimination

While the terms are often used interchangeably, “ageism” and “age discrimination” aren’t exactly the same:

- “Ageism” is a prejudice against particular age groups, especially the elderly, based on negative stereotypes about aging and older people;

“Age discrimination,” which is banned under human rights laws, is conduct, policies and decisions that have the effect, whether intentional or not, of treating people unfavourably because of their age.

Ageism often results in age discrimination. But like other forms of prejudice, ageism isn’t necessarily overt or obvious and can be manifested in ways so subtle that the person engaging in the behaviour doesn’t even recognize that it’s ageist, for example, assuming that an older applicant won’t be able to perform heavy labour simply because of his age. Preventing age discrimination is about rooting out ageist attitudes and guarding against the subtle forms of age discrimination they may lead to. Here are 5 discriminatory practices to guard against.

1. Establishing Age Limits or Ranges for Jobs

Pitfall: Requiring people to be a certain age to do a job is a direct form of age

discrimination, unless the law specifies a minimum or maximum age for the position. **Example:** Telling a 26-year-old student she couldn't apply for a student hiring program open to full-time students between ages 18 and 24 was age discrimination [*Vallee v. Fairweather Ltd. (No. 3)*, (2012), 74 C.H.R.R. D/109].

Solution: Don't make age a criterion for a job unless either:

- An act or regulation specifies a minimum or maximum age for the particular position; or
- You can prove that the age requirement is what's called a "bona fide occupational requirement" (BFOR) for the position, which is extremely difficult to do.

2. Referring to Age in Job Advertisements

Pitfall: Job advertisements that express a preference for particular ages or age groups are a common form of age discrimination. The most blatant form is to list appropriate ages or age ranges for particular jobs, including summer jobs.

Solution: In addition to avoiding any references to age in job ads, be aware and steer clear of more subtle advertising practices that may send a discriminatory message to older applicants, such as including photographs of young people, and utilizing code words and phrases like "recent college graduate," "digital native," "high energy level," "tech savvy," "fresh," "dynamic" and "cultural fit"—especially when paired with "young company."

3. Asking Applicants How Old They Are

Pitfall: While it may seem harmless, asking for a job applicant's age is potent evidence of age discrimination that an applicant who doesn't get the job will use against you, especially if she was passed over for a younger candidate. Questions NOT to ask on a job application or during an interview:

- How old are you?
- What's your date of birth?
- What year did you graduate from high school or college?
- Can you provide a copy of your birth certificate?

Solution: The one time when you can ask about age during the hiring process is for jobs subject to minimum or maximum age requirements. Just be sure to phrase the question appropriately. Examples: "Are you legally eligible to do this job?," or "Are you 18 or older?" for a job that a person under age 18 isn't legally allowed to perform. If you need to know a person's precise age for company benefits plans or other legitimate purposes, ask for it only **after** you offer the applicant the job and keep the information confidential.

4. Targeting Older Employees for Downsizing

Pitfall: Corporate restructuring and downsizing tends to have a disproportionate impact on older employees. Downsizing is often considered an opportunity to "rejuvenate" and infuse the company with "new blood," while shedding older employees earning relatively higher salaries and accruing pension and retirement benefits. But targeting older employees for downsizing is age discrimination, even if age is only one factor in the decision.

Example: The Newfoundland Human Rights Commission ruled that an employer committed

age discrimination by factoring a 55-year-old regional manager's pension-eligibility factored into the decision to eliminate his position; keeping the position intact and filling it with a younger person did little to help the company's defence [*Salter v. Newfoundland*, 2001 CanLII 61147 (NL HRC)].

Solution: Establish downsizing selection criteria that are objective and not based on subjective impressions about an employee's enthusiasm, flexibility or willingness to adapt. Eliminate positions, not people and don't refill the positions you said you were eliminating, especially if the new hire is significantly younger than the one you let go.

5. Pestering Older Employees About their Retirement Plans

Pitfall: While asking older employees if they plan to retire isn't necessarily discriminatory. It all depends on how and why you ask and how you behave after the employee responds. Consider this scenario, based on an actual case: "I hear you're having a big birthday this year," says the supervisor to the 59-year-old employee. "Do you have any plans to retire?" She acknowledges that she's turning 60 but says she can't afford to retire. The supervisor winces. A few weeks later, the supervisor asks if the employee has given any further thought to retirement. "My financial advisor says I'm going to need to work full-time for at least 5 more years," she replies. The supervisor then lets her know that her services are no longer required and that her employment is terminated. **Result:** The BC Human Rights Tribunal finds the company liable for age discrimination [*Buchanan v. WMC Management Services,* 2006 BCHRT 339].

Solution: Recognize that inquiries about an older employee's retirement plans is extremely sensitive:

- Don't bring up the employee's age;
- If the employee says he has no plans to retire, don't press him or express surprise or disapproval; and
- Let the issue rest for a while and don't ask again too soon or too often.

Take the same approach if the employee brings up the subject or asks for retirement information and don't do or say anything that might be perceived as encouraging or pressing her to retire.

Keeping Early Retirement Incentives Nondiscriminatory

Offering older employees financial incentives to retire early is deemed legitimate and non-discriminatory, provided that you don't use it as a pressure tactic or target them for downsizing after they reject the option. To guard against these risks, the Ontario Human Rights Commission recommends that employers:

- **Establish clear eligibility criteria for voluntary retirement and communicate them to all staff, regardless of age;**
- **Provide a response deadline and contact that employees interested in the package can talk to without feeling pressure from management; and**
- **Ensure and reassure employees that there's no link between accepting the package and job loss.**