

Age Discrimination Compliance Game Plan



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.

Human rights laws make it illegal to base employment decisions on a person's age. 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? Here's an 11-step Game Plan for implementing a [written Policy](#) to root out ageism and ensure compliance with age discrimination laws.

Step 1. Distinguish Age Discrimination from Ageism

While the terms are often used interchangeably, "ageism" and "age discrimination" aren't exactly the same. The starting point for compliance is to grasp—and help your organization and its personnel grasp—both concepts and how they relate to each other.

"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. In the employment context, it typically involves:

- Refusing to employ or continue to employ somebody due to their age;
- Imposing differential and less favorable terms of employment based on a person's age;
- Using or circulating any job ad, employment application form, asking applicants direct questions about or other communication that indicates a preference or limitation based on age;
- Harassing a person due to age;
- Retaliating against a person for complaining about age discrimination; and
- Expelling, excluding or limiting a person's participation in a trade union or other employment based organization, including a benefits plan, due to 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 about rooting out ageist attitudes and guarding against the subtle forms of age discrimination they may lead to.

Step 2. Keep All Job Positions Age-Neutral

Once you understand the dynamic between ageism and age discrimination, you'll be in a better position to recognize and avoid the subtle practices that can get your organization into legal hot water. The first pitfall is 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].

Compliance Strategy: 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.

Step 3. Ban References to Age in Job Advertisements

Job advertisements that express a preference for or against 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.

Compliance Strategy: Ban HR and recruiting staff from making any references to age in job ads, as well as engaging in 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."

Step 4. Keep Age Out of Job Applications and Interviews

Asking job applicants for their age is potent evidence of age discrimination that applicants you reject will almost surely use this against you, especially if they're passed over for a younger candidate. Questions NOT to ask on a job application or during a job 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?

Compliance Strategy: 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.

Step 5. Beware of Targeting Older Employees for Downsizing

Studies show that corporate restructuring and [downsizing](#) tend 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)].

Compliance Strategy: 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.

Step 6. Establish Appropriate Protocols for Asking Older Employees About their Retirement Plans

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].

Compliance Strategy: 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.

Step 7. Ban Age-Based Harassment

Ensure that organization [bans against workplace harassment](#) include harassment on the basis of age.

Compliance Strategy: Your policy should define harassment as engaging in a course of vexatious comment or conduct that's known or should reasonably be known to be unwelcome. Explain that such comments or conduct become age discrimination to the extent they're based on the victim's age. Examples:

- Calling an older employee "gramps," "granny" or some other derisive age-based nickname;
- Ageist cartoons, graffiti, screensavers, etc.;
- Ridiculing individuals because of their age;
- Trying to force employees to retire because of their age; and
- Acts or threats of violence, bullying and intimidation based on the victim's age.

Step 8. Establish a Mechanism for Making Age Discrimination & Harassment Complaints

Require employees to report any acts of workplace age harassment or discrimination they experience or witness and be sure there's a process or mechanism in place for them to do so, preferably without having to reveal their name. If you require employees to report to their supervisor or manager, there should be an alternative available in case those individuals are involved in the complained of conduct.

Compliance Strategy: Include a clear statement assuring employees that they won't suffer retaliation of any kind for reporting age harassment or discrimination as long as they do so in good faith.

Step 9. Investigate Age Discrimination & Harassment Complaints

Do a full, fair and thorough investigation of workplace age harassment and discrimination complaints. Consider requiring the investigator to possess professional qualifications and recognized certifications (this is mandatory if you're federally regulated). Such requirements are also typical in collective agreements with union employees.

Compliance Strategy: Regardless of who performs the investigation, it's highly advisable to develop specific instructions on how it should proceed and [what it should cover](#). Here's a harassment complaint investigation checklist that you can adapt for your own use.

Step 10. Discipline Employees Who Engage in Age Discrimination & Harassment

Hold all employees accountable regardless of position. Anybody found to have engaged in age discrimination and harassment should be subject to appropriate discipline up

to and including termination based on the totality of the circumstances.

Compliance Strategy: Keep detailed records documenting the efforts of your organization to enforce your discrimination policies on a strict and consistent basis. Such documentation may play a crucial role in your legal defence if somebody accuses you of age discrimination and harassment.

Step 11. Monitor Your Age Discrimination & Harassment Policies

Monitor your age discrimination and harassment policies to ensure that they're effective and working the way you intended.

Compliance Strategy: Evaluate your policy and on a regular and more frequent basis in response to red flags such as incidents or complaints of age discrimination or harassment.