Don’t Let Age-ist Stereotypes Taint Cost-Cutting & Reorganization Layoffs

It’s discriminatory to target senior employees for layoff just because they’re older.

True Story: After wishing her a happy 60th birthday, a BC consulting firm manager asks the senior administrator if she’s given any thought to retiring. I can’t afford to retire, she responds. A few weeks later, the manager again asks the administrator about her retirement plans and gets the same response. Soon after that, the firm lays off the administrator in an effort to cut costs. The BC Human Rights Tribunal acknowledges the company’s dire financial situation and legitimate need to restructure, but still finds it liable for age discrimination. The administrator’s position was the only one the company had considered eliminating. And it hadn’t considered alternatives that might have allowed her to stay on the payroll. In addition, the Tribunal concluded that the manager’s remarks to the administrator retirement suggested that the administrator’s age was a factor in her layoff [*Buchanan v. WMC Management Services*, [2006] BCHRT 339, July 14, 2006].

Age-Related Factors Can Taint Cost-Cutting Decisions

Many companies are under pressure to cut costs and enhance productivity. This pressure often leads to lay-offs and staff reductions. When downsizing or reorganizing, it may be tempting to put older employees on the chopping block first, especially if they’ve worked for the company for a long time and have relatively high salaries. Whether consciously or unconsciously, age-ist stereotypes, a “can't-teach-old-dogs-new-tricks” mindset and a desire to infuse the company with “younger blood” may also factor into the decision. The *Buchanan* case is an illustration of what can happen to companies who allow age to taint the decision of which employees to target for cost-cutting measures.

Age Discrimination Law, 101

Provincial human rights laws protect employees from discrimination on the basis of personal characteristics, including age. Discriminatory practices that the laws bar include:

- Refusing to hire, train or promote individuals because of their age;
- Targeting older workers for workplace downsizing or reorganization because of their age; and

- Deliberately trying to make a company “younger.”

An employee doesn’t have to show that she was laid off or otherwise treated unfavourably) **solely** because of his/her age; to prove age discrimination, the employee need only show that age was **one of** the factors in the decision.

Age discrimination complaints are common when companies reorganize or downsize because of the disproportionate impact such actions often have on older employees. Among the common stereotypes is the belief that older employees who’ve done their job a certain way for a long time will have more trouble adjusting to or accepting new technology, procedures or work conditions. Bringing in younger people to replace these “dinosaurs” may be perceived as a way to “rejuvenate” the company and help it ride out hard times.

When resolving age discrimination complaints, courts, arbitrators and human rights tribunals consider a number of factors to determine whether a company committed age discrimination, including:

- A comparison between the job performances and ages of targeted employees and those whom were unaffected (or less affected) by the reorganization;
- Possible use of stereotyping and subjective criteria to decide who would be fired as part of the reorganization, e.g., about the target employee’s “flexibility”;
- Indications that employees were targeted because they were pension-eligible or it was believed they were going to retire soon anyway; and
- Use of terms or statements that could be interpreted as euphemisms for age, such as “career potential,” “rejuvenate,” “renewal” and the like.

3 Ways to Protect Your Company from Age Discrimination Liability

As HR director, you want to ensure that strategic decisions about reorganization and downsizing are carried out in an objective, nondiscriminatory manner that don’t factor age into the equation. Specifically, you want to ensure that your company’s officers, directors and decision makers do 3 things:

1. Eliminate Positions, Not Employees

Ideally, positions rather than employees should be targeted for elimination. And positions that have been eliminated shouldn’t subsequently be refilled.

2. Consider All Employees as Potential Targets

Consider all employees equally and without considering their age in deciding whose positions to eliminate or restructure. Targeting older employees is almost certain to lead to age discrimination complaints.

3. Document Reasons for Targeting Older Employees

The ban on age discrimination doesn’t mean that you can’t ever fire older employees. But if you decide to terminate an older employee, document the legitimate, non-discriminatory reasons for that decision. For example, indicate which other employees were also considered for termination, why the older employee was selected for termination, and what other options were considered in lieu of termination, such as a reduction from full-time to part-time employment.