



MARK SHOFFNER EXPLORES EFFORTS TO EXPAND ADEA TO RECRUITING

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Partner [Mark A. Shoffner](#) authored the *InsideCounsel* article titled, “Caveat Recruiter: Be Aware of a Potential New Wrinkle in Age Discrimination Litigation.” The piece, which also appears on *Corporate Counsel*, outlines a move to expand the scope – through litigation – of the Age Discrimination in Employment Act (ADEA) to cover job applicants who are denied employment or promotion under age-neutral policies. Such an interpretation of the statute could put in peril college and graduate school recruitment programs that have been around for years. In the short term, Shoffner predicts more litigation on this issue given conflicting court rulings; and, long term he foresees a possible review by the U.S. Supreme Court.

Caveat Recruiter: Be Aware of a Potential New Wrinkle in Age Discrimination Litigation

The Age Discrimination in Employment Act (ADEA) turns 50 this year and it is still learning new tricks. A question that has never been definitively answered under the now middle-aged statute is whether it applies to job applicants who are disproportionately affected by age-neutral policies or practices – like an employment recruitment program that is conducted on college campuses. Yes, the ADEA could potentially upend the targeted recruitment of college students or recent graduates, like law school or business school recruiting or even military on-campus recruitment programs. How could a law designed to eradicate discrimination against older workers force employers to stop recruiting younger workers? After two recent federal court decisions, that issue may be on its way to the U.S. Supreme Court.



Here's the legal framework: Under the ADEA's famed predecessor – Title VII of the Civil Rights Act of 1964 – Congress and the federal courts recognized and constructed remedies for intentional (direct impact) and unintentional (disparate impact) discrimination. Both types of discrimination are also actionable by employees under the ADEA. In other words, if an employee is intentionally or unintentionally discriminated against because of his age, he can seek redress in court. Moreover, an applicant for employment can sue for intentional discrimination because the ADEA prohibits an employer from “failing or refusing” to hire any individual because of his or her age. But it remains unresolved whether a job applicant can sue for unintentional discrimination if a facially neutral policy adversely impacts a person over the age of 40.

One Court Says: No.

Richard Villareal, 49, applied for a position as territory manager for R.J. Reynolds Tobacco Company. Villareal's application was screened out under company guidelines that described the “targeted candidate” as someone “2-3 years out of college” who “adjusts easily to changes” and instructed the contractor to “stay away from” applicants “in sales for 8-10 years.”

Villareal filed a charge of discrimination with the EEOC and ultimately brought a collective action on behalf of “all applicants from the Territory Manager position who applied for the position since the date R.J. Reynolds began its pattern or practice of discriminating against over the age of 40.” He sued for both disparate treatment and disparate impact under the ADEA.

As to the disparate impact claim, the Eleventh Circuit, sitting en banc, examined the pertinent section of the statute, which makes it “unlawful for an employer ... to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.” After an exposition in statutory construction, the Court held that the plain language of this statutory text covers only discrimination against employees, not applicants for employment, and that Congress had not provided a remedy to applicants who are not employees when alleged discrimination occurred.

This remains a case to watch as Villareal has filed a petition for a writ of certiorari that has not yet been acted on by the Supreme Court.

Another Court Says: Yes.

Steve Rabin, a 53-year old public accountant, applied for a low-level position on a PwC audit team. Rabin alleged that he was not even able to apply for an entry-level job at PwC because the company does not post those openings on its website and only accepts applications for these positions from college students. He was interviewed for but was not hired for the audit team job.

Rabin filed a disparate impact collective action alleging that PwC fills entry-level accountant positions almost solely through college campus recruiting thereby preventing a person not affiliated with a school from applying for those jobs. Rabin asserts that these policies and practices of PwC result in disproportionate employment of younger applicants.

The U.S. District Court in San Francisco rejected PwC's argument that the ADEA simply does not permit this type of claim and held that the plain language of the statute supports an "inclusive" interpretation. Specifically, the court held that the statute's use of "any individual" and "employment opportunities" indicated that it applied more broadly than to just current employees. In concluding its analysis of the statute's text, the court stated: "Given that it is PwC's alleged discrimination that deprived Mr. Rabin of his status as an employee, it would turn the ADEA on its head to say that Mr. Rabin cannot bring a disparate impact claim because he was never actually hired."

[What Next?](#)

In the short term, employers can expect to see more of these cases as uncertainty and confusion persists about the contours of the ADEA. In the two cases discussed above, both courts cited the plain language of the ADEA to support polar opposite outcomes. And it remains unknown if the Supreme Court will take up this issue anytime soon.

In the meantime, employers do not need to scrap their recruiting programs, but they should make sure that they can justify them and articulate legitimate business reasons for any such programs or policies. It is not a violation of the ADEA for an employer to take action that otherwise would be prohibited when the action is based on reasonable factors other than age. For example, in an employee-disparate impact case, the Supreme Court found that a city's rationale for giving its younger police officers more generous raises than older ones was justified by the need to bring the salaries of younger officers in line with those offered in surrounding communities. Indeed, the challenged practices in PwC may be based on reasonable factors other than age, such as wanting lower salaried persons with no experience in entry-level positions who need training to build skills and knowledge and to learn PwC's culture and practices.

Employers should be proactive in checking methods of recruiting and hiring to determine if they disproportionately affect older applicants. If there are discernible discrepancies, fix them now and do not wait for a lawsuit. If there are automatic exclusions, like the screen out process in Villareal, determine why those are in place and whether your practices are based on factors other than age. Make sure the facts supporting those factors have solid support in your records.

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