

# A new wrinkle on age bias

It just got easier to file age discrimination claims. Is your business at risk?

**BUSINESS OWNERS BEWARE:** This past March, the Supreme Court made it a lot easier for workers to file age discrimination claims in federal court. Before the ruling, in order to bring a claim to court, plaintiffs had to show that a company's policies were deliberately biased. But now the threshold is much lower: If your company has a policy or practice that adversely affects a disproportionate number of workers age 40 and older—even if it's not intentional—you're making yourself vulnerable to accusations of age discrimination.

The timing couldn't be worse for business owners. Last year, more than 8,000 age discrimination lawsuits were filed against companies with fewer than 500 employees, according to the Equal Employment Opportunity Commission. That number could surge in the next decade, as the baby boom generation—about half of the U.S. work force—gets older.

To safeguard your business from an age discrimination claim, you'll have to do a lot more than slap a policy in the back of your employee manual and hold an annual training seminar. Business owners must now analyze how all of their policies and practices—both formal and informal—affect older workers, says Don Livingston, an attorney with Washington, D.C.-based law firm Akin Gump Strauss Hauer & Feld. Livingston, former general counsel for the EEOC, suggests applying the "four-fifths rule" to any policy or practice related to hiring, firing, promotions, layoffs, compensation, benefits, job assignments, and training. If four out of every five employees adversely affected by a policy or practice are 40 or older—if, for instance, you grant raises mostly to junior staffers—you could wind up in court, Livingston says.

Apply that standard, and you may be surprised at what you learn. Like many entrepreneurs, Bert Miller, founder and CEO of Indianapolis-based recruiting firm Protis Executive Innovations, thought of his business as friendly to all workers, young and old. An age discrimination policy was outlined in the employee manual, and six of the firm's 27 staffers were older than 40—as were a third of the executives placed by

the service. Nevertheless, in 2001 the EEOC began investigating the company for discriminating against job-placement candidates—a group protected by age discrimination laws—after being given a tip from two staffers who had been fired. The investigation unearthed some damning evidence in Protis' database: Age-related descriptions, such as "athletic," "up-and-coming," and "long in the tooth," were used to describe some candidates. Over the next three years, Miller racked up \$100,000 in legal fees before finally agreeing to pay a \$150,000 settlement last March to avoid court.

Miller, 43, blames the problems on one junior employee who wasn't following company policy. "I couldn't swallow the fact that I was being sued for something that I'm against," he says. Still, he admits that he should have been more vigilant.

To that end, he now performs monthly audits of the firm's database and reminds employees to notify him if clients make requests for young job candidates. He's also considering requiring departing workers to sign a separation agreement pledging not to sue Protis for age discrimination; in exchange they get extra severance or extended medical coverage. (The pledges are legally binding but do not prevent the EEOC from suing on behalf of employees.) To cover all of his bases, Miller may take out employment practice liability insurance—which costs between \$1,500 and \$8,000 a year—to pay for attorney fees and settlement costs related to any future discrimination suits. He just hopes he won't have to use it.

There is some good news for business owners like Miller: The recent Supreme Court ruling, which applies to companies with 20 or more employees, just makes it easier to get a claim into court; it doesn't make it easier for employees to win a case once it's been brought. If there's a legitimate business reason behind a policy that leads to a claim—for example, if you dole out bigger raises to junior staffers because they earn much less than older workers—you could still prevail in court. By then, though, much damage may already have been done. —Darren Dahl

