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Updated guidance on workplace age discrimination

As America's workforce gets older, do you know the laws that protect older workers — anyone 40 or older — in California?

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Q: What's the fastest-growing age group in the American workforce? A: From a recent [blog post](#) on the website of design firm Gensler: "According to the [U.S. Bureau of Labor Statistics](#), the fastest-growing age group in the U.S. workforce today is workers 75 years or older (+78%); the second-fastest is workers 65 to 74 (+25%). No other age segment even comes close."

Yet recent [research](#) from AARP finds 90% of those 50-plus surveyed believe age discrimination in the workplace is common. AARP reports nearly two-thirds of workers 50-plus have experienced or witnessed work-related age discrimination.

The California Civil Rights Department (CRD) just posted a [new fact sheet](#) describing how California law protects older workers, defined as those 40 and over. Here are highlights.

Age discrimination law covers more than older workers

California's Fair Employment and Housing Act (FEHA) prohibits age discrimination by employers with five or more employees. Limited exceptions to that rule include mandatory retirement ages for certain professions and where age is a bona fide occupational qualification.

CRD notes FEHA also prohibits discriminating "against someone based on the mistaken belief the person is 40 or over or based on their association with a person aged 40 or older." FEHA similarly prohibits discrimination based on the mistaken perception that someone is a particular race, ethnicity, etc. or based on their association with someone of a particular race, ethnicity, etc.

Age discrimination in hiring

CRD says it's illegal for employers to screen out older workers by limiting the amount of experience a candidate should have or requiring candidates to be "digital natives," that is, to have grown up using computers. Job postings should avoid seeking "young and energetic" individuals or "a recent college graduate or early career professional." And, though not mentioned in the new guidance, employers should avoid using artificial intelligence programs that effectively screen out older workers.

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Employers also must not ask candidates their age directly or indirectly, such as asking when they graduated from high school.

Still, CRD says employers may recruit on college campuses and may hire younger candidates better qualified than older candidates. As I tell both my clients and my SDSU business students, it is not illegal to reject a candidate who is 40 or older; it is illegal to reject a candidate because they are 40 or older or based on another protected characteristic.

Age discrimination on the job

CRD cautions employers against paying older workers less than younger workers on the assumption they are more financially secure, for example, because they are less likely to have student loan or home mortgage debt or young children. Policies that apply to all employees may be unlawful if they disproportionately disadvantage older workers.

Employers also may not refuse to train older workers on new technology or refuse to promote them because of their age.

CRD says employees may be compensated or promoted “differently based on experience or other business-related, non-discriminatory reasons so long as age is not the reason for the employer’s decision.”

Ageist comments in the workplace may be unlawful hostile environment harassment if they are so severe or pervasive they alter the older worker’s work conditions. CRD cites repeatedly making comments like “OK, Boomer!” and mocking clothing or hair as “old-fashioned.”

Age discrimination in termination

CRD underscores that employers may not eliminate older workers in downsizing just because it is cheaper to retain lower-paid, younger workers. CRD also says private employers “generally cannot force someone to retire just because they reach a specific age over 40.” There is again this caveat: “If after passing retirement age an employee’s job performance no longer meets the employer’s standards, an employer can legally fire the employee, as long as the standards are not arbitrary or based on age.”

According to Gensler’s post, “As recently as 1995, when asked about their plans at retirement age, 86% of people said they planned to retire. A similar study conducted in 2023 found that 73% of people planned to continue to work in some fashion.” As people live, stay healthy and work longer, CRD’s updated guidance reminds employers of legal protections the graying workforce enjoys.

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