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TIME TO RETIRE MANDATORY RETIREMENT POLICIES

More attorneys questioning practice of forcing out older partners

By GARY PHELAN

On his popular Connecticut Employment Law Blog, attorney Daniel Schwartz remarked on March 4, 2008, that "in representing clients, I have, on occasion, had a client make an honest inquiry about federal laws regarding age discrimination. Their question is something along the lines of, 'If discriminating against age is against the law, why can law firms insist on mandatory retirement policies?'

With lawyers living longer, staying healthier, and financially battered by our ailing economy, Schwartz's clients are not the only ones asking that question. It is also being asked by lawyers from the "baby boom" generation who cannot afford to retire because they are still putting their children through college or graduate school or caring for aging parents.

It is being asked by lawyers from the Woodstock generation who learned to "question authority." It is being asked by lawyers in their sixties who saw the value of their 401(k) and retirement investments plummet during the economic decline. It is being asked by some lawyers who wonder during their daily gym workouts or weekend running or biking races why they are being "put out to pasture" when they feel as healthy as they have ever felt.

And it is being asked by lawyers who witnessed 68-year old Jim Calhoun lead a scrappy group of overachievers to the NCAA Division 1 Basketball National Championship after what many consider the finest coaching job of his Hall of Fame career.

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According to a 2006 *National Law Journal* article entitled, "Pitfalls of Mandatory Law Firm Retirement," 57 percent of law firms with more than 100 lawyers and 13 percent of firms with fewer than 100 lawyers had mandatory retirement age policies at that time.

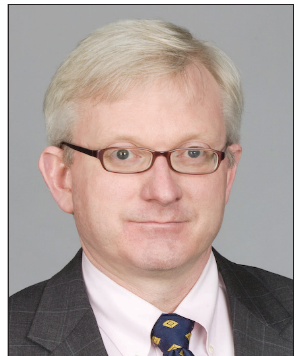
In a September 2007 survey on lawyer retirement conducted by the legal consultant firm Altman Weil Inc., 50 percent of firms with 50 or more lawyers reported having mandatory retirement policies. Of the firms with such policies, 38 percent mandated retirement at age 65 and 36 percent mandated retirement at 70.

EEOC Skirmishing

Questions about the legality of mandatory retirement policies surfaced when the Equal Employment Opportunity Commission filed an age discrimination charge in 2002 against Chicago-based Sidley Austin Brown & Wood. The EEOC alleged that the firm violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621(b), by demoting 32 older partners to non-equity status and by implementing a mandatory retirement age policy.

After three years of skirmishing at the administrative level, the EEOC filed a lawsuit in 2005. The trial court noted that the case had "been of great interest not only to Sidley, but also to most of the other large law firms in the country." *EEOC v. Sidley Austin*, 406 F. Supp. 2d 991, 995 (N.D. Ill. 2005).

Because the case settled in October 2007, there was little guidance provided to law firms seeking answers in this arena. However, the $27.5 million settlement—or approximately $860,000 per plaintiff—echoed throughout the legal profession.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The administrative and court challenges to mandatory retirement age policies have focused on the threshold question of whether the "partner" is an "employer" or an "employee" under the ADEA. If the partner is a "bona fide" partner then she is an "employer" and not protected under ADEA. However, if the individual is not a "bona fide" partner under relevant legal principles, they are protected by the ADEA.

In *Clackamas Gastroenterology Associates P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court explained that, when deciding whether a partner might be considered an "employee" under federal employment discrimination statutes, the fundamental question is "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."

According to the Supreme Court, when making that inquiry, "the common-law element of control is the principal guidepost." *Clackamas* endorsed the EEOC's six-factor test as being relevant to the inquiry.

1) Whether the organization can hire and fire the individual or set the rules and

regulations of the individual's work.

2) Whether, and if so, to what extent the organization supervised the individual's work.
3) Whether the individual reports to someone higher up in the organization.
4) Whether and, if so, to what extent the individual is able to influence the organization.
5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
6) Whether the individual shares the profits, losses and liabilities of the organization.

The *Clackamas* factors are non-exhaustive. In the law firm context, there are many things that may be indicative of whether a partner is an employee for purposes of discrimination laws. By examining a partner's autonomy, authority, and liability, we may determine to what degree the partner is subject to the firm's control and, in turn, whether she is an employer or employee.

However, by focusing on the threshold "bona fide" partner issue, law firms often fail to examine three vital questions: Do bona fide partners still have any legal basis to challenge these policies? Are mandatory age retirement policies the "right" thing to do? Are there alternative ways to enable law firms to accomplish the business-related objectives underlying these policies other than forcing lawyers to retire or give up their equity status at a certain age?

Partnership agreements are contracts which establish a fiduciary relationship. There is generally an implied term of good faith in partnership agreements. Therefore, bona fide partners who are either forced to retire or are "de-equitized" at a certain age may have common law claims for breach of the duty of good faith and fair dealing and breach of fiduciary duty.

The New York State Bar Association and the American Bar Association have emphatically stated that mandatory retirement age policies are not the right thing to do. In January 2007, a Special Committee on Age Discrimination established by the NYSBA concluded that mandatory retirement policies were not acceptable practice and a lawyer's age, standing alone, is not an appropriate criterion for determining professional capacity or employment status. In its report, the committee noted that New York's Disciplinary Rules state that it is "misconduct" for a lawyer or law firm to "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."

In August 2007, the ABA's House of Delegates approved a resolution encouraging law firms to dispense with mandatory age retirement policies for partners. The ABA concluded that mandatory retirement policies were "inconsistent with accepted employment practices, against public policy and not in the best interest of either law firms or their clients."

There are certainly some genuine business-related reasons for mandatory retirement age policies, such as transitioning responsibilities for clients and providing leadership opportunities to younger partners. However, other industries also routinely face these challenges. Rather than avoid them because of an archaic shortcut based on a stereotype, they address them on an individualized and flexible basis.

Conclusion

Law firms that continue to have mandatory retirement age policies are in a precarious position. They risk being the next Sidley Austin. They risk being the next Kelley Drye & Warren, which dropped its policy of de-equitizing partners at 70 after it was sued by the EEOC in 2009. They risk being the next Mendes & Mount, which saw seven partners leave in 2010 to launch a boutique after the firm rejected a request to modify its mandatory retirement age policy.

Or, they can decide to stop hiding behind an eroding defense whose foundation is based on unlawful stereotypes and instead follow the ABA's admonition to "evaluate senior partners individually in accordance with their attributes and interests and the firm's generally accepted performance criteria." ■