12-2018

Are Accounting Firms Breaching the Age Discrimination Act with the Inclusion of Mandatory Retirement Provisions

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by

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An Honors Thesis in partial fulfillment of the requirements for the degree Bachelor of Science in Business Administration in Marketing.

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December 15, 2018

INTRODUCTION

Age is just a number. This phrase has been murmured time after time in history. From famous movie scenes, song lyrics, pages in books, and wisdom from mothers, everyone has heard this at least once in their lives. Some joke that age only matters in wine and cheese. Some argue that age is all a limitation that the mind gives you. People are taught to never ask a woman how old she is, and as a society we celebrate certain ages such as twenty-one and sixteen, yet shun and deny those such as thirty and fifty. There are rules for dating between certain ages, and we are granted new rights and responsibilities as our eternal clocks tick on longer and longer. Society has created its own formula for finding appropriate dating ages, dividing the older person's age by two and adding seven, producing the youngest age they can "rightfully" date. There are psychological studies based on age. Clothing choices are made based on "age appropriateness". As a society, we tell each other that "age is just a number", but box ourselves in with rules and traditions based around that very thing, age. In every realm of life, age is relevant. In some aspects of life, age is everything. However, with our changing world, the rights and beliefs on age are changing. The United States has passed laws to protect those of certain age groups, and works to give help and aid to those in age groups that are more vulnerable than others. In our changing world, age is changing too. "Forty is the new thirty" these days. Couples are getting married and having children older than they used to. Education is taking more time. Life expectancy is rising exponentially with daily scientific findings and revelations. The world is changing, but many of our laws and traditions are not keeping up the pace. A very specific example that is gaining momentum among the business sector of the United States is the question of weather accounting firms are breaking the law by forcing mandatory retirement clauses in the contracts of their partners. This hot topic has two very distinct sides and is progressively being brought forward to the media and in court trials. Though the whispers are turning to shouts, there still is no legal presidency that has been set to answer if these firms are being unethical. Is mandatory retirement wrong? Unethical? Are mandatory retirement provisions that are increasingly being added into the contracts that accounting firm partners are expected to sign violating the 1967 Age Discrimination in Employment Act?

BACKGROUND

The Age Discrimination in Employment Act was first enacted in 1967. The act was proposed based on the rising trend of older workers being stereotyped and cast aside in applicant pools when applying for jobs that they were still qualified to do. This came to a header in 1964, when those over the age of fifty-five who were seeking jobs were barred from twenty-five percent, and those ten years their senior, were turned away from half of all job openings. The mass discrimination that the older generation was facing was getting out of hand, leaving those in the middle ground between middle aged and became retired, unemployed, and discouraged. An employment crisis was on the cusp, and the government knew mediation was urgently needed.

Three years later, Congress and President Lyndon B. Johnson fell into agreement to pass the ADEA in December of 1967. This new law granted many protections for persons once they reach the age of forty and up to the age of seventy, but only applies to employers who employ at least twenty employees on a regular basis within the current or prior calendar year. However, this holds no relevance to the question at hand because the firms that are facing the mandatory retirement allegations and lawsuits are those that make up the largest and most successful, not mom and pop shops. According to the law "It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . [or] (2) 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." (3). The law not only protects against its birthright of limited employment benefits, but also from termination, layoffs, and reduced benefits. According to the ADEA, there is protection granted to employers that provides them the right of "the denial of benefits to older employees". This only applies in cases the cost of providing the full benefits to younger workers is the same as the reduced benefits to their older coworkers, simply stating that they still have to be paid congruently with their younger counterparts. ("Age Discrimination in Employment Act of 1967.,2018)

In summary, the ADEA prohibits employers from considering age when they make any decisions about their employees. In 1986, the cap of protection that stopped at employees sixty-fifth birthday was removed and was rewritten to have an unlimited age protection after the age of forty. It is interesting that the original law written in 1967 protected employees to an age that some of the largest accounting firms in the nation force mandatory retirement. Have we really grown as a nation? Another addition that was made along with the age cap is forbiddance against mandatory retirement in most sectors. In the 1990s, the law was again relooked at, and a provision was added to further protect workers in the category of their benefits. There are a few professions that are exceptions to this law, such as public safety officers, firefighters, and police officers. Another loophole to this law is the existence of bona fide occupation qualifications, which means that age can come into play when hiring if the job must be done by someone of a particular age, or another protected class. An example of this would be a casting crew looking for an actor to play an eighteen-year-old boy. A sixty-five-year-old woman would not be able to execute the job.

When it comes to defining an employee that falls under the statutes of the Age Discrimination in Employment Act, there are a few details the court described to define an employee. According to the ADEA, for a partner to be considered an employee to the firm he must be able to be fired by the firm, be supervised by superiors, have no influence on the firms voting, and cannot share in the profits and liabilities of the firm. However, all of this is still up the judge's discretion when cases do get brought to court. The overwhelming trend with this law is that there is nothing completely transparent or set in stone. Because no legal precedent exists, everyone involved with this conundrum is left with uncertainty on which side to lean on.

After its enactment in 1967 and the provisions that followed, the ADEA seemed to be accepted and enforced by society just like many of the other laws in the United States. Recently, this legislation has been dusted off the shelf and back into the spotlight. One of the first triggers to the recent relook buzz on the Age Discrimination in Employment Act took place in 2008 and revolved around the legislation just after its fiftieth birthday. The case was based on employees receiving retaliation from employers when they whistle blew about age discrimination in the workplace. "The case continued the Court's long-standing position that cause for action following retaliation can be inferred in civil rights legislation, even though the law does not explicitly provide protection against victimization." This case challenges the notion that partner's civil rights are being infringed when they are being forced into mandatory retirement clauses. (Gomez-Perez_v._Potter,2018)

There are two sides to this argument, and each have their own arsenal of facts, history, and opinions to backup their claims. There are no clear answers on who's opinion is correct. However, it is important for society at large to be aware of these issues in order to set a legal precedent moving forward in order to understand who the Age Discrimination Act protects as accounting businesses continue to evolve and help solve this debate and those that will come in the future

ARGUMENT 1

One side suggests that the inclusion of a mandatory retirement provision in the contracts of account firm's partners is not only fair, but needed in order to have an orderly progression of younger employees reaching partner level. Many argue that as young employees move up the ladder and receive trainings, their salaries climb higher. Once these employees reach their peak at the top of the food chain and are raking in large sums of money year after year, they may not want to retire at a standard age, and instead stay years past the normal retirement age in order to continue to collect paychecks. In the minds of those who are believers in mandatory retirement for professionals at this level say that this would make it easier for younger employees to advance their career at a steadier pace, reducing the wait time when an employee is waiting on another to retire in order to continue in the succession of their career.

Another interesting thought behind having an appointed retirement age, is that it gives older applicants a more attractive light when applying for jobs at an old age. The proponents claim that those hiring might fear that hiring an older worker would bring the burden of them fighting against retiring at a standard age and bringing about age discrimination lawsuits. Instead, if these applicants were allowed to retire from the firm at a predetermined date, this unconscious discrimination would be eliminated from the equation. In many cases, companies don't even have to bother with the issue if the partners choose to retire at their own will before the predetermined birth day.

EEOC V. DELOITTE

During a hearing in 2014 the Equal Employment Opportunity Commission called when questioning some of the Big Four accounting firm's mandatory retirement policies. Councilman William Lloyd pointed out that many of Deloitte's partners actually choose to retire before the predetermined mandatory retirement age specified in their contract, sixty-two. Among Deloitte's almost three thousand partners, the average retirement age is fifty-eight, years earlier than were contracted. Lloyd himself testified that when he started working for Deloitte, he chose to take a position as a director because he knew he wanted to work past the mandatory retirement age presented at the time he was being introduced to the company. Those who plan to work past the predetermined ages have options within the company to align themselves to meet their retirement or non retirement goals. Lloyd, at the time of the hearing, was over the age of sixty-two. A final point Lloyd brought to the surface in light of the mandatory retirement policy practiced by Deloitte and many of their rival large firms, is the benefits that are reaped with diversity in the companies. Diversity is something not only large firms, but the United States government has been working to increase in all sectors. Because of the mandatory retirement age, Deloitte's diversity is continually growing. "More of the employees who have been made partners in the recent years have been women and minorities, opening up the partnership ranks beyond the white males who have traditionally led most CPA firms." stated Lloyd. The American Institute of CPAs formed a National Commission on Diversity in 2012 to help fuel this mission to further the opportunities for diversity. The EEOC has backed this fight for increasing opportunities for minorities and women. During this hearing, Deloitte challenged their claims against them, saying that the removal of the mandatory retirement clauses would put a damper on the rising fire of diversity spreading not only in the accounting field, but in all sections of business. (Cohn 2014)

RETIREMENT PLANNING AND NATURAL SUCCESION

A point many have raised against the dilemma of mandatory retirement clauses is that companies need to present this requirement as something that is a benefit for the partner, not something that is boxing them in and setting their expiration date. When partners don't look forward to and plan for their retirement the age old saying "failure to plan is planning to fail" comes into play. When a partner doesn't want to retire, it not only creates an awkward and sometimes hostile situation for the company, but also inhibits the natural succession of younger employees into the spots they have earned. If a partner is underperforming compared to his fellow partners, this creates an extra sticky situation for those trying to push retirement for this partner in order to give the job to those below him who are helping to pull the weight he isn't able to carry on his own.

To avoid all of this unnecessary drama and time, the creation of a retirement planning process within companies that begins many years before the partners retire can not only help the company save time and effort, but also create a happier outlook for the employee both before, during, and after their retirement. Many partners try to avoid retirement because so much of their livelihood relies on having the title at their company, and do not know how to continue their existence in the world without it. With the succession planning, partners maintain a good relationship with companies during and after the retirement process takes place, creating a solid alumni network and giving partners the opportunity to plan and take the steps to potentially capture seats on boards or other future opportunities within the firm. The approach as laid out by Accounting Today, involves a consultant that is not a part of the firm, so that the partner can truly speak their mind without fear of hurting feelings or facing repercussions through the stressful and life changing process. The sessions start several years before the actual retirement, and occur every four to six months, so a solid relationship between the consultant and the partner is created. Because retirement plans are made far in advance, partners can feel excited and prepared for the next step, rather than forced out and scared. Many want to go into a second, less time consuming career. Others choose to pursue activities such as volunteering, hobbies, travel, or other personal plans. This process helps partners who are normally not emotionally prepared for the chances to come, and has massive benefits to their attitudes and emotional comforts. (Carlson 2017).

According to Accounting Today, forty-four percent of CPA firms already have a succession plan. With the increased use of tools like this, the mandatory retirement clauses for partners is not only legal and ethical, it can be a blessing and future builder for employees. A managing partner interviewed by Accounting Today stated, "We should make this program optional at age fifty-five and mandatory at age sixty. The earlier we help partners with planning their retirements, the more productive and cooperative they will be in their later years." With the years partners put their heart and souls into the firms they serve in order to have achieved the ranks they sit in, the firms owe it to them to make sure once they age out, their lives are still prosperous and happy. (Carlson 2017)

INTERVIEW WITH MARTIN FISCUS

I was able to interview a recent retiree of one of the big four, PwC, Martin Fiscus, and received his firsthand knowledge and opinion on this subject. In August of 1983, after graduating from the University of Arkansas with an accounting degree, Fiscus started his career in public accounting at one of the big eight accounting firms, Coopers and Librand, in Tulsa, Oklahoma. He worked for the firm for seventeen years and made partner in 1995. The company was later bought out by PriceWaterhouse in 1998, creating the large meca we know today as PriceWaterhouseCoopers, and Fiscus stayed after the merger, becoming a partner of this firm as well. An Arkansas native, Fiscus jumped at the opportunity toward the end of his career to move back to his home state and open up an office tailored to the Tyson account in the summer of 2010 after living in Tulsa and Austin.

When Fiscus because a partner with PwC, the inclusion of the mandatory retirement clause in his partnership agreement was something he said he didn't give much thought to upon signing, because it was so far in the future. He said he was not bothered by it, and it was just a part of the company he worked for. Fiscus explained that PwC had a clear process of mandatory retirement by the age of sixty. He stated that this was a common feeling among his comrades, and he had no firsthand experience of anyone ever objecting or feeling bothered by PwC's mandatory retirement policy by age sixty. "To me I always knew that provision was there, I saw partners retiring and moving on to whatever they wanted to move on to, whether that was some other type of work endeavor or not, so I didn't question it, but now that I have gone through the full cycle, I still have no problem with the provision." He had never heard of a situation within his firm when a partner had any issues with this agreement.

Martin Fiscus, when prompted on the question of whether the Age Discrimination Act was being infringed upon by the mandatory retirement provision, was very quick to retort that he did not believe that was the case, and was stern in the fact that accounting firm partners were in fact in no way employees. "I would not be supportive of litigation to head down the path because I don't think that is the way firms operate. You certainly are not an employee, and if you want to be a part of a partnership, you sign that partnership agreement, which covers lots of things not just this (mandatory retirement) and you abide with it." When presented with the agreement, there are no options for changes to be made to the contract. It is what it is. In the topic of the positive or negative effect the provision has on the firm and those who are employed by it, Fiscus told me that accounting was a highly competitive, challenging profession that changes constantly. He said "…to a certain extent, there is a view in the firm that they don't want folks that are just 'holding on', and there comes a time to leave the workforce. I do think that the fact that people retire creates opportunity for other people to make partner and move up in the organization, and that can create opportunity. This is a profession where there is a lot of change, and this changing is genuinely a positive. We don't ever feel that we don't have a sufficient pipeline of talent that is always there to address any issues, needs, or positions that we need to fill.

Fiscus retired early at the age of fifty-seven after a thirty-five-year long career. When asked why he had chosen to end his career three years before it's "expiration date", he explained because his Sarbanes Oxley term was running up on the Tyson job, and he knew he would have to move again in order to be able to work for another account, and he and his wife were happy in Arkansas. Because of the structure of the company, he said that once reaching age fifty-five, the retirement package is reached and many start to retire after this age. An interesting fact Fiscus pointed out to me, was that PwC sometimes extends partners contracts beyond the age of sixty with congruent commission. Though it isn't common, if the job at hand still needs the attention of the partner that had been performing it past the age of retirement, PwC will make exceptions and extend their terms in order to accomplish the task at hand, without reducing the partners hourly work and compensation. Fiscus stated "My view would be that anybody who has the business case to extend beyond the age of sixty is there for an important enough reason that there would be no adjustment in their compensation… I believe that for those who I knew who extended, they were there working for an important client." In Fiscus' case, he could have possibly been extended himself if he were to have taken another role as an auditor for another company focus, since the term is five years, putting him over the age of sixty by the end of the term.

Overall, something that stood out to me throughout the interview was how passionate Martin Fiscus was about PwC, and the decisions that the company had made. I could tell from my short time with him that he loved the firm, and never felt that he or anyone else was ever in jeopardy of having their rights infringed by the firm's mandatory retirement clause. Fiscus explained that he knew once he retired that he would want to continue to be active in some realm of working, whether that be charity, serving on boards, or academia. He stated that there are many opportunities for those who have served as partners of large firms to be able to do a variety of things after their retirement. He is now in his first semester in teaching Accounting at his alma matter.

ARGUMENT 2

However, the other side of the debate is hot on their heels to prove that forcing mandatory retirement on partners is not only illegal, but detrimental to the employees lives and mental health. A perfect way to start the discussion for the side who is not in favor of mandatory retirement is with a quote from Kerry Hannon, a tenured personal finance journalist for Forbes Magazine and USA today. Hannon, after attending a three-day program called Age Bloom Academy with the theme "Global Aging: Danger Ahead". After listening to a speaker, Hannon stated that her table concluded that "'Old' has nothing to do with chronological age. There's no typical older person. Yet, society and employers don't always see it that way." (Hannon 2015)

MANDATORY RETIRMENT- COST CUTTING STRATEGY?

A popular conspiracy among proponents of the mandatory retirement additions to contracts of accounting firm partners is that this is just a way for firms to cut costs. As employees age, rise in the ranks of the company, and grow in expertise of the profession, their salaries grow in relation. According to the CPA journal and the 2016 Practice Management Survey, eighty-eight percent of large firms implement a mandatory retirement policy in contracts with their partners. Based of the data recorded, income per equity partner is rising nationally year after year. Once these partners who are bringing in these lofty salaries are forced to retire, they are replaced with lower level, younger employees who are paid comparably less. Though this is part of normal succession, the survey also found that there is a trend in the reduction of the number of partners a firm is enlisting, even though the income they're raking in is rising. Is this evidence of firms taking short cuts to push out their most expensive assets- senior level partners?

Another finding by the Practice Management Survey that lays parallel to the previous claim is that for the first time in years, the number of partners over the age of fifty has began to decline. In 2016, the average age of partners in the large sized firms is only fifty-two and a half years old. This is young in comparison to the growing life expectancy of Americans. The world's population over the age of sixty is almost one billion at present day, and is predicted to rise to double this amount by 2050. This demographic is only going to grow in the years to come, creating the threat of this issue becoming a bigger and bigger problem. (Hannon 2015)

A separate argument this group made against mandatory retirement is the risk it exposes for there to not be valid replacements to step up and continue to run the firm as smoothly as it has been. With the baby boomers retiring, some managements are having a hard time finding effective leadership to fill in for their older retirees. The Practice Management Survey found that this challenge is creating problems for the firms who have these younger employees taking over these positions before the retiring partner has time to adequately prepare and groom them. This is resulting in rocky steps for these firms as they readjust and are being lead by partners who are prematurely taking over roles. (CPAJ 2017)

RABIN V. PRICEWATERHOUSECOOPERS

An aged based class action lawsuit that has been ongoing since April of 2016 stars one of the largest and most well-known accounting firms, PricewaterhouseCoopers, or PwC. This lawsuit falls perfectly in place with those who argue that age discrimination is taking place in accounting firms, and that partners are suffering. Some of the evidence brought forward in the case was that PwC was purposefully implementing a biased campus recruitment tool that was only accessible to those who were currently enrolled in a university. Instead of posting many of their entry level jobs across multiple job search sites and tools, they exclusively list these on only student accessible sites. PwC openly is going after a younger workforce, with approximately eighty percent of those they employee being millennials in 2016. (Bloomberg Tax 2016). This just sets the stage for not only partners to be discriminated against in this accounting firm, but potentially everyone that is employed. Of course, PwC also has implemented a mandatory retirement age for partners at sixty, continuing to move toward that younger median age.

The defendant who started the ruckus brought forth claims for himself and other individuals who were forty years of age or older who had been wrongfully denied employment from PricewaterhouseCoopers. A large argument that ties in with the mandatory retirement clause those who are eligible for the position have to face, is that of those who enter into the accounting field later in age. The defendant, Rabin, did not become a certified public accountant right out of college like many of his comrades, but instead followed the career after fifteen years in the computer industry. Is it fair to force someone to retire if they are naturally inclined to succeed but haven't been with the firm for the same amount of years as other partners? Was he not hired because of his age and the firm's knowledge that they would not be keeping him around for years to come because he was "older"? Are PwC and other firms missing out on good talent because they're too blinded by the year a potential employee was born? (Bloomberg Tax 2016)

SMALL FIRMS SEAKING OUT THOSE PUSHED OUT BY THE BIG FOUR

The reason firms claim that mandatory retirement can be a good is because partners can "lose their edge", "become slower" or, "become an anchor the rest of the partners have to pull extra weight for." However, there are smaller accounting firms that are not only hiring, but seeking out these individuals that the "Big Four" are kicking out the door. For example, PKF O'Connor Davies LLP are excited to bring in partners that are forced into mandatory retirement in their fifties and sixties. The co-director of the New York based company prides in working with these experienced individuals, boasting they bring experience and wisdom to the office and help groom and train younger employees. Instead of looking at the age of these men and women as a liability, they use it to their advantage in a time of low unemployment. These people are helping the firm grow in times when hiring the best talent out of top universities is competitive and costly. Not only will these older employees walk on with tons of experience, they will take pay cuts, less hours, and do not cost the firm to be trained. They are far less risky and can bring more to the firm sometimes than the firm can bring to them. Another New York based company that is breaking the age barriers is WithumSmith+Brown PC, an accounting and consulting company with over eight hundred employees ranging from age twenty to ninety-one. Though they do ask their partners to step down after age sixty-five, they still encourage and invite the businessmen to continue to work for the firm as emeritus partners and stay as long as they are productive. (Hymowitz 2018). Joan Kampo, the director of Human Resources for this firm said it best with, "There's a benefit to having five generations in the workplace, because everyone brings something to the table. It's not about age. It's about keeping talent in this tight labor market. You can have a 22-year old who's wise beyond his years and someone in his 70s who's motivated and willing to embrace changes."

RETIREMENT PROVISIONS IN SIMILAR HIGH SKILLED PROFESSIONS

A nice retort to the argument the other side makes that firms run the risk that partners will "lose their touch" due to old age, is the comparison of mandatory retirement provisions in similar level professions, or the lack there of. Judges, who's decisions effect the lives of every defendant and plaintiff they come in contact with, are not required to retire by many states until age seventy to seventy-five. That grants judges sometimes over ten more years than accounting firm partners to work until they are forcibly removed from their positon. Another comparable profession would be those who serve in the medical field. Doctors, who quite literally take their patients' lives into their own hands, are rarely given any requirements on when they are to retire. Instead of limiting the age that a medical professional can serve the population, the American Medical Association has developed guidelines to "assess the physical and mental health of older physicians and review their treatment of patients. One-fourth of U.S. doctors are now older than 65, according to the AMA." (Hannon 2015) It is hard to see the validity in the argument posed that businesses could be in danger of having leaders whose age is putting their work in question, when those society trusts to heal them are allowed to work with no set in stone expiration date. Phillip Pizzo, editor of the book, "The Upside of Aging", put all of this into words beautifully. His overarching conclusion: "What we value as a society needs upending. We have not reached the point where respect for wisdom is valued as much as respect of perceived vigor of performance," Pizzo said. "That is where the real need for change is — but it will take time to accomplish and it won't be altered by renderings on mandatory retirement per se." (Hannon 2015)

There are other unethical ways that employers dance around age discrimination and mandatory retirement in order to get their older comrades out the door. One way of doing this is eliminating the position the worker is serving. Once the older employee is gone, they can tweak the job title and priorities as to not cause grounds for a lawsuit when the firm rehires someone younger in their place. Another avenue is laying off an employee. Some other routes that have been taken in response to the inability to force mandatory retirement are giving them unfavorable performance ratings, making grounds for forced retirement, or threatening their pension. (Novins, York & Jacobus, Attorneys at Law) All of these are unethical ways companies are forcing out their older employees every day. Not only are these actions unfair and demeaning to the employee who has put in tenor with the firm, but can also have negative effects on the partner's self-esteem and mental health. An argument could be made that legalizing mandatory retirement would avoid these unethical means of termination, but is that really solving the problem at the root?

FINAL THOUGHTS

Something that was not mentioned on either side of the debate over whether mandatory retirement among accounting firm partners is the basic idea of trust. Mental states, money, and the welfare of others has all been tossed back and fourth among critics and believers. A foundational piece that could help bridge the divide is much simpler than anything else previously mentioned. A fine example of this is the "Garrison Keillor Decision". The story behind the "Garrison Keillor Decision" is that Keillor, a seventy-two-year-old radio host made the decision to retire when he knew he was no longer in a prime state to continue the job. He said that after making a mistake during a broadcast, he chose to retire. He left before his age related errors could become a problem for his show, the people he works with, and the listeners he had gained. If society could trust every professional to have the candor and respect for his profession and those it effects, the issue of mandatory retirement might among accounting firm partners and those who are inflicting the decision onto them may not have come up as it has recently. As the years continue and the lawsuits continue to surface, all facets of business and society, not just the financial faction, will have to learn and adjust in order to protect the rights of those who serve and are being served.

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