



Ohio Township Association Risk Management Authority

UPDATE

FALL 2020

Combating Age Discrimination in the Workplace

By Dawn Frick, Partner, Surdyk, Dowd & Turner

In 1967, Congress enacted the federal Age Discrimination in Employment Act (ADEA) to prohibit age discrimination in the workplace and promote the employment of older workers. The ADEA was part of several congressional actions in the 1960s relating to equal opportunity in the workplace, along with the Equal Pay Act of 1963 and the Civil Rights Act of 1964. In a recent study by an insurance company entitled *2019 Ageism in the Workplace Study*¹, some statistics noted the growing problem of age discrimination for American employers. Specifically, it found that:



- **The number of age-related discrimination charges** filed with employers and the EEOC by workers aged 65+ doubled from 1990 to 2017.
- **44%** of employees report that they or someone they know experienced age discrimination in the workplace.
- **21%** report they faced age discrimination themselves.
- **36%** feel their age prevented them from getting a job since turning 40.
- **26%** feel there is some risk they could lose their current job because of age.
- **Only 40%** who experienced age discrimination filed a charge or complaint.
- **Employers paid \$810.4 million** to settle age discrimination charges filed with the EEOC between 2010 and 2018 (excluding litigation).

Cont'd on pg. 2

¹ 2019 Hiscox Ageism in the Workplace Study, <https://www.hiscox.com/documents/2019-Hiscox-Ageism-Workplace-Study.pdf>

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The OTARMA Program is exclusively endorsed by the OTA

Every effort has been made to ensure the accuracy of the information in this newsletter. Professional counsel should be sought before any action is taken or decision is made based on this material.

www.OTARMA.org

Photo courtesy of Hopewell Township, Seneca County.

The EEOC defines age discrimination as treating an applicant or employee less favorably because of his or her age. The ADEA forbids age discrimination against employees and applicants who are age 40 or older. The law forbids discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, benefits, and any other term or condition of employment. The ADEA also makes it illegal to harass a person due to his or her age. The EEOC defines harassment as “unwelcome conduct based on age.” As such, complaints regarding age discrimination should be treated and investigated as any other discrimination or harassment claim.

Due to a relatively recent decision by the United States Supreme Court, *Mount Lemmon Fire District v. Guido*, No. 17-587, 2018 WL 5794639 (Nov. 6, 2018), all states and their political subdivisions must comply with the ADEA. In *Mount Lemmon*, a fire department laid off its two oldest firefighters. Those firefighters sued the fire department for age discrimination under the ADEA. The department argued that the ADEA did not apply because the department had fewer than 20 employees. The Supreme Court examined whether the ADEA applied to all states and their political subdivisions, or only those



Age discrimination claims most frequently arise out of terminations and failure-to-promote situations. One way to avoid age discrimination claims, like any other discrimination claim, is to train workers and management regarding discrimination. “No manager should ever be in the position where he/she might testify

that he/she was not aware that it is illegal to discriminate on the basis of age.” *Mathis v. Chevrolet*, 269 F.3d 771 (7th Cir.2001). In the *Mathis* case, the court stated, “leaving managers with hiring authority in ignorance of the basic features of the [ADEA] is an ‘extraordinary mistake’ for [an employer] to make.”

To avoid ADEA claims, employers should embrace a disciplined approach to any reduction in force that avoids an unintentional lower ranking of older employees. Development of criteria, and a consistent application of those criteria, is the best approach. Furthermore, except for a few limited circumstances, mandatory retirement ages can easily lead to an age-discrimination claim. Additionally, it is important to send the right message. Management should avoid making ageist comments in order to set the tone and keep the best people, rather than inferring “fresh blood” is preferred, or getting rid of the “good old boys” is needed. For example, the U.S. Supreme Court recently heard oral arguments in which the question of whether referring to someone as a “boomer” during a hiring discussion would be actionable. Also, watch for, and eliminate, comments that might be viewed as age-related in all performance documentation. Finally, avoid situations in which “shedding high salaries” is a basis for a termination, because courts have examined whether that is a pretext for age discrimination.

Similarly, when hiring, it is important to watch how you describe jobs. Defining a position as ideal for a “young” tech-savvy college student could be misconstrued as age discrimination. Similarly, identifying the best candidate as one that is a “recent college graduate” could also be misconstrued. Avoid using terminology that implies that

“To avoid ADEA claims, employers should embrace a disciplined approach to any reduction in force that avoids an unintentional lower ranking of older employees.”

that have 20 or more employees. The Supreme Court unanimously ruled that the ADEA applies to all states and their political subdivisions, regardless of size. As such, states and their political subdivisions including townships must understand their obligations under the ADEA.

a person must be younger to fit into your culture. It is important not to use words that fit the person you are looking for, but rather to use words that describe the job itself. Evaluate the information you really need on a job application and what other information you may want to get during interviews. It is legal to ask a person's age, but it could be used as evidence that age influenced a hiring decision. Also, train people to be careful during interviews. Stay away from topics regarding children or grandchildren because this information could be used as evidence that age was a factor in a hiring choice.

To succeed on an age discrimination claim under the ADEA, a plaintiff must prove that age was the "but-for" (that is, the only) cause of the challenged adverse employment action. In the controlling United States Supreme Court case of *Gross v. FBL Financial Servs.*, the Court held that:

“ By 2024, workers age 55 and older will represent 25% of the nation’s workforce, with the fastest annual growth rates among those aged 65 and older. ”

a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

Because age discrimination plaintiffs must now prove "but-for" causation, it is important for employers to carefully document employees' performance problems and other disciplinary action. A well-documented personnel file will make it that much more difficult for a plaintiff to prove that age was the sole reason motivating a termination or other action.

In a relatively recent case, *DeBra v. JP Morgan Chase & Co.*, 749 Fed. Appx. 331 (2018), a 59-year-old bank teller

brought a claim under the ADEA. The plaintiff worked for the bank for about 12 years. Towards the end of her tenure, the plaintiff worked for two different bank managers. Although she faced no previous discipline, prior performance evaluations noted she needed

improvement on her cash-handling skills. The plaintiff's most recent supervisor began documenting cash-control errors and eventually she was terminated. The plaintiff filed suit and the case turned on whether the documented discipline was a pretext for discrimination. The plaintiff argued that other similarly situated younger employees had similar mistakes but they were not terminated. The court found that the other employees who "got off the hook" for similar errors reported to other supervisors than the plaintiff, and in fact, plaintiff's mistakes had been tolerated by other supervisors as well. However, the tougher supervisor documented her errors

and the plaintiff had not proven that the supervisor favored younger employees over older employees.

In summary, practical takeaways from this case are that, although the plaintiff had a history of performance issues, the employer did not terminate her until there was sufficient documentation of such errors. Documentation of problems is the key to defending a claim that age is the reason for an employment action. Additionally, it illustrates how consistency among supervisors is important, which can be accomplished through management training.

By 2024, workers age 55 and older will represent 25% of the nation's workforce, with the fastest annual growth rates among those aged 65 and older.² As such, it is important to be educated and proactive in preventing age discrimination to avoid age discrimination claims.

² <https://www.bls.gov/careeroutlook/2017/article/older-workers.htm>

OTARMA IS HERE FOR YOU

OTARMA stands in partnership with its members even in the most challenging of times, like the one we face with COVID-19. For its members, OTARMA

reacted immediately and implemented special programs and resources in addition to bolstering valuable benefits and services already provided.

PARTNERSHIP

OTARMA CARES Program - Special Support Funds

To assist members with risk management efforts and loss of income as a result of COVID-19, OTARMA issued special support funds to each member under the new OTARMA CARES Program.

COVID-19 Resource Packet

OTARMA created a COVID-19 resource packet for members, which includes information on social distancing, travel, IT and cyber security recommendations, working from home recommendations, Families First Coronavirus Response Act, and Ohio Open Meeting legal memos. Resources can be found in the Online Resource eLibrary at www.OTARMA.org.

Teleconferences for Members

OTARMA provided timely COVID-19 related information to its membership by offering two teleconferences. In the first, attorneys provided free legal counsel to assist members with the challenges townships are facing during the COVID-19 pandemic. The second teleconference, "Understanding & Implementing House Bill 481," addressed how the Ohio CARES Act impacts townships, as well as how the funds can be obtained and used. Resources developed from the teleconferences are available

in the Online Resource eLibrary at www.OTARMA.org.

OTARMA IT Specialist

OTARMA welcomed IT Specialist Aaron Willis in 2019. Aaron has over 19 years of IT experience working for Cooper Communications Group, Verizon, and Maloney & Novotny. Aaron is available to assist OTARMA Members with their cyber issues.

Cyber Portal

OTARMA offers members access to the eRiskHub, a cyber portal that provides tools and resources necessary to help combat a data breach. Some of the key features include initial consultation with a breach coach, incident response planning, security news, and helpful industry links. The eRiskHub information and login page can be found under Member Services on the OTARMA Website at www.OTARMA.org.

Managing Ohio Risk Exposures (MORE) Grant Program

The MORE Grant offers up to \$500 per township annually for the purpose of assisting OTARMA Members in eliminating or preventing risk exposures that can lead to liability claims and property losses. OTARMA's MORE Grant funds can be used toward personal protective equipment (PPE), disinfectants, protective gear,

signage, and other items to assist with the ongoing risk management efforts related to COVID-19. Members that have not yet applied for the grant this year can quickly apply for funds with a few clicks through the online application under Member Services at www.OTARMA.org.

Police & Fire Policy Grant Program

The Police & Fire Policy Grant Program is designed to assist OTARMA Members with developing or updating policies and procedures for police and fire departments. OTARMA Members may apply for up to \$2,000 (\$1,000 for police and \$1,000 for fire) in grant funds annually for contracting with a service provider specializing in police and/or fire policies and procedures. OTARMA Members can download the one-page Police & Fire Policy Grant application under Member Services at www.OTARMA.org.

Property Appraisals

This program continues and includes an appraisal for all buildings scheduled at \$50,000 or greater; for those members without a building scheduled at \$50,000, the scheduled building with the greatest value will be appraised. All OTARMA Members with scheduled buildings will receive an appraisal and written report at no cost to the member.

OTARMA continues to lead the way for Ohio townships.

MEMBER PROFILE: AMERICAN TOWNSHIP, ALLEN COUNTY

American Township is one of the largest of Allen County's 12 townships, with approximately 14,000 residents. Two municipalities are located in American Township: the village of Elida and part of the city of Lima, the county seat of Allen County. The township is the major retail hub in the county with a wide variety of shopping centers and restaurants and a convenient 18-minute drive to Interstate 75. A fire department with two fire stations and a police department provide services to the community.

For recreation and entertainment, people of all ages can participate in a variety of activities. They may choose from a roller-skating arena, a golf course, a sports center with driving range, a motor sports park, bowling, arcades, and a movie theater. In addition, the township maintains a community events calendar on their website.

Three trustees and a fiscal officer serve the township. Larry Vandemark, American Township Trustee since 2008, describes his township by stating, "I am proud of what American Township has to offer to our residents and local businesses. We are here to help and greet our residents and businesses, openly making them feel that American Township is a great place to live and work. Our safety services are some of the best in the area with the most up-to-date equipment and trained personnel."



When asked to explain his responsibilities as a trustee, Mr. Vandemark replies, "As a trustee, it is our job to control and oversee the care of our residents and businesses within our township. We make sure that we offer high-quality safety services, our roads are well maintained, yet working at staying within a financially balanced budget."

He adds, "I have enjoyed meeting and working with various people throughout the years and looking back and seeing what we have accomplished – bringing American Township to a level that businesses and residents are proud to call this home."

In 2020, American Township became an OTARMA Member. When asked what led to the decision to select OTARMA for property and liability coverage and risk management services, Mr. Vandemark explains, "American Township selected OTARMA for what they have to offer. They were able to bring more coverage for the same or even a little less than what we were previously paying."

To another township that might be considering OTARMA, he advises, "I would encourage other townships to take a long and serious look into comparing OTARMA to their present insurance coverage. I would think they would see the difference."

For more information about American Township, please visit <https://www.amertwp.us/>.



OTARMA WELCOMES NEW RISK CONTROL CONSULTANT MIKE CHARBACK

Today, more than 1,040 Ohio townships enjoy the benefits of OTARMA and are well acquainted with the stability, security, and peace of mind OTARMA provides. Formed in 1987, OTARMA is endorsed by the Ohio Township Association and provides townships with the broadest coverage available in Ohio, the best claims and risk management services, most stable pricing, and the most professional and helpful service providers.

OTARMA is committed to offering members personal attention and customized coverage specific to the unique needs of Ohio townships. The OTARMA Service Team is here to serve all existing OTARMA Members and welcome new members. Therefore, the Risk Control Team is please to introduce Mike Charback. You are most likely going to meet Mike at your township office. As an OTARMA Risk Control Consultant, Mike is responsible for providing onsite risk control assessments for OTARMA Members throughout the state of Ohio. Mike's focus is delivering exceptional



Mike Charback

customer service to members while providing risk management recommendations to help mitigate the liability exposures that often lead to costly claims.

Mike is a graduate of Illinois State University with a degree in Business Administration. Mike worked in life and health insurance for State Farm for 41 years in various roles, including Claim Leadership. Additionally, Mike worked extensively in the corporate business risk review process. Mike earned and held both the Chartered Financial Consultant and Chartered Life Underwriter designations during his career.

In his spare time, Mike is very handy and enjoys carpentry work, which he put to good use when he did a full rehabilitation on two houses recently. Mike also loves the outdoors, and backpacking is one of his favorite activities. In fact, over the last 23 years, Mike and his closest friends have backpacked 19 state and national parks across the United States and Canada. The love of outdoors takes Mike and his family on RV trips to campsites in Ohio and across the country. Let's welcome Mike to OTARMA.

COVERAGE CORNER - GREEN COVERAGE

There may be more benefits than you realize to "going green."

As a pool member, you are provided a property extension that adds coverage for the increased cost of repairing or replacing covered property damaged by a covered cause of loss using materials and methods that are recognized as being "green." For example, a member may replace the physically damaged portions of its insured roof and go green with a vegetative roof.

Besides this additional coverage, some further benefits of going green may include:

Environmental Benefits

- Enhance and protect biodiversity and ecosystems
- Improve air and water quality
- Reduce waste streams
- Conserve and restore natural resources

Economic Benefits

- Reduce operating costs
- Create, expand and shape markets for green products and services
- Optimize life-cycle economic performance

Social Benefits

- Enhance occupants' comfort and health
- Heighten aesthetic qualities
- Minimize strain on local infrastructure
- Improve overall quality of life



OTARMA BOARD OF DIRECTORS: STEADFAST LEADERSHIP FOR ITS MEMBERSHIP

Ohio Township Association Risk Management Authority (OTARMA) has provided property and liability coverage and risk management services to OTARMA Members for over three decades. Founded in 1987, OTARMA has grown to serve more than 1,040 member townships with an impressive 99% retention rate.

In addition to a loyal membership and the support provided by skilled service providers, much of OTARMA's success can be attributed to the steadfast leadership exhibited by the OTARMA Board of Directors.

The OTARMA Board of Directors is accountable for the program's oversight and governance. The Board consists of the Ohio Township Association (OTA) Executive Director, President, and Insurance Committee Chairperson and four township officials, which are elected by the majority vote of the membership. Excluding the OTA positions, no more than one Director may be a township administrator.

In 2020, the OTARMA Board of Directors welcomed Ms. Heidi M. Fought as the OTA Executive Director and Mr. Ed Huff, Jr., as the OTA Insurance Committee Chair. Mr. Tim Lynch previously held a seat on the OTARMA Board and returned in 2020 to serve in his new capacity as the OTA President.

Upon the completion of Ms. Joyce Fetzter's two-year term serving as the OTARMA Board Chair in April of this year, Ms. Marsha Funk became the OTARMA Board Chair;

OTARMA's Board of Directors



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Stark County



Nick Schwab
Board Member
Reily Township,
Butler County



Ed Huff, Jr.
Board Member
Brown Township,
Darke County

Philip Cox, the Vice-Chair; and Tim Lynch, the Secretary. Upon concluding her service as OTARMA Chair, Ms. Fetzter stated, "It has been my pleasure to serve as your OTARMA Board Chair over the past two years. I am thankful to have served with our dedicated Board of Directors. Together, with our Service Team, we consistently and collaboratively provide our membership with programs and services, which offer our members the tools and resources they need to best serve their own team and community members."

The OTARMA Board of Directors and Officers are:

Marsha Funk, Chair

Philip Cox, Vice-Chair

Tim Lynch, Secretary

Heidi M. Fought

Joyce Fetzter

Nick Schwab

Ed Huff, Jr.

The partnership between OTARMA and the OTA distinguishes itself by its longevity and commitment to work together on behalf of Ohio townships. OTARMA looks forward to continued success, long-term strength, stability, industry-leading coverages, and risk management solutions for existing and prospective members.

For more information about OTARMA, go to www.OTARMA.org. Or contact an OTARMA Representative at (800) 748-0554.



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Newsletters are available for viewing and printing at www.OTARMA.org.

OTARMA WELCOMES NEW MEMBERS

American Township, Allen County

American Township is one of 12 townships in Allen County and is in the northwestern part of the state of Ohio. American Township was named German Township until 1918, when the township's citizens successfully petitioned for the name change. Better coverage with enhanced services and property appraisals convinced the township to join OTARMA.



Liberty Township, Washington County

Liberty Township in Washington County is in southeast Ohio. There are approximately 600 residents. The county, named for George Washington, is the oldest in the state. Liberty Township joined OTARMA for price, benefits, and services.



Belpre Township, Washington County

Belpre Township is one of 22 townships in Washington County and is in southeast Ohio, along the Ohio River. The population is approximately 3,800. The name Belpre was derived from the French word for "beautiful meadow." The township joined the OTARMA Program for increased coverage and OTARMA's expertise and experience serving Ohio townships.



Madison Township, Licking County

Madison Township, in Licking County, is located approximately 46 miles northeast of Columbus. The township has approximately 3,400 residents. Better coverage, enhanced services, and the grant programs convinced the township to join OTARMA.



Bethel Township, Clark County

Bethel Township is one of ten townships in Clark County. It is conveniently located about 15 miles northeast of Dayton. The population is nearly 18,000. The township joined OTARMA for improved coverage at a lower cost.



Unity Township, Columbiana County

Unity Township, with approximately 10,000 residents, is one of 18 townships in Columbiana County. The county is in East Ohio and was named after Christopher Columbus. One city (a section of the City of Columbiana) and two villages are in Unity Township. The township joined OTARMA for improved coverage and price.



If your township is not yet an OTARMA Member, we invite you to consider joining.

Please contact us at (800) 748-0554 and ask to speak with an OTARMA Representative. We welcome the opportunity to meet with you, learn more about your township, and discuss how OTARMA can best serve you.