

Mandatory Retirement of Partners

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There is no question but that “[w]ith so many baby boomers reaching traditional retirement age, retirement policies are probably one of the biggest issues facing law firms today.”¹ The same is true of partnerships beyond law firms such as the accounting and medical firms that are included in the more than 2 million businesses that are organized as partnerships in the United States.² The significance of the partnership business form is that mandatory retirement of partners based on age is permissible because, as employers, partners do not fall within the coverage of the Age Discrimination in Employment Act of 1967, as amended (the “ADEA”)³ or, for that matter, the other antidiscrimination laws. However, as noted in *Caruso v. Peat, Marwick, Mitchell & Co.*, “if the partner’s or principal’s duties closely resemble those of a salaried employee, with only limited decision-making responsibilities, his title alone will not defeat an ADEA claim.”⁴

Partnerships have been increasingly compelled to defend policies and practices that mandate retirement of older partners or otherwise use age as a factor. For example, in 2007, a law firm partnership, Winston & Strawn LLP, settled a suit challenging various aspects of its alleged “decompression” policy, which reduced partners’ pay after age 65.⁵ In the same year, another law firm partnership, Sidley Austin LLP, paid \$27.5 million to settle a well-publicized suit that the EEOC had brought on behalf of 32 former partners who had been demoted to counsel allegedly on the basis of age.⁶ Recently, in January 2010, the EEOC filed a lawsuit against yet another law firm partnership, Kelley Drye & Warren LLP, challenging alleged mandatory retirement of partners at age 70.⁷

This article will focus on the key employment law issues involved in mandatory retirement of partners.⁸

Partners as De Facto Employees?

The ADEA, and the other discrimination laws, protect “employees” from employment discrimination.⁹ However, “Congress managed to produce a piece of legislation which, on its face at least, fails to provide a workable definition for a key term,” because, as in Title VII and other laws, “‘employee’ is defined in the ADEA simply as ‘an individual employed by any employer.’”¹⁰ This “circular” definition “has spawned much litigation,”¹¹ with *Kelley Drye* only the latest in a long line of cases as to whether an individual denominated other than as an “employee” will be found to be a de facto employee. “For some time after the enactment of Title VII and the ADEA, courts assumed that the statutes did not apply to partners.”¹² Indeed, in the first significant ADEA cases involving partner-plaintiffs, courts applied a “*per se* rule” barring partners, who by definition “own and manage a business,” from proceeding as protected “employees.”¹³ “Over time, the *per se* rule lost favor to an economic realities test.”¹⁴ Under this more flexible test, courts analyzed factors such as how the partner was compensated, whether the partner had “management authority and to what extent that authority [could] be exercised, ... the amount of control the purported employer exercises over the individual’s work,” “the organization and character of the employer’s business, the employer’s [personnel] practices, performance and reward criteria, the worker’s ability to hire other workers, and the bargaining power of the worker vis-à-vis the employer.”¹⁵ Some courts applying the economic realities test also focused on “whether the employer’s control of employment opportunities places the worker in a position of dependency on the employer which may expose the worker to discriminatory conduct.”¹⁶

The courts generally favored the economic realities test until 2000, when the EEOC issued its Compliance

Manual,¹⁷ which remains in force today. The EEOC's Compliance Manual notes that "in most circumstances, individuals who are partners . . . will not qualify as employees,"¹⁸ but provides that "an individual's title . . . does not determine whether the individual is a partner . . . as opposed to an employee."¹⁹ The EEOC Compliance Manual calls for a determination as to "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control. If the individual is subject to the organization's control, s/he is an employee."²⁰ In making this determination, the EEOC considers: (1) whether the organization can hire or fire the individual or set the rules of the individual's work; (2) whether and to what extent the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and 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 an agreement; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.²¹

The search for a workable definition of "employee" did not reach the Supreme Court until 2003. In *Clackamas Gastroenterology Associates, P.C. v. Wells*,²² the Court rejected the formerly prominent *per se* and economic realities tests. Instead, the Court adopted the EEOC's six factors and buttressed them by finding that "the common law element of control is the principal guidepost that should be followed."²³ In doing so, *Clackamas* "made clear that neither an entity's status as a 'partnership' nor an individual's designation as a 'partner' would automatically bar the partner from bringing a discrimination claim against the firm under federal law."²⁴

Clackamas raised eyebrows among law firms, not least because Justice Stevens, writing for the majority, specifically noted that modern partnerships can have "hundreds of members," "where control is concentrated in a small number of managing partners."²⁵ This dictum did not have to wait long for an influential ruling applying *Clackamas* to the law firm context. In 1999, the law firm partnership Sidley Austin demoted 32 of its older equity partners to "counsel" or "senior counsel" positions.²⁶ The EEOC charged the Sidley partnership with having violated the ADEA by doing so. In its investigation, the EEOC issued a subpoena, with which the Sidley partnership refused to comply in part, arguing that "it had given the Commission enough information to show that before their demotion the 32 had been 'real' partners and so there was no basis for the Commission to continue its investigation."²⁷ The district court enforced the EEOC's subpoena and the Sidley partnership appealed to the Seventh Circuit.²⁸ Judge Posner observed that the Sidley partnership was "controlled by a self-perpetuating executive committee," and that the demoted partners' "own status [was] at the committee's mercy."²⁹ Noting several other features of the Sidley partnership that could lead a court to deem the demotees protected employees, the Seventh Circuit ordered the Sidley partnership to comply with the portion of the subpoena it had challenged.³⁰

In 2007, before a decision was reached on the merits, the Sidley partnership paid \$27.5 million to settle the suit.³¹ Following the Sidley partnership settlement, the American Bar Association adopted a recommendation that law firms discontinue the use of mandatory retirement policies, calling them an "unacceptable practice" that is "unwarranted and unwise."³² Quoting extensively from the *Clackamas* and *Sidley* decisions, the ABA recommendation cautioned that "until recently, the [mandatory] retirement of law firm partners widely was regarded as lawful and outside the permissible scope of review by [the EEOC] and the courts," but the *Sidley* case had "caused the legal profession to sit up and take notice, and to consider whether established assumptions regarding the inapplicability of certain civil rights protections to partners . . . need to be reexamined."

Even If A De Facto Employee, Is A "Partner" A Bona Fide Executive Or High Policymaker?

If a partner is found to be a de facto employee, the ADEA inquiry into mandatory retirement may not end there. Neither the *Clackamas* nor *Sidley* decisions had occasion to consider that the ADEA exempts from its protection "compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position," as long as the executive or high policymaker is entitled to an immediate retirement benefit plan worth at least \$44,000.³³

Employers are afforded little wiggle room in asserting the bona fide executive/high policymaker exemption. The Code of Federal Regulations provides that this exemption "must be narrowly construed,"

and places the burden on the employer to show “that every element has been clearly and unmistakably met.”³⁴ This exemption applies “only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business.”³⁵ Whether a particular de facto employee titled partner would qualify for the bona fide executive/high policymaker exemption would necessarily be a fact-specific inquiry. A bona fide executive is defined as one who makes at least \$455 per week, whose primary duty is management of a business or subdivision, who customarily and regularly directs the work of at least two subordinates, and who has the authority to hire or fire employees or make personnel recommendations that are given particular weight.³⁶ “[C]ertain top level employees” who are not bona fide executives may nevertheless be in high policymaking positions if the “position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.”³⁷

No reported decision has considered whether a de facto employee’s mandatory retirement from a partnership was exempt from ADEA protection on the basis that he/she was a bona fide executive or high policymaker³⁸. At least two courts, however, have declined to apply the bona fide executive/high policymaker exemption to the retirement of in-house attorneys.³⁹ In *Whittlesey v. Union Carbide Corp.*, the seminal case construing this exemption, a Southern District of New York court found that while the plaintiff, an in-house Chief Labor Counsel of a large corporation, “had some administrative or executive responsibility over the functioning of his small section[,] his supervisory duties nevertheless were quite minimal and occupied a very small portion of his time.” The court “rejected the argument that Whittlesey’s high salary and title of chief labor counsel automatically removed him from coverage” as a bona fide executive.⁴⁰ A Northern District of Illinois court, following *Whittlesey*, likewise denied application of this exemption to the retirement of a “[p]laintiff [who] was primarily an attorney doing legal work, and not a high policymaking employee.”⁴¹

Even If A De Facto Employee, Has The “Partner” Waived ADEA Rights?

Unlike some other protected rights, ADEA rights can be waived.⁴² The question then becomes whether a partnership can effect such a waiver by having its partners, whether de facto employees or not, sign partnership or other agreements providing for mandatory retirements at a certain age. This appears at first blush not to be possible because Section 7(f)(1)(C) of the ADEA prohibits the waiver of rights or claims that arise following the execution of the waiver.⁴³ However, the EEOC’s regulations provide that ADEA Section 7(f)(1)(C) “does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcements of agreements to perform future employment-related actions such as the employee’s agreement to retire or otherwise terminate employment at a future date.”⁴⁴ The other statutory requirements to which the EEOC regulations refer are contained in the Older Workers Benefit Protection Act (OWBPA),⁴⁵ and include, *inter alia*, the requirement that the waiver must be “knowing and voluntary.”⁴⁶ Query whether a “partner” who signed such a waiver at the commencement of partnership would be able to successfully argue that it was not “knowing” because the putative partner signed thinking that he/she would be a real partner but turned out to be a de facto employee? Aside from the fact that courts do not always defer to EEOC regulations⁴⁷ it would come as no great surprise if the EEOC decided to change its mind and reverse its position in new regulations regarding waiver of future rights if partnerships defended mandatory retirement of de facto employees on the basis of such waivers.⁴⁸

Conclusion

As baby boomer partners come to what previously was considered to be retirement age, litigation challenging the mandatory retirement of partners is likely to be more frequent. Partnerships would be wise to focus now on whether it is important to keep mandatory retirement if they already have it in place. If so, partnerships have two choices: shore up waivers and hope that they will stick or; take a careful look to ensure that their “partners” will qualify as such and, if not, make the necessary changes. The latter would be the safer course of action.

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1. Ammet Sachdev, EEOC Sues Law Firm for Age Discrimination, Chicago Tribune, February 2, 2010.
 2. See U.S. Bureau of Census, Statistical Abstract of the United States, tbl. 726 (2009).
 3. 29 U.S.C. Sec. 621, et seq.
 4. 717 F. Supp. 218, 220 (S.D.N.Y. 1989).
 5. Marc Tracy, Winston & Strawn, Partner Settle Salary Suit, Law 360, Nov. 20, 2007, at <http://www.law360.com/articles/40639>.
 6. Anthony Lin, Sidley Austin Settles Age Bias Suit; No Determination of Merits, N.Y. L.J., Oct. 8, 2007, at <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1191834192615>.
 7. *EEOC v. Kelley Drye & Warren, LLP*, No. 10 Civ. 0655 (S.D.N.Y. 2010) (Swain, J.).
 8. A forthcoming article by the same contributors in Bloomberg Law Reports – Law Firm Management will focus on mandatory retirement of law firm partners.
 9. See, e.g., 29 U.S.C. sec. 623 (2010).
 10. Peter J. Prettyman, Note, How to Discriminate Against Old Lawyers: The Status of Partners, Shareholders, and Members Under the Age Discrimination in Employment Act with Addendum Discussing *Clackamas Gastroenterology Associates, P.C. v. Wells*, 37 Ind. L. Rev. 545, 546 (2004) (citing 29 U.S.C. § 630(f)).
 11. Allan Haguewood, Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies, 51 Vand. L. Rev. 429, 436 (1998).
 12. Joel Bannister, In Search of a Title: When Should Partners Be Considered “Employees” for Purposes of Federal Employment Antidiscrimination Statutes?, 53 Kan. L. Rev. 257, 263 (2004).
 13. Haguewood, Gray Power, at 439. The early “per se rule” cases include: *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977); *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982).
 14. Bannister, In Search of a Title, at 264.
 15. Prettyman, How to Discriminate, at 558 (citing *Schmidt v. Ottawa Med. Ctr., P.C.*, 155 F. Supp. 2d 919 (N.D. Ill. 2001) and *Fountain v. Melcalf, Zima & Co.*, 925 F.2d 1398 (11th Cir. 1991); David R. Strass, Comment - An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected from Discriminatory Employment Practices, 47 Kan. L. Rev. 239, 249 (1998).
 16. Troy D. Ferguson, Comment - Partners as Employees Under the Federal Employment Discrimination Statutes: Are the Roles of Partner and Employee Mutually Exclusive?, 42 U. Miami L. Rev. 699 (1988).
 17. Equal Employment Opportunity Commission, EEOC Compliance Manual, § 2-III(A)(1)(d) (2000).
 18. *Id.*
 19. *Id.*
 20. *Id.*
 21. *Id.*
 22. 538 U.S. 440 (2003).
 23. *Id.* at 448.
 24. Fink, A Crumbling Pyramid, at 42.
 25. *Clackamas*, 538 U.S. at 446.
 26. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002).
 27. *Id.* at 698-99.
 28. *EEOC v. Sidley & Austin*, 315 F.3d 696 (7th Cir. 2002).
 29. *Id.* at 699.
 30. *Id.* at 707.
 31. Anthony Lin, Sidley Austin Settles Age Bias Suit; No Determination of Merits, N.Y. L.J., Oct. 8, 2007, at <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1191834192615>.
 32. American Bar Association House of Delegates, Daily J., Aug. 13-14, 2007, Report 10A at 11-12, available at <http://www.abanet.org/leadership/2007/annual/dailyjournal.doc>.
 33. 29 U.S.C. § 631(c)(1) (2010).
 34. 29 C.F.R. § 1625.12 (2010).
 35. *Id.* at (d)(2).
 36. General rule for executive employees, 29 C.F.R. § 541.100 (2010).
 37. 29 C.F.R. § 1625.12(e).

38. On its face, this inquiry may appear counterintuitive on the basis that if a denominated partner does not even rise to that title but, rather, is found to be a de facto employee, how could such an individual qualify as a bona fide executive or high policymaker? However, an individual, such as an Executive Director of a partnership, for example, could qualify by playing a significant role in the development and implementation of partnership policy and/or managing the partnership and having other executive authority.
39. *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320 (S.D.N.Y. 1983), *aff'd* 742 F.2d 724 (2d Cir. 1984); *see also*, *Rand v. CF Indus.*, 797 F. Supp. 643 (N.D. Ill. 1992).
40. *Whittlesey*, 742 F.2d at 726.
41. *Stinneford*, 845 F. Supp. at 1246.
42. See 29 U.S.C. § 626(f) (Waiver).
43. See 29 U.S.C. § 626(f)(1)(C).
44. 29 C.F.R. § 1625.22(a)(c) (2010) (“Waiver of future rights”).
45. 29 U.S.C. § 626(f) (2010).
46. See 29 U.S.C. § 626(f)(1) (2010). It could be argued that the OWBPA would be inapplicable if the waiver was signed when the “partner” was under 40. This argument would likely be unavailing because the challenge would be brought to mandatory retirement over the age of 40 and, hence, the OWPBA would be applicable.
47. *E.g.*, *EEOC v. Beauty Enters.*, No. 3:01CV378, Docket Entry 161 (D. Conn. Oct. 25, 2005).
48. *E.g.*, 29 C.F.R. § 1625.32 (“Coordination of retiree health benefits with Medicare and State health benefits”) (the EEOC reversing its previous position).

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