

Insights, News & Events

NBA COMMISSIONER'S COMMENTS ON OLDER COACHES IS A LESSON TO ALL EMPLOYERS RETURNING TO WORK

Insights
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The National Basketball Association made national headlines last week by announcing its season would resume later this summer. That same night, league commissioner Adam Silver also garnered national attention – and criticism – when he said that older coaches may not be able to sit with their teams on the sidelines during games. In an interview on TNT's "Inside the NBA," Silver said that "some older coaches may not be able to be the bench coach in order to protect them."

Silver's comments immediately drew criticism, including from one of the "older coaches," 65-year-old Alvin Gentry, the coach of the New Orleans Pelicans. "That doesn't make sense. How can I coach that way?" [Gentry told ESPN's Ramona Shelbourne](#), adding that he does not think that older coaches should be "singled out."

As noted in one of [our firm's recent newsletter articles](#), a recent AARP study found that individuals 65 or older comprised 19.3% of the U.S. workforce. Employers are understandably concerned about their older employees, considering that the Centers for Disease Control and Prevention (CDC) has reported that 80% of COVID-19-related deaths reported in the U.S. have been in adults 65 years of age and older.

The controversy around Silver's comments, however, should be a lesson for employers who are trying to figure out how to return to work safely. Trying to "protect" older employees may leave employers susceptible to age discrimination lawsuits.

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WHAT LAW APPLIES?

On the federal level, the Age Discrimination in Employment Act (ADEA) provides protection for applicants and employees who are 40 years of age or older from age-based employment discrimination by certain employers.

Specifically, the ADEA makes it unlawful for employers to discriminate against an individual because of their age with respect to any term, condition, or privilege of employment, to harass an employee because of their age, or to retaliate against an individual for opposing employment practices that are discriminatory on the basis of age. State and local laws and regulations may provide additional or greater protections.

Given this legal landscape, you need to avoid enacting policies, implementing procedures, or otherwise taking actions that disfavor older employees, such as requiring them to work from home while other employees return to work, work in a different area of your location, take lunch or breaks separately, undergo testing, or take other precautionary measures not required of all employees. You may, however, *favor* older employees based upon their age under the ADEA. For example, a policy providing older workers the opportunity to work remotely, if they wish, would not violate the ADEA. Similarly, you may elect to grant older workers' requests to work remotely even if you deny similar requests from younger employees.

WHAT SHOULD YOU DO TO AVOID LEGAL LIABILITY?

The CDC [says you should](#) consider implementing the following strategies to protect employees who may be at higher risk of illness:

- Permitting telework and developing other social distancing practices;
- Actively encouraging employees to stay home when sick;
- Promoting handwashing; and
- Providing supplies and appropriate personal protective equipment (PPE) for cleaning and disinfecting workspaces.

The EEOC has also weighed in on this topic, specifically stating that employers may not "postpone the start date or

withdraw a job offer because the individual is 65 years old," but noting that employers may "choose to allow telework or . . . discuss with these individuals if they would like to postpone the start date." The EEOC [also recently noted](#) that "[t]he ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19." The agency also stated that the ADEA does not prohibit employers from providing flexibility to workers age 65 and older, "even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison."

You should be aware of the operation of these laws and this guidance as you consider plans to return to work. First, you should develop return to work plans and policies that do not *disadvantage* employees based upon age. Second, you should be aware that managers or Human Resources personnel may be inclined to "protect" older employees – but such well-meaning attitudes can lead to behaviors that unwittingly lead to ADEA violations. For this reason, you should consider implementing additional training for managers or Human Resources personnel regarding age discrimination.

Finally, at a minimum, you should remind all employees about your policies against discrimination, harassment, and retaliation on the basis of protected characteristics. Now is a perfect time to offer all-employee training sessions or redistribute your existing policies.

CONCLUSION

NBA coach Rick Carlisle's response to Silver's comments is a good example of what companies' mindsets should be as they return employees to work: "The health and safety of our coaches is first and foremost. It's entirely possible that an NBA coach in his 60's or 70's could be healthier than someone in their 30's or 40's. The conversation should never be solely about a person's age."

You should beware of using employees' ages or other protected characteristics as considerations when returning employees to work. You will want to consult with your employment counsel to develop a legally compliant return-

to-work plan, craft workplace policies, and train employees to handle potential age bias.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.