A.S.A.P.™

A LITTLER MENDELSON TIME SENSITIVE NEWSLETTER

IN THIS ISSUE

MARCH 2004

The Supreme Court Has Definitively Ruled That the ADEA Is Designed to Protect Relatively Older Workers Against Practices That Favor the Relatively Young, and Not the Other Way Around.

CLOUD OF DOUBT REGARDING "REVERSE AGE DISCRIMINATION" BLOWN AWAY: SUPREME COURT RULES THAT ADEA DOES NOT PROHIBIT PRACTICES FAVORING "OLDER" EMPLOYEES

By Steven J. Friedman

In a decision that will be welcomed by employers and many older workers alike, the U.S. Supreme Court recently ruled that the Federal Age Discrimination in Employment Act ("ADEA") does not prohibit favoring relatively older employees over relatively younger employees, even when those younger employees are within the protected age group (age 40 and older). Under the Court's decision, federal law generally would not preclude certain practices that favor older employees, such as enhanced early retirement programs that are made available only to employees who have attained a certain age (for example, 50 or 55) to the exclusion of younger employees, including younger employees within the protected age group. The decision is important because it removes a cloud of doubt that had been hanging over employers attempting to implement such programs since the U.S. Court of Appeals for the Sixth Circuit broke from the historical reading of the ADEA to conclude that distinctions between individuals within the protected age group were unlawful, even if they favored the older employees.

THE *CLINE* STORY

In *General Dynamics Land Systems Inc. v. Cline*, a group of employees between the ages of 40 and 49 – and thus within the age group protected under the ADEA – challenged a collective bargaining agreement that limited the availability of retiree health benefits to those employees who were 50 or older at the time of the agreement. The plaintiffs' age discrimination claim was initially dismissed by a federal district court, but the Sixth Circuit reversed and reinstated the claim, holding that the ADEA's "plain meaning" was to prohibit discrimination against all persons 40 and older on the basis of age, regardless of whether the younger or older employee within the group got the benefit of the employer's action. The Sixth Circuit relied, in part, on an EEOC regulation that prevented employers from discriminating against individuals age 40 and over, regardless of whether more favorable treatment was accorded to older employees within the protected group. The Supreme Court rejected the Sixth Circuit's interpretation and stated that the EEOC regulation was "clearly wrong." According to the Court, the ADEA is clearly intended to prohibit discrimination against individuals within the protected age group on the basis of relatively older age and "reverse age discrimination" claims of the sort advanced by the plaintiffs in *Cline* are not within the scope of the Act.

WHAT DOES THIS MEAN FOR EMPLOYERS?

The *Cline* decision validates the understanding most employers had been operating under prior to the Sixth Circuit's ruling in 2002 – that, under

federal law, age discrimination against "older" employees within the protected age group is prohibited and preferences favoring relatively "younger" employees are what run afoul of federal law. Under that approach, as confirmed by *Cline*, employers have more flexibility to design programs that benefit employees who are closest to retirement. This flexibility carries with it a lower likelihood of class action age discrimination litigation – like that filed by the plaintiffs in *Cline* – challenging such programs. Such programs include not only early retirement incentive programs but also retiree medical programs, which are often available only to those who terminate employment after reaching a certain age. In addition, many employers who sponsor retirement plans and retiree medical programs have sought to freeze or eliminate such benefits in an effort to reduce costs. To minimize the impact of such changes on those closest to retirement, employers often will provide for a group of those employees closest to retirement the option of being able to continue to participate in these plans or programs even as they become unavailable to others.

A WORD OF CAUTION

Employers should be aware, however, that the full impact of the *Cline* decision is not yet entirely clear and that some age-based actions might be beyond the logical scope of the ruling. In addition, it is extremely important that employers understand state anti-discrimination laws as well as federal law. After *Cline*, state legislation may take on a more important role in shaping an employer's conduct – several states have enacted statutes specifically prohibiting "reverse age discrimination," and employers operating in those states should be wary of taking action that, though lawful under federal law, would violate state anti-discrimination provisions. Employers operating in multiple states should be particularly cautious and ensure compliance with all of the various state laws that regulate their actions. Plans and programs covered by ERISA will best protected by the *Cline* decision, as state laws generally will be preempted. However, ERISA carries with it other concerns such as periodic nondiscrimination testing which may be problematic if the older employees who are receiving better benefits are also the highest paid. Employers should carefully assess all of these concerns.

The attorneys of Littler Mendelson are experienced in advising and defending employers in connection with all areas of employment and labor law, and we have attorneys with particular expertise in the areas of age discrimination litigation, class action litigation, employee benefit/retirement programs, and benefits litigation.

Steven J. Friedman is the Employee Benefits Practice Group Chair and a shareholder in Littler Mendelson's New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or sfriedman@littler.com.