



# The Nuances of Age Discrimination

**Urgent message:** As the United States learns to support an aging workforce, understanding the nuances of age discrimination can help urgent care practices to be fair and diverse workplaces that avoid potential legal pitfalls.

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*"Lori's been here since dinosaurs roamed the earth—she'll know where it's at."<sup>1</sup>*

That type of comment may land you and your urgent care in court. By 2024, workers who are age 55 and older will represent a quarter of the nation's workforce, with the fastest annual growth rates among those aged 65 and older.<sup>2</sup> That means the status of older workers, and how they are treated, will become more of a concern for urgent care owners and managers.

A 2019 study found that ageism creates a number of issues for employers, such as discrimination litigation, demotivated employees, and the lost opportunity costs associated with devaluing older workers.<sup>3</sup> The study showed that 67% of surveyed workers aged 40-65 plan to continue to work after they reach age 66.<sup>3</sup>

This article will look at age discrimination and how you can avoid claims in your business.

## What Is the ADEA and How Does It Apply to Employers?

The Age Discrimination in Employment Act of 1967 (ADEA) and of 1975<sup>4</sup> prohibit employers from discriminating against applicants and employees who are age 40 or older in aspects of their employment.

Under the ADEA, it's unlawful to discriminate against a person because of his or her age with respect to "any term, condition, or privilege of employment."<sup>5</sup> This includes hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

Note that it's not illegal for an employer to favor an older worker over a younger one, even if both are age 40 or older.<sup>6</sup>

This federal law applies to any employer who has 20 or more employees. However, some states' laws make



age discrimination applicable to even smaller businesses or to all businesses within the state.<sup>7,8</sup>

Note that it's also unlawful to *retaliate* against a person for opposing employment practices that discriminate based on age or for pursuing an age discrimination charge, testifying, or participating in any manner in an investigation, proceeding, or litigation under the ADEA.<sup>7</sup>

An applicant or employee bringing an action under the ADEA has the burden of proof to show that his or her age was the "but-for reason" for the illegal discrimination.<sup>9</sup> A plaintiff may prove a violation by either direct or circumstantial evidence.<sup>9</sup> Direct evidence of employment discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a *motivating factor in the employer's actions*."<sup>10,11</sup>

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Circumstantial evidence is proof that doesn't "on its face establish discriminatory animus, but does allow a fact finder to draw a reasonable inference that discrimination occurred."<sup>12,13</sup>

### What Do Urgent Care Providers Need to Know About Age Discrimination?

Age discrimination can easily arise in the urgent care setting.

For example, you hire a 42-year-old to replace a 35-year-old who resigned from an executive position. A year later, the urgent care eliminated the now 43-year-old's position as part of a larger downsizing because the work she was doing was unnecessary and redundant. However, younger individuals were later hired in the department in different positions at a lower pay grade than the eliminated employee. The 43-year-old woman files an EEOC claim alleging age discrimination against your company.

Or...a 62-year-old regional manager with a high school diploma but many years of experience in the position is terminated after 1 year for poor performance. The position is subsequently posted with no age qualifications. A highly qualified candidate—age 27 with an MBA—is hired to replace him. The man who was fired sues for wrongful termination in age discrimination.

These situations can arise easily, and the best way to handle them is to avoid them in the first place. That requires a concerted effort by management to create a work environment that is diverse and inclusive.

The next section will examine the ways that an urgent care operator can address and avoid age discrimination.

### How Can Urgent Care Centers Avoid Age Discrimination Claims?

The number of age-related discrimination charges filed with employers and the EEOC by employees who were age 65+ doubled from 1990 to 2017.<sup>14</sup> There were 18,376 cases in 2017.<sup>14</sup>

Most urgent cares don't have any age criteria for their positions. Many positions require some specific education or training, such as a doctor, physician assistant, medical assistant, or licensed practical nurse. Support staff, such as those at the registration desk, may need clerical training or computer skills. Thus, age should not play a role in any hiring decision. The qualifications for the specific position should be the main concern, along with clean licensure and relevant experience.

While some factors may favor certain age groups over others, the objective criteria should be the primary

focus. It shouldn't matter if you have a 60-year-old ER doctor or a 49-year-old nurse practitioner—the key is if they're qualified for the position in hiring and adequately perform once on board.

With that said, here are some tips to avoid age discrimination in your urgent care:

#### Keep a Diverse Workforce

Your hiring managers may have an implicit bias, a tendency to hire people who are similar to themselves without realizing it. Make certain that these individuals are trained to hire based on an applicant's qualifications for a particular job.<sup>15</sup> In addition, managers may look for a new person to "gel" and be a "good fit" with the existing staff. While we all want to work with "fun" people, this gets into subjective criteria which are harder to define—and *harder to defend*.

You don't know if a 60-year-old ER doctor or 49-year-old nurse practitioner won't like working with staff, so it shouldn't disqualify the candidate from fair consideration. If this occurs, it may be discrimination based on age. Hiring decisions should be based on facts (experience, certifications, degrees, etc.) rather than assumptions.

#### Review Your Job Descriptions

If you have a position at your urgent care requiring "soft skills," be aware of how you describe those skills. Words like "energetic," "spirited," or "tech-savvy" in a job description may raise red flags for a discriminatory practice. Of course, "young" is out of the question.

As an alternative, try words like "motivated" or "dedicated" that convey a candidate's passion and work ethic without the association with a requirement that they be young to do the job.

If you're having a hard time with the job description, it's a sign that you should abandon trying to determine what "type" of person would best fit the role and simply describe the role that needs to be filled.

#### Scrutinize Your Job Application Process

Determine the information you absolutely need to have on your job applications. For example, is there a reason you must know the year they graduated from high school or college? Older candidates can also see this as a red flag that age rather than qualifications is a determining factor in job seekers. This may negatively impact your reputation and deprive you of some great talent.

Ask more specific questions on your job applications and in interviews. For example, for an in-take position, you might ask if a candidate can use a particular soft-

ware program and what applications they used at their last position.<sup>15</sup>

Refrain from requesting unnecessary information. If an applicant or employee files an age discrimination claim, this can be used as evidence that your hiring manager and your practices place an emphasis on a candidate's age and that it influences their hiring decisions. Develop structured interview outlines for consistency. That way, every applicant will be asked the same questions.

### Eliminate Stereotypes

"You can't teach an old dog new tricks." Don't assume an employee can't keep up with new technology or new procedures because of his or her age.

In the same manner, know the retirement rules. People quickly get into trouble by assuming that because someone's older, they're ready for retirement. That's another stereotype. We're living longer, and today's workers today often stay in their jobs well after the Social Security retirement age. You generally can't force an employee to retire, and inquiring about their plans to retire is wrong.<sup>16</sup>

### Set an Example and Be Aware of Your Speech

You don't want to call that 60-year-old doctor or 49-year-old nurse practitioner "old." But in addition, you need to avoid making disparaging comments. A "playful" or "good-natured" comment can fuel your employees to do the same, creating an environment of age-based harassment.

In a recent employment discrimination lawsuit, one employee asked the plaintiff, "Back in the day, did you sell chariots?"<sup>17</sup> And at a small birthday celebration in that same case, another employee asked the 59-year-old plaintiff, "How old are you now, 70?"<sup>18</sup>

In another case, a manager described an older employee as having a "limited shelf life" and noted that she had reached her "expiration date."<sup>19</sup>

These comments could have the potential to make older employees feel discriminated against. You should foster an inclusive environment for all employees and avoid these types of comments.

### Takeaway

Don't tolerate discrimination of any kind at your urgent care.

Provide training on implicit bias, discrimination, and workplace harassment, and create a comprehensive age discrimination policy that includes an emphasis on skills and performance, as well as fair guidelines for eval-

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uating job candidates.

Further, implement a zero-tolerance antidiscrimination and harassment policy at your urgent care and provide guidelines and expectations concerning inclusiveness. Treat all employees—regardless of age—in the same manner.<sup>20</sup>

It's critical to note that smaller businesses with between 10 and 99 employees have had the highest reported discrimination claim rates.<sup>21</sup> And even if an age discrimination plaintiff loses at trial, you and your company will have been impacted on numerous levels, including productivity, expense, and reputation. ■

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