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IS MANDATORY RETIREMENT A FADING RELIC?

By Peter A. Giuliani

While businesses can no longer unilaterally require aging employees to retire, many law firms still have policies that force partners to retire at a certain age. The argument is that partners are owners of the business and not employees, placing them outside the reach of laws that prohibit employment discrimination based on age.

Such policies came into practice in the 1950s, as many law firms formalized partnership agreements, along the lines of the ABA Model Partnership Agreement. Mandatory retirement was a natural extension of seniority-driven lock-step compensation systems. New partners would climb the ladder to parity with other partners, and older partners would scale down – usually starting at age 65 – until they retired at age 70.

The policy also went hand-in-hand with a non-qualified, unfunded retirement plan. Such plans typically paid a retired partner an annual life-time pension equal to 20% to 25% of the average of his highest five years of compensation. Often, the plan also provided for a ten-year surviving-spouse benefit and lifetime health insurance coverage for the retired partner and his spouse.

The rationale expressed for adopting such policies included:

1. To get older partners (and firm founders) into retirement to make room for younger partners;
2. To reflect expected declining productivity and contribution of partners as they age, without doing damage to the lock-step compensation system;
3. To force older partners to turn over control of client relationships to the firm;
4. To discourage partners from “*hanging around*” because they had not provided for their own retirements;
5. To avoid the unpleasant task of having to tell an aging senior that he no longer has a place at the firm.

Within the context of mid-Twentieth-Century law practice, mandatory retirement policies were not necessarily a bad thing. Law firms were much smaller than they are today. Many younger lawyers had delayed their careers to serve in World War II and needed opportunities to catch up. Defined-benefit pension plans – a relatively new idea – were being adopted by major corporations, which had the effect of encouraging workers to retire. Finally, most people simply didn’t live much beyond age 65.

A lot has changed since the 1950s and 1960s. Law firms have grown at near exponential rates, filling their partnership ranks with thousands of “Baby Boomers”. The changing demographics have made unfunded defined-benefit plans non-sustainable. Old defined-benefit plans have been replaced by pay-as-you-go defined contribution plans. Lock-step has given way to merit-based compensation. With increasing free-agency of partners, control of client relationships has become a major leverage point in compensation deliberations. Clients have also shifted their loyalties from “*firm*” to individual lawyers. People are living longer and may need to work longer to fund eventual retirement.

As some law firms adopted the corporate form of organization or converted to LLCs, “partners” have become “shareholders” and “members,” who are also employees of the firm. Once owners have attained employee status, mandatory retirement policies become open to legal challenge as age-discriminatory. In fact, mandatory retirement policies of large law firms that still operate as partnerships are being challenged in the courts in both the US and the UK.

It is probably safe to conclude that mandatory retirement within the law partnership context will eventually fall to a successful legal challenge. Historically, partners were unlikely to challenge mandatory retirement, mainly because the golden parachutes offered were so rich. Today’s law partners are being asked to bear the principal weight of funding their own retirements. For those who find themselves under-funded at, say, age 67, there will be an incentive to challenge a policy that forces them to retire at age 70. At some point the distinction between “partner” and “employee” becomes a matter of semantics, and courts will extend anti-discrimination protection to “partners” as a matter of public policy. Bottom line, while mandatory retirement policies may have some utility, they will become increasingly harder to defend.

How, then, are law firms to encourage practice succession, deal with under-performing elders, make room for rising stars, institutionalize client relationships, etc.? These are not necessarily age-related issues. They are performance-related issues. For starters, firms can do a better job defining and communicating criteria for attaining and sustaining equity status. Partners – of any age – who don’t meet the criteria can be dealt with through compensation and/or conversion to non-equity status. Client succession and development of “next-generation” partners can be included as performance criteria. Whatever the solution, law firms will have to manage their businesses more directly and not rely on blanket policies to deal with performance issues.

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