

Experience Caps Run Afoul of ADEA's Disparate Impact Provision, and Outside Applicants May Sue Thereunder Rules 7th Circuit

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If your company hires in Illinois, Indiana, or Wisconsin, and uses years of experience ranges in job postings, it is time to break out the red pen and strike the upper end of those ranges. In a 2-1 opinion, [the 7th Circuit recently held](#) the disparate impact provision of the Age Discrimination in Employment Act (ADEA) protects outside job applicants as well as internal job applicants. Now, hiring practices that disparately impact outside applicants over age 40 are unlawful. Applying that ruling in the case before it, the court revived a disparate impact lawsuit claiming experience caps disparately impacted older workers in violation of the ADEA.

Here is the background: The plaintiff, a seasoned, 58-year old attorney, responded to a job posting with the explicit experience requirement of “3 to 7 years of experience (no more than 7 years) of relevant legal experience.” The employer did not invite the plaintiff to interview. He then filed a charge of discrimination, alleging the experience cap violated the ADEA because it was “based on unfounded stereotypes and assumptions about older workers, deters older workers for applying for positions . . . and has a disparate impact on qualified applicants over the age of 40.” In response to the charge, the employer explained the cap was an “objective criterion based on the reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention.”

After unsuccessful conciliation efforts, the plaintiff filed suit in federal court. The employer immediately moved to dismiss, and prevailed on the theory that the ADEA does not permit disparate impact claims by outside job applicants. The plaintiff appealed.

On appeal, the parties engaged in a valiant textual battle over the meaning of the disparate impact provision, 29 U.S.C. § 623(a)(2), which does not refer to job applicants. Ultimately, the court rejected the employer's narrow reading of the provision in favor of a broad reading that focuses on whether an employer classifies jobs in a way that tends to limit any older individual's employment opportunities, including outside applicants.

Although the court spent a considerable amount of ink and paper addressing the parties' textual arguments, the court appeared swayed most by practical considerations such as the absence of a logical explanation for treating outside and inside applicants differently. The court commented that reading a statute that is supposed to prohibit arbitrary age discrimination in employment in a way that classifies the two differently would be "arbitrary and even baffling." It also judged that *the* most central goal of the ADEA drafters was the prevention of age discrimination in *hiring*.

This decision does not write the bona fide occupational qualification exemption out of the Act. Age limitations are permitted only if the limitation is a bona fide occupational qualification necessary to the performance of the duties of the position. Because the case came before the appellate court on motions to dismiss, it did not consider any affirmative defenses raised by the employer.

Employers, particularly in the 7th Circuit, should review their job postings and replace experience ranges with experience minimums, e.g., "7+ years of experience" or "a minimum of 7 years of experience." Employers should also keep in mind this decision is not limited to experience caps. It applies to all hiring practices that could have disparate impact on workers over 40 years old. As such, all hiring practices and policies should be reviewed.

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Topics

ADEA, Age Discrimination, Disparate Impact, Job Applicant, Outside Applicants, Internal Applicants, Experience