

## Six Steps to Arbitrating an Age Discrimination Case

By Louis M. Marlin, Esq.

Fifty years ago, in 1967, the Age Discrimination in Employment Act (ADEA) was passed by Congress. According to the Department of Labor, it protects “employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation or terms, conditions or privileges of employment.” California has its own version of this law, codified as part of the Fair Employment and Housing Act (FEHA).

Because of the proliferation of employment contracts that mandate that litigation of age discrimination claims be resolved in arbitration, understanding the arbitration process is increasingly important. This article will offer several steps to consider when handling an age discrimination case, with the caveat that it is assumed that the practitioner is familiar with the procedural prerequisite for commencing an action under the FEHA or the ADEA.

### Step 1: Determine Which Arbitration Rules Apply

Many, if not most, employment arbitration agreements specify the rules to be applied in the event of a dispute. For example, the agreement might designate the JAMS Comprehensive Arbitration Rules as controlling, as opposed to the JAMS Employment Rules. Or the agreement may call for arbitration without specifying which

rules will apply, in which case JAMS will apply the rules of the designated administrator. The parties may agree to choose a different set of rules, or a different company to administer a specific set of rules.

### Step 2: Gain a Comprehensive Understanding of the Applicable Rules

It is critical that the practitioner review and analyze the selected rules at the commencement of a case. By example:

- a. As referenced above, JAMS has several sets of arbitration rules and sample arbitration clauses at [www.jamsadr.com/adr-rules-procedures](http://www.jamsadr.com/adr-rules-procedures). JAMS will accept any matter wherein JAMS is indicated in the arbitration clause, wherein another provider is indicated in the arbitration clause but the parties stipulate to JAMS or wherein no provider is indicated in the clause and parties either stipulated or the respondent does not object when the matter is submitted to JAMS.
- b. Under JAMS rules, the respondent may file a response and counterclaim within 14 days of service of notice of a claim. Other providers have different time frames. This could impact the filing of a timely counterclaim.
- c. Understand the discovery limitations. For example, Rule 17 of



both the JAMS Employment and Comprehensive Arbitration Rules is a comprehensive, multi-paragraph rule that covers discovery. Other providers have differing standards.

### Step 3: Pay Attention to Preliminary Conference Orders

For JAMS cases, see Rule 16 of both the JAMS Employment and Comprehensive Arbitration Rules for a discussion of what is called a preliminary conference. The topics and issues addressed in these conferences include scheduling the arbitration hearing and issues critical to the case. It is the roadmap for the arbitration process.

### Step 4: Understand the Multi-Part Process for Establishing or Defending an Age Discrimination Claim

Both the ADEA and FEHA look to traditional discrimination claims (e.g.,

race, religion, etc.) for direction as to the nature of the claims that can be raised. There is a difference between a disparate treatment claim, which seeks recovery for age discrimination directed at the claimant, and a disparate impact claim, which (broadly speaking) alleges that an employer's actions, although non-discriminatory on the surface, have a discriminatory impact on employees or prospective employees 40 years and older.

Except where there is direct evidence of discrimination, discrimination cases, including those claiming age discrimination based on either disparate treatment or disparate impact, are subject to a three-part burden-shifting analysis. Once a prima facie case is established, the burden shifts to the employer to offer a legitimate non-discriminatory reason for its actions. At that point, the burden shifts back to the claimant to show that the reasons offered by the employer are a pretext for age discrimination. Understanding this process is important in planning the presentation of your case, regardless of whether you are representing the employer or the employee.

### Step 5: Limit Your Evidence

Arbitration is supposed to be a speedy and efficient methodology for handling cases. That benefit, which is a huge one for both sides, is lost when attorneys treat an arbitration as if it were a jury trial. It is not. First, the normal rules of evidence do not



apply in most arbitrations unless the parties have specifically stated that they will in the arbitration agreement. Thus, objections as to the form of a question or even relevancy are rarely appropriate and merely delay the hearing. Similarly, the effectiveness of motions in limine should be questioned. What is the benefit of presenting such a motion to the ultimate trier of fact when a simple objection can be raised at the hearing?

### Step 6: Curb Closing Briefs

At the close of evidence, most attorneys in age discrimination cases are prepared to give comprehensive closing arguments, summarizing the key evidence for their side to the arbitrator. This is an effective tool.

However, some attorneys ask for the authority to file comprehensive closing briefs. If the case is complex, or the facts are somewhat convoluted, or the arbitrator appears unsure of the applicable law, then a brief—in the true sense of the word—can be helpful. But 25, 30 or 50 pages of argument should not be necessary. ●



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