

Mandatory Retirement Overhaul To Test Firms' Mettle

By Leigh Kamping-Carder

Law360, New York (February 10, 2010) -- The recent lawsuit by the U.S. Equal Employment Opportunity Commission against Kelley Drye & Warren LLP over its mandatory retirement policy may have some firms taking a hard look at this long frowned-upon practice. And while scrapping the policy could be disastrous for some firms, others are well-positioned to reap significant benefits from the change.

The EEOC's action signals a renewed interest in how law firms cope with older partners in what it sees as widespread age discrimination. In 2007 the EEOC extracted a \$28.5 million settlement from Sidley Austin LLP and a promise that the firm would retire forced retirement. That year, K&L Gates LLP and Pillsbury Winthrop Shaw Pittman LLP publicly — and voluntarily — did just that.

In January, when the commission sued Kelley Drye over its retirement policy, the EEOC's acting chairman, Stuart J. Ishimaru, warned the suit should be a “wake-up call” to firms that did not heed the lessons of 2007.

“The fact is, in a culture in which irrational discriminations are frowned upon, it strikes me as curious in the extreme that the age of partners is somehow exempted from this cultural imperative,” said Peter J. Kalis, chairman and global managing partner of K&L Gates, whose partners voted unanimously to abolish the custom.

Roughly half of U.S. law firms with more than 50 lawyers will force partners to leave or hand over their equity status when they hit a certain age, according to two studies conducted in 2007.

Overhauling the policy took a back seat during the recession, when layoffs and economic woes jumped to the fore, said Deborah Epstein Henry, founder and president of consulting firm Flex-Time Lawyers LLC.

The EEOC's action against Kelley Drye may prompt firms to revisit the thorny issue, and while scrapping the policy may pose challenges, experts say it could also bring significant gains.

According to James Cotterman, a partner at consulting firm Altman Weil Inc., law firms will have to enact a system of “robust” performance evaluation metrics to determine when a partner should stay at a firm, and to catch underperforming senior attorneys.

But this is no more difficult to do for a 75-year-old than a 45-year-old, Kalis insisted, pointing out that at K&L Gates, several partners have passed what was once a cutoff date and are shouldering exactly the same work burden.

“They're practicing hard law and lots of it,” he said.

Consultants said that firms may not find the best use for a senior partner in hands-on legal work, but there are other roles for them, including developing alternative fee structures, expanding the firm's international profile, working on a legal or tax strategy, mentoring, handling public relations, or helping junior partners transition into relationship roles with clients.

In other words, firms will have to change the notion of what it means for partners to contribute — and adapt evaluation criteria accordingly, according to consultants.

“That's where the challenge is going to be, putting that into the meritocracy mix and doing it effectively,” Cotterman said.

There are countless benefits to having veterans stay on: They can pass on their wisdom, experience and vast network of contacts, consultants said. Law firms have already been making exceptions for "superstar partners," such as Irving H. Picard of Baker & Hostetler LLP, noted Janet Markoff, a partner and leader of the New York partner practice group at legal recruiting firm Major Lindsey & Africa LLC.

In practice, the impact of scrapping mandatory retirement will depend on the ethos of the individual firm — whether it has “the glue” of mentoring or embraces the philosophy of “eat-what-you-kill,” Markoff said.

“I really don't think that if this is abolished it will affect those firms that already have a culture in which they value and reward the mentoring of young lawyers, and sharing relationships, and cross-selling and so forth,” she said.

For K&L Gates, abolishing mandatory retirement has posed no growing pains, nor has it prompted any concern from younger attorneys, insisted Kalis, who admitted he had not spoken directly with associates about the matter.

Still, the firm spends a lot of energy and money recruiting productive partners, Kalis said, and the idea that it would maroon them on their 70th birthdays seems paradoxical. Rather, the new case-by-case policy has allowed K&L Gates to attract and retain partners in their 60s who faced the “specter” of forced retirement elsewhere, he said.

“Overall, we feel closer as a partnership that we do not, on purely irrational and anachronistic grounds, go out and metaphorically shoot a bunch of our partners when they hit a certain age,” said Kalis, who is about to celebrate his 60th birthday.

Despite Kalis' confidence, consultants said that some firms will face hurdles if they are forced to revoke mandatory retirement, especially when it comes to preparing for the future.

Succession planning is the biggest challenge firms will confront in an industry without compulsory retirement, Henry said, adding that younger partners may have to wait longer to take over clients and cases, which can slow development of the future face of the firm.

With senior partners hanging on, junior partners will not transition into the role of “relationship partner” as they should, she said.

In an extreme scenario — where partners continue to draw paychecks without contributing as they once did — frustration and resentment could grow, Cotterman said.

“That would be probably a disaster,” he added.

Associates will need to have discussions with senior partners in their 60s to ask, “What's my future, what's the business plan for me?” Markoff said.

Laterals, too, may be concerned about joining firms where the roles of senior partners are less clear, Henry said. If the upper echelons of the firm are already filled, it will be more difficult for laterals to envision where they fit in, and whether they can inherit business, she said.

Eat-what-you-kill firms especially “will just have a hard time in attracting younger partners, top talent, if you will,” Markoff said.

If the perception is that senior partners dispense advice, open doors for younger colleagues and help to position the practice, it could be a boon if they stick around, Cotterman said.

But if they fail to understand the need for younger attorneys to advance, they will become increasingly “marginalized,” in Markoff's words, and firms will have to cut compensation or cut partners loose, according to consultants.

“That is an enormously difficult conversation to have,” Cotterman said, likening the talk to finally taking the car keys away from Mom or Dad.

Nonetheless, Cotterman hopes and expects law firms will address the issue within the next year or two, noting that eventually firms that push partners to retire based on their age will find themselves at a competitive disadvantage.

"If they really love what they do, and they have the energy to continue at the same level, and the brain power, they should be able to do it," Markoff said. "They should just be able to do it in a firm that will really appreciate them."

All Content © 2003-2010, Portfolio Media, Inc.