partner agreements?

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Is Mandatory Partner Retirement Legal?

By Marc Rosenberg, CPA

Laws seem to be moving towards making mandatory retirement illegal due to age discrimination. Can CPA firms still safely provide for mandatory retirement in their partner agreements?

Let's be clear what mandatory retirement means in practice.

The extreme definition, used almost exclusively at giant firms, is that partners must retire cold-turkey, or close to it, upon reaching a mandatory retirement age.

For 95% of all firms below $15M, mandatory retirement is not necessarily the age that a partner must stop working.   Instead, the mandatory retirement age is the point where partners receive permission from the remaining partners to continue working, usually giving up their equity and frequently moving to part-time status. In my experience, in excess of 90% of partners at local firms opt to continue working past mandatory retirement age, which is almost always 65-66.

How many CPA firms have mandatory retirement provisions?

Per the [2016 Rosenberg Survey:]

- 88% of firms over $20M have mandatory retirement policies
- 72% for firms $10-20M
- 60% for firms $2-10M

Current status

- But in typical local firms, partners DO function in substance more as a partner than an employee.

The EEOC’s interpretation is that there is no specific exemption from the age discrimination law just because one is a partner. Instead, the exemption is given to the extent that six factors are considered as evidence of partners’ ability to assert control over their role in the firm and their work, as cited in the Supreme Court’s Clackamas decision of 2003.

The case indicates that the 6 factors below generally will evidence that a partners is an employer, not an employee. The Court did NOT state that all 6 must be present, instead stating that no one factor will be decisive.

1. The firm cannot fire partners or set rules for their work.
2. The partner’s work is NOT supervised by others.
3. The partner does NOT report to someone higher.
4. The partner can influence the firm, presumably by attending partner meetings and having a vote. Note: the presence of an Executive Committee making some or all firm decisions along with the MP will tend to favor partners being employees in this area.
5. There are NO written agreements stating that the firm will treat the partner as an employee.
6. The partner shares in profits, losses and liabilities.

Partners with the vast majority all non-national firms will pass this test. It is highly probable that most non-equity partners cannot pass the above test.

The EEOC in recent years has taken action against mega-CPA and law firms, including Winston & Strawn, Sidley & Austin, Deloitte and PwC. Sidley paid $27.5M to settle an EEOC suite brought on behalf of 32 ex-partners who fell under their mandatory retirement policy. Between settlements and appeals, it is difficult to tell if

I have been advised by two attorneys who work extensively with CPA firms that, as a practical matter, typical local firms have little to worry about, mainly because their partners DO pass the Clackamas test. Also, it appears that the EEOC is only going after the mega-firms.

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Marc Rosenberg is a nationally known consultant, author and speaker on CPA firm management, strategy and partner issues. The Rosenberg Associates.

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