





# Senior Momentum



GRAYING WORKFORCE RAISES NEW CHALLENGES FOR IN-HOUSE COUNSEL



BY MARY SWANTON  
ILLUSTRATIONS BY STUART BRIERS



**EMPLOYERS BEWARE:** The baby boom generation is about to transform the way you think about older workers.

Instead of looking for ways to ease them out the door to make way for younger, cheaper and potentially more energetic employees, you'll be scrambling to find ways to keep them. At the same time your litigation risks may soar as boomers demand the equal treatment that state and federal age and disability discrimination statutes promise.

The convergence of a significantly lower birth rate for the post-boomer generation with tighter curbs on immigration already is creating shortages of skilled workers in industries such as technology and health

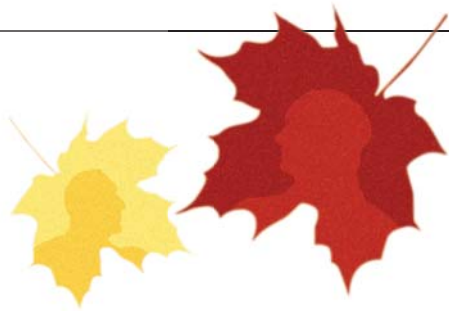
care. That predicament could very soon be the norm across the economy.

Luckily boomers don't want to spend their golden years playing golf and catching the early-bird specials. More than two-thirds want to keep working, albeit on their own terms. That means they are threatening the time-honored take-it-or-leave-it 9-to-5 work week. They are demanding more flexibility in schedules, part-time work with benefits, sabbaticals and phased retirement programs as the price for staying on (see "Flexibility Gap," p. 52).

And this generation that grew up challenging authority probably won't hesitate to take legal action against any employer that marginalizes or excludes older workers

based on pervasive stereotypes about old age. That raises the stakes for employers who don't purge their workplace of age bias and complicates the process of terminating senior employees who aren't meeting performance standards.

"Corporations are saying, 'We can't find people to fill the jobs.' And older workers are saying, 'We can, we want to, and we will.' If they are passed over because people think they are overqualified, or won't be flexible, or will be resistant to change—all the proxies used for age bias—there will be more and more litigation," says Jonathan Segal, partner in Wolf, Block, Schorr and Solis-Cohen. "As the workforce gets older, it will only get worse."



#### LITIGATION LAND MINES

The increased risk of age-related litigation hasn't popped up yet on the radar screen of many general counsel. While the Age Discrimination in Employment Act (ADEA) was passed in 1967 to protect older workers and amended in 1986 to outlaw mandatory retirement for most people, courts have largely been unsympathetic to age discrimination claims and the EEOC hasn't made it a high priority. As a result most employers haven't taken it too seriously.

"Employers aren't terribly worried," says Glen Nager, partner in Jones Day, citing a string of defense verdicts in age discrimination cases. "To lots of companies age discrimination lawsuits don't cause the same degree of concern that race and sex discrimination cases do."

At a recent AARP conference celebrating the 40th anniversary of the ADEA, EEOC commissioner Stuart Ishimaru admitted, "Quite often, age is

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the stepchild of the protected classes." So negative attitudes and stereotypes about older workers aren't addressed in many companies the way those about gender, race and disability are. But that compla-

gency may be a trap as the percentage of workers over 50 continues to grow.

"Unfortunately some managers maintain inaccurate perceptions about older workers' ability to work hard and learn new tasks that adversely affect their opportunities for hiring, promotion and retention," says Debra Friedman, member in Cozen O'Connor. "That raises a risk for the employer of legal liability, especially with the changing demographics of more older workers in the workforce."

For example, it's common practice to assume that someone is not eligible for, or interested in, promotion because he or she may be nearing what used to be retirement age. Assuming a retirement is imminent, or asking about an older worker's retirement plans, can land an employer on the wrong end of an age discrimination complaint.

Another trap is excluding older workers from training programs on the assumption they don't want to learn new skills or aren't capable of doing so.

"There is a notion that older worker Fred is not willing to learn new technologies," says Randall Avram, partner in Kilpatrick Stockton. "But you can't make an assumption that Fred can't be trained just like Mary, who is right out of college. You have to be aware of preconceived notions of what an older employee can and cannot do."

While most workplaces have been purged of jokes and comments that offend other protected classes, older workers are still the target of insensitive remarks.

"Age is one of the last areas where you find smoking-gun comments," Avram says. "You get comments like, 'You can't teach an old dog new tricks' or jokes about having a 'senior moment' that make defending age discrimination cases more difficult."

#### EMPLOYEES FIRST

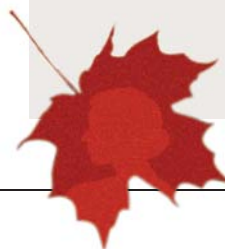
Several years ago First Horizon National Corp. took a look at its branch banks and found that branches with the longest-serving employees had the best financial performance. That sparked an effort to figure out ways to retain employees—an effort that earned First Horizon a spot on the AARP's 2007 list of the top 10 places for people over age 50 to work.

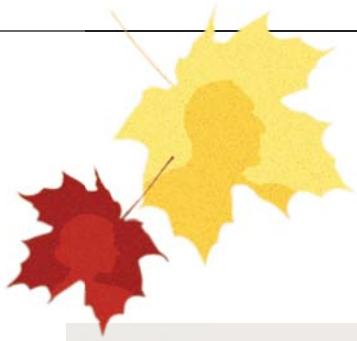
"The company said, 'if we take care of our employees, they will take care of our customers, and if our customers are taken care of, our shareholders will be taken care of, too,'" says Ken Bottoms, First Horizon senior vice president.

The company found employees wanted more flexibility. So the company's Prime Time program allows employees to reduce their work week to 20 to 32 hours but still retain full benefits. Employees can even try out a reduced schedule for six months and come back to work full time if they change their minds.

First Horizon also allows employees to select flexible hours to accommodate their lifestyle and in some cases to work from home. The flexible options help the company retain working mothers as well as older employees.

"Being flexible helps us keep some high-performing employees," Bottoms says. "If the alternative is full time or zero time, a lot of them will say, 'I'm outta here.'"





### FLEXIBILITY GAP

For years demographers have warned of an impending labor shortage as the 76 million baby boomers born between 1946 and 1964 near the traditional retirement age. Meanwhile, the number of younger workers coming into the workforce is shrinking—only 46 million Generation Xers are following them, and tough immigration standards have slowed the influx of foreign workers.

But recent research indicates that the labor shortage need not be as dire as predicted. That's because most baby boomers don't want to retire at age 65 as their parents did.

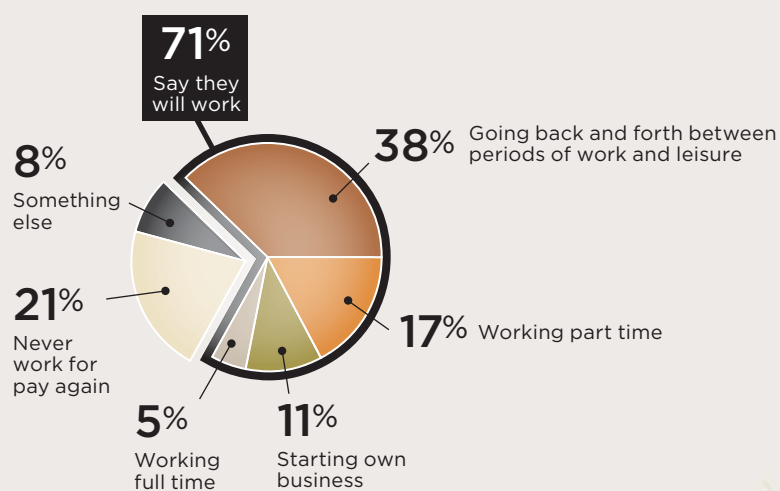
A 2006 Merrill Lynch study found that 71 percent of employees intend to spend at least part of their retirement years working, citing their desire to remain mentally and physically active above financial reasons as their motivation. Of those, 45 percent say they never plan to stop working completely. Of those who plan to stop working at some time, the average age at which they plan to stop is 70.

But only 5 percent of those who want to work envision working full time for someone else. The rest would like to alternate periods of work and leisure by taking on contract work or temporary jobs; work part time; or start their own business. The preference for part-time and contract work offers opportunities for employers to retain the skills of their older workers at a reasonable cost.

Still the study found that while 68 percent of employers view retaining skilled labor as a very or somewhat serious problem, they aren't focused on their older workers. While 61 percent have assessed ways to attract younger talent, only 38 percent have identified actions to retain older workers, and less than half are offering the flexibility many people say they want in retirement.

### WORK V. LEISURE

Percentage of adults that say the following is the ideal plan for retirement:



SOURCE: 2006 MERRILL LYNCH NEW RETIREMENT STUDY

### CRUEL REALITIES

While the proverbial old dog may in fact be re-energized and motivated by the opportunity to learn new skills, the cruel reality of aging is that it can affect energy, mental clarity and physical capabilities. The fact that many people now say they never want to quit working entirely increases the possibility that employers may have to deal with underperforming older workers. Some suggest the aging workforce could unleash the perfect storm of liability, with those who don't sue under age discrimination laws claiming accommodation under the Americans with Disabilities Act (ADA).

"You have to deal with what I call 'the older worker who is slowing down challenge,'" because eventually the worker may not be able handle the job, Avram says. "It's important to manage those issues like other workforce performance issues, but in general juries want to see you go beyond what you do for other workers. If you have someone who has done the job for 30 years, they will want to see you do more than give him two warnings before you let him go."

While people stay healthier longer than ever, the number of ADA claims is expected to soar, too. While only 12.1 percent of Americans age 16 to 64 have some sort of disability, 40.5 percent of those over 65 do, according to U.S. Census Bureau statistics. That could mean requests for everything from instructions in large print and amplifiers on audio equipment to ramps and desks to accommodate wheelchairs. It could also mean more litigation liability if an employer, for example, makes an assumption that an employee would rather retire than continue working with a disability.

If a worker is terminated because he



or she can't meet the demands of the workplace, it's important to document attempts to help that employee as a possible defense against an age discrimination claim.

"If older workers declined training opportunities, it is much harder for them to credibly claim that discrimination is occurring," says Garry Mathiason, vice chair of Littler Mendelson. "Document the offer of training, even if it is declined."

more experience an applicant has, the more the employer has to pay," Segal says. "Managers think it would be insulting to offer less pay or less authority. But that's just younger people projecting their misconceptions, because a lot of older workers would love to be a contributor but don't want as much responsibility."

All the stereotypes that make older workers vulnerable to termination, such as assuming they won't be able to adapt to

They are looking for nontraditional work arrangements, such as part-time work that includes health care benefits.

Pitt-Catsouphe says corporate America is at the tipping point on the issue of implementing workplace flexibility to retain older workers. A 2006 study of 600 corporations conducted by the Center on Aging & Work found that more than half think implementing more flexibility is good for their business as well as for their employees. More recently, a few leading-edge companies started translating that into action (see "Employees First," p. 50).

"We are beginning to see a number of companies implementing strategies around developing a multigenerational workforce, and this is happening almost overnight," Pitt-Catsouphe says. "Two years ago employers said, 'I know [employee retention] is going to be an issue,' but they weren't doing much. Now a few larger employers are starting to do things, and once they take the plunge, then the people who watch them will say, 'Maybe we should do this, too.'"

But even those who aren't ready to jump on the bandwagon of enticing older workers need to protect themselves against the inevitable aging of their workforce by implementing training programs directed at rooting out age discrimination.

"Managers need to know that age discrimination and harassment are both bad business policy as well as unlawful," Mathiason says. "While this may seem obvious, it is still amazing to us that in litigation we can prove there has been training on sex discrimination and harassment, but not necessarily on other forms of harassment and discrimination, including age." ■

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### **HIRING REALITIES**

While employers struggle to manage underperforming older employees, the projected skilled-workers shortage means they may need to start hiring older workers. Recent research indicates that employers are less prepared to hire an older person they don't know than to retain an older employee who is adding value, says Marcie Pitt-Catsouphe, director of the Center on Aging & Work at Boston College. "The jury is still out" on the question of whether employers will open their doors to graying workers displaced from other companies, she says.

Often they use the rationalization that the employee is overqualified and would be bored or unhappy taking a step down in responsibility and pay. Yet the reality is that some older workers are looking for a less stressful position or one that will allow them more free time, and they are willing to trade off salary.

"There is a misconception that the

a new work environment, also block them from getting new jobs. And while very few hiring discrimination claims succeed, employers should be on guard about how comments in internal e-mails and other documents, such as a preference for hiring "young blood," might play into a future discrimination suit, Mathiason warns.

"You can see a persuasive argument to a jury: You are looking for someone who is qualified but you aren't hiring someone who is highly qualified," Segal says. "Instead you are hiring no one or hiring someone who is underqualified."

### **TIPPING POINT**

Employers who embrace the need to hire and retain older workers face their own set of challenges. To attract the best of the older workforce, most employers will have to introduce more flexible work policies, because while most people intend to work many years past the traditional retirement age, few want to work full time.