NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on Ageism in the Legal Profession**

October 2025

Approved by the House of Delegates on October 25, 2025.

TASK FORCE ON AGEISM IN THE LEGAL PROFESSION

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I. INTRODUCTION

> *[Given New York's] great cosmopolitan population, there is* ***no greater danger*** *to the health, morals, safety and welfare of its inhabitants* ***than the existence of groups prejudiced*** *against one another and antagonistic to each other because of their actual or perceived differences,* ***including those based on . . . age****.*[1]

In 2007, the New York State Bar Association ("NYSBA") appointed a Special Committee to study and report on practices in the legal profession that disadvantage lawyers because of their age.[2] The practices studied included mandatory retirement and "up-or-out" policies, age-based hierarchical staffing of cases, policies concerning retention of counsel, and the fixing of time charge rates and non-competition clauses combined with mandatory retirement policies, among other questionable practices. Given the daunting complexity of the issues, the Special Committee limited its examination, and thus its report, to mandatory retirement laws and practices, recommending against them. Following that Special Committee, NYSBA formed an Age Discrimination Committee to "help senior lawyers, as well as younger members of the bar become more familiar with this area of the law" given the effect on their careers. The goal included promoting changes that could end age-related discriminatory practices that affected attorneys. The Committee issued their study and conducted continuing legal education in an attempt to address ageism.[3]

Federal and New York law prohibit age discrimination against both young and old alike, and NYSBA has taken a strong stance against such bias. Still, the Association is concerned that more can, and should, be done. The Task Force on Ageism in the Legal Profession was established at the direction of NYSBA President Domenick Napoletano, Esq. in April 2025 to undertake a more fulsome examination of age discrimination. The mission is to ascertain if there are any further recommendations for NYSBA to undertake through its Executive Committee that might help to eradicate or further deter or minimize the negative impacts of ageism on the New York legal professional community.

1. Discrimination

"There is one constant for today's 54-year-old, as compared to the same worker 10 years ago —

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1 New York City Human Rights Law ("NYSHRL"), found at N.Y. City Admin. Code, Title 8: Civil Rights, Ch. 1.
2 See NYSBA Special Committee on Age Discrimination in the Profession, *Report and Recommendations on Mandatory Retirement Practices in the Profession*, Jan. 2007, https://nysba.org/wp-content/uploads/2020/02/Age-Discrimination-Report.pdf?srsltid=AfmBOoqJSQyf_PaFELM77SZHTKyrItGxy2WappHALFQmV1Hwz1ValtEa (last accessed May 14, 2025).
3 NYSBA Age Discrimination Committee, https://nysba.org/committees/age-discrimination-committee/ (last accessed April 2, 2025).

age discrimination."[4] The Society for Human Resource Management (SHRM) reports that even as late as 2023, nearly one-third of HR professionals acknowledged that age plays a role in employment decisions.[5]

Ageism, or age bias, consists of the prejudices and stereotypes that support the cycles of age discrimination, which deprives members of one age group of opportunities or privileges that are available to members of another age group.[6] Age is, arguably, the most serious class in the DEI (*diversity, equity and inclusion*) frontier, since it is the only identifying category that everyone may eventually join. Once discriminated against, an individual becomes part of a class that feels the devaluing and demoralizing effects of implicit, or worse, intentional, bias. Many people facing discrimination, including legal professionals, often feel powerless to act and unable to afford relief. So, they do not pursue legal remedies.

Technology and social trends may change, but *people* — the humanity that fuels technology and sociology — appear to have stayed the same. The cost to society is so high that we can no longer ignore ideas and contributions because someone is "too young," nor accept negative attitudes and stereotypes based on old age. The penalties, burdens, or requirements imposed exclusively (or to a greater degree) upon an age group — such as lockstep compensation[7] or military conscription, negative attitudes, or practices and policies that perpetuate stereotypes (like that healthy elders should be happy to "ride into the sunset") — need to be put to bed instead.

The question that seems to keep eluding us all, though, is just how to eradicate age bias. How can we promote and maintain the value of our aging population, our repositories of wisdom, skill, and ability? The current need is compelling, given the national (and global) labor crisis driven by an aging workforce and declining birth rates.[8] An analysis of the extent of systemic change needed is timely, especially given the current reexamination of discrimination laws, in particular the doctrine of disparate impact, which drives many age discrimination claims. The political and legal tension calls into question the constitutionality of the disparate impact doctrine — specifically, whether

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4 Victoria Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, EEOC, https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment (last accessed April 14, 2025).
5 Society of Human Resources Mgmt., *New SHRM Research Details Age Discrimination in the Workplace*, May 11, 2023, https://www.shrm.org/about/press-room/new-shrm-research-details-age-discrimination-workplace (last accessed March 30, 2025).
6 Ageism, as defined by the World Health Organization, refers to "stereotypes, prejudice and discrimination towards others or oneself based on age." World Health Org., *Ageing: Ageism*, March 18, 2021, https://www.who.int/news-room/questions-and-answers/item/ageing-ageism (last accessed March 30, 2025).
7 Another term for Seniority-Based Compensation.
8 Justis Antonioli & Jack Malde, *The Demographic Transition: An Overview of America's Aging Population and Immigration's Mediating Role*, Bipartisan Policy Center, Sept. 2023, https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/09/BPC_LIT-Review.pdf (last accessed April 7, 2025).

distinct patterns are unlawful, or whether such standards are far too vague.[9]

Societal Consequences

The profound consequences of discrimination cannot be overstated. According to the Bureau of Labor Statistics, by the year 2030, the share of older workers in the workforce will increase, with the oldest segment of the workforce, people 75 and older, expected to grow significantly.[10] Individuals remaining active, gainful, and purposeful contributors to society benefit everyone. As President Kennedy concluded long ago, pro-longevity efforts should seek not merely an increase in time, but an extension of the healthy and productive period of life: "to add life to the years, not just years to the life."[11] Older adults can contribute to their societies as producers, consumers, volunteers, taxpayers, and distributors of wealth. Research on this topic emphasizes the importance of generativity, as social relationships nurture, educate, and support and, as such, are an essential contributor to the well-being of future generations.[12]

The AARP (American Association of Retired Persons) has identified older individuals being kept out of the workforce as a societal problem.[13] It contributes to increased costs to society, not only in the form of financial insecurity, but also poorer health, social isolation, emotional desperation, cognitive decline and other disabilities that contribute to increased hospitalization and an overall decrease in the quality of life. The fallout from ageism can even lead to premature death.[14] The

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9 Exec. Order No. 14281, *Restoring Equality Of Opportunity and Meritocracy*, April 23, 2025, https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/; s*ee Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977); Michael Evan Gold, *Disparate Impact Is Not Unconstitutional*, 16(2) Texas J. on Civil Liberties & Civil Rights 171, 171–87 (Spring 2011), https://ecommons.cornell.edu/server/api/core/bitstreams/47357a27-c8e1-45c1-8b1c-145187bdbb31/content; James Scanlon, *Is the Disparate Impact Doctrine Constitutionally Vague?*, Federalist Society, May 5, 2016, https://fedsoc.org/commentary/fedsoc-blog/is-the-disparate-impact-doctrine-unconstitutionally-vague (last accessed May 14, 2025).

10 U.S. Department of Labor Statistics, *Number of people 75 and older in the labor force is expected to grow 96.5 percent by 2030*, TED: The Economics Daily, Nov. 4, 2021, https://www.bls.gov/opub/ted/2021/number-of-people-75-and-older-in-the-labor-force-is-expected-to-grow-96-5-percent-by-2030.htm#:~:text=By%202030%2C%20all%20baby%20boomers%20will%20be,data%20are%20from%20the%20Employment%20Projections%20program (last accessed March 30, 2025).

11 President John F. Kennedy, *Special Message to Congress on the Needs of the Nation's Senior Citizens*, Feb. 21, 1963, https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-needs-the-nations-senior-citizens.

12 David J. Ekerdt, *Longevity's Purposes*, 2(3) Innovations in Aging, 1, 1–2 (Oct. 29, 2018) https://pmc.ncbi.nlm.nih.gov/articles/PMC6204715/#CIT0003 (last accessed April 6, 2025).

13 Lona Choi-Allum, *Age Discrimination Among Workers Age 50-Plus*, Am. Ass'n of Retired Persons, July 26, 2022, https://www.aarp.org/pri/topics/work-finances-retirement/employers-workforce/workforce-trends-older-adults-age-discrimination/ (last accessed March 30, 2025).

14 Charlotte Zimmer, *Ageism negatively affects elderly health*, *Yale study finds*, Yale News, Feb. 12, 2020, https://yaledailynews.com/blog/2020/02/12/ageism-negatively-affects-elderly-health-yale-study-finds/#:~:text=Scientists%20have%20long%20known%20that%20old%20age,to%20poor%20health%20outcomes%20in%20elderly%20people (last accessed April 3, 2025).

EEOC (Equal Employment Opportunity Commission), in a 2018 report on the 50th anniversary of the Age Discrimination in Employment Act ("ADEA"), observed that age discrimination remains a constant, regardless of the state of the U.S. economy, and persists as a significant and costly problem for all.[15] Nonetheless, workplace age discrimination tends to be perceived as an economic issue and not a fundamental civil right.[16] Despite its impact, age discrimination has historically been viewed as "less malevolent than race, gender, and other forms of discrimination", contributing to its perpetuation.[17] In this emerging era of increased longevity,[18] people are remaining productive well past the traditional retirement age of sixty-five. Therefore, it has never more essential to effectively dispose of age discrimination.

Legal professionals are not outside the reach of this societal problem,[19] despite most in New York being protected against age discrimination under federal, state, and local law.[20] One sad reality the Task Force found to be at the core of ageism manifests purely from negative assumptions about abilities, worth, or relevance, thus resulting in biased practices that preclude hiring or limit opportunities for older people.

2. Stereotypes

Surprisingly, over the years there has been little change in stereotypes of the old or the young. This includes job seekers and employees, despite technological advances and shifting societal values. Recently while attending a NYSBA Section meeting, a young female attorney shared her story with a Task Force member. She was told by a local bar association leader she was "too young" to be put into the leadership path. The irony was that this attorney had prolific talent in project management. In fact, during her brief time serving this local association, she had implemented many of the strategic programs that proved critical to meeting membership goals. This is often the case at firms, where talents may be downplayed to extract greater productivity or force older attorneys out the door.

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15 Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, U.S. EEOC, https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment (last accessed March 30, 2025).
16. Laurie A. McCann, *The Age Discrimination in Employment Act at 50: When Will It Become a "Real" Civil Rights Statute?*, 33 A.B.A. J. of Lab. & Emp. L. 89, 95 (2018).
17 *Id.*
18 Dongsheng Chen, The Era of Longevity: Transformation of Aging, Health and Wealth (Springer, 2023), https://link.springer.com/book/10.1007/978-981-19-6784-9 (last accessed May 14, 2025).
19 Supporting data and a discussion of ageism's impact on the legal profession is contained in Appendix A.
20 The reason why "most" are covered is because state and federal law still contain exemptions which allow discrimination in certain instances.

While current published statistics suggest that attorneys are working longer than employees in other industries,[21] the anecdotal evidence seems to suggest that age discrimination impacts legal professionals as well. In our survey of lawyers, may reported age bias encounters often become more noticeable around the age of 40. Bias, based on commonly held age stereotypes, unduly limits professional development, for both young and older attorneys. Young lawyers often believe they are too young to work in certain capacities. Similarly, senior attorneys believe that they are too old to develop new skills.[22]

Research on older persons all come to the same conclusion — every one of the stereotypes about older workers do not hold up to reality and may contribute to ongoing challenges in employment. Implicit age bias is based on attitudes, feelings, and myths about individuals or groups, which influence judgments and behaviors, often without a conscious awareness. In the workplace, it manifests in actions resulting from negative perceptions that certain age groups have less value or may be overqualified. With older workers, the presumptions are that they may be less adaptable, technologically inept, unwilling to learn, more expensive, or pose potential financial detriment from a greater risk of impending poor health. Age stereotypes go beyond description; they also encompass normative expectations about older adults (prescriptive age stereotypes).[23] For example, older adults are expected to relinquish access to valued social resources in favor of younger generations (altruistic disengagement).[24]

The reality, though, is that older workers tend to have lower turnover rates. They cost their employers less by avoiding the high cost of recruitment and continuous hiring and training of new employees.[25] An older employee will not jump ship, soon after hiring, for a small jump in pay. In fact, research shows that workers over 50 years old are five times less likely to change jobs, compared to those in the 20–24 age range. Another surprising difference in generations is that once employees are in a job, the retention factors that motivate Gen Z to leave are related to overwork,

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21 Bureau of Labor Statistics, *Employed persons by detailed occupation and age*, https://www.bls.gov/cps/cpsaat11b.htm (last accessed April 2, 2025).
22 Rebecca Howlett & Cynthia Sharp, *Creating the Law Firm of the Future: Combating Age Bias*, Am. Bar Ass'n, Nov. 22, 2021, https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/creating-law-firm-future-combating-age-bias/ (last accessed May 6, 2025).
23 M. Clara de Paula Couto et al., *Antecedents and Consequences of Endorsing Prescriptive Views of Active Aging and Altruistic Disengagement*, 13 Frontiers in Psychology 807726, 13 (2022), https://pmc.ncbi.nlm.nih.gov/articles/PMC8844369/; M. Clara de Paula Couto & Klaus Rothermund, *Prescriptive Views of Aging: Disengagement, Activation, Wisdom, and Dignity as Normative Expectations for Older People*, in Yarul Palgi, Amit Shrira, Manfred Diehl (Eds.), Subjective views of aging, (Springer, 2022)), 59–75.
24 Michael S. North & Susan T. Fiske, *An inconvenienced youth? Ageism and its potential intergenerational roots*, 138(5) Psychological Bulletin 982, 982–97; Ashley E. Martin, Michael S. North, *Equality for (almost) all: egalitarian advocacy predicts lower endorsement of sexism and racism, but not ageism*, 123(2) J. of Personality and Social Psychology 373, 373–99 (2021), https://pubmed.ncbi.nlm.nih.gov/33464112/.
25 Vantage Aging, *Myths About Older Workers (and 7 Facts That Prove Them Wrong)*, Sept. 25, 2020https://vantageaging.org/blog/myths-about-older-workers/ (last accessed April 6, 2025).

while their older counterparts leave due to lack of meaningful work.[26]

Younger employees can suffer similar bias; often perceived as less able or incapable, and thus less valuable, regardless of their actual skill, experience, or education. Youth age discrimination can manifest in the following manner: belittling, passed over for interviews, promotions, or, alternatively, disparately overworked, overburdened, and underpaid or not offered wage increases. Youth are often associated with having to *pay their dues first* or as incurring a lower cost of living. Additional obscurity has emerged in buzzwords about whether someone "fits the company culture", an entirely subjective standard that appears to be nothing more than an escape hatch from culpability for discrimination.

3. The Digital Divide

The digital literacy hypothesis is that older Americans are behind the curve, deemed "digital immigrants" versus younger "digital natives." The technological skills of older people can vary widely by economic status, education, and age — often termed a "second-level digital divide."[27] Young lawyers may rely too heavily on technology, such as ChatGPT. Often, these attorneys may not undertake deeper research to determine the basis and explanations of complex legal topics, obtain valid citations, or understand important precedents. Their "research" may fail to confirm the validity and authenticity of the AI-generated materials.[28] Meanwhile, older lawyers can rely too heavily on "old school" methods, opting to rely solely on their own manually tedious research for judgement. Both methods have benefits: younger lawyers may produce a fulsome product that can save billable hours, helping to keep and attract cost-conscious clients, while an older lawyer may create a nuanced product that will burnish a firm's reputation and thus attract certain clients with money.

The Gerontologist advises critical evaluation of AI as the world's population grows older.[29] The convergence of demographic aging and rapid technological innovation has introduced a critical area of inquiry within the field of AI, termed "*Digital Ageism*," which encompasses the ways in which algorithmic design, data representation, and technological deployment may perpetuate or

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26 Aaron De Smet et al., *Gen what? Debunking age-based myths about worker preferences*, McKinsey & Company, Apr. 20, 2023, https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/gen-what-debunking-age-based-myths-about-worker-preferences (last accessed April 7, 2025).
27 Eszter Hargittai, Anne Marie Piper & Meredith R. Morris, *From internet access to internet skills: digital inequality among older adults*, 18 Universal Access in the Info. Society 881, 881–90 (May 2018), https://doi.org/10.1007/s10209-018-0617-5 (last accessed May 2, 2025).
28 Santiago Paz, *Responsible use of Chat GPT by Lawyers*, Dentons, June 8, 2023 https://www.dentons.com/en/insights/articles/2023/june/8/responsible-use-of-chat-gpt-by-lawyers#footnote2 (last accessed May 2, 2025).
29 Charlene H Chu et al., *Digital Ageism: Challenges and Opportunities in Artificial Intelligence for Older Adults*, 62(7) The Gerontologist 947, 947–55, https://doi.org/10.1093/geront/gnab167 (last accessed April 2, 2025).

exacerbate age-related biases, thereby shaping access, equity, and participation for older populations in digital societies. This manifests not only in AI's design, but in its use as well. AI predictive models developed using data or designs that reflect implicit bias result in explicit bias. Because large language models rely on complex algorithms, it can be difficult to ascertain discriminatory intent without an audit or other validation.

4. Mandatory Retirement, Fiscal Sustainability, Youth Underemployment

The fiscal sustainability of pensions is a central concern of policymakers in every advanced economy. Policymakers attempt to ensure the sustainability of these programs by raising retirement ages. Generally, the law requires that retirement, benefits, and severance for all employees must not discriminate on the basis of age. Attorneys and judges alike are faced with mandatory retirement with varied benefits. Many employees are reaching the traditional retirement age with their functional capacities largely intact and thus many years of productivity remaining. However, there are concerns that keeping older workers in the workforce for longer might have negative consequences for younger workers. Since youth unemployment is a pressing problem, it is important to consider the impact of these policies on younger workers' employment prospects. It is not economically feasible to simply replace senior workers with younger ones. While younger workers might have lower salaries and benefits initially, the long-term costs of training, onboarding, and potential turnover can offset these advantages. Moreover, senior workers often bring valuable experience, knowledge, and networks that can be difficult and costly to replicate. In fact, keeping older workers in the workforce longer not only fails to harm the employment of younger workers, but may even help both groups.[30] Studies demonstrate pros and cons:

Pros

- There is no trade-off in the employment of young and old workers: higher employment for older workers coincides with higher employment for younger workers.
- Increasing the retirement age increases younger workers' wages.
- Younger and older workers complement each other, rather than act as zero-sum substitutes.

Cons

- Reducing the employment of older people does not provide more job opportunities for younger people.
- Increasing the employment of older people neither reduces employment, nor does it lead to more unemployment for younger people.

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30 Rene Boheim & Thomas Nice, *The Effect Of Early Retirement Schemes On Youth Employment*, IZA World of Labor, 2019, https://wol.iza.org/articles/effect-of-early-retirement-schemes-on-youth-employment/long#izawol.70-figure-000003 (last accessed May 14, 2025).

- Lowering the retirement age decreases the incentives to train and to invest in additional skills and therefore leads to lower economic growth.

The most likely causes of the positive association of younger and older workers' employment and wages are the additional demand created by employed older workers and, in countries like the U.S. where pensions are financed by taxes, a reduction of the tax burden due to a lower number of inactive people. (There are also additional benefits as moderate employment in older age has been found to be associated with better physical and mental health.)

Note: The following sections were written before the issuance of an Executive Order by President Trump which seeks to prioritize meritocracy by abandoning enforcement of certain current DEI disparate impact rules on the basis of constitutionality, as well as ending other similar practices.[31] While the Constitution requires the President to "take care that the laws be faithfully executed,"[32] a President can direct the Department of Justice not to enforce a law if he believes that it is unconstitutional. This power stems from the President's duty to uphold the Constitution, and the belief that enforcing an unconstitutional law would violate that duty. However, the Supreme Court ultimately decides on the constitutionality of laws, and a Presidential decision not to enforce a law based on unconstitutionality is subject to judicial review.[33] Therefore, the Task Force attempted to annotate sections of the report as written with asterisks, given that the environment was ripe for challenge.

II. EXECUTIVE SUMMARY

1. Mission

The members of the Task Force on Ageism in the Legal Profession commend NYSBA President Domenick Napoletano for his initiative in forming a Task Force with the mission of examining if ageism negatively impacts NYSBA members and the legal profession at large and proposing any recommendations that can contribute to ageism's detection, deterrence, and eradication.

The Task Force's mission statement is as follows:

> "Review laws, current practices, past research and current impact reports to suggest legal and regulatory mandates that may better detect and deter ageism against lawyers with the

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31 Exec. Order No. 14281, *Restoring Equality of Opportunity and Meritocracy*, April 23, 2025, *available at* https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/ (last accessed May 2, 2025).
32 U.S. Constitution, *Take Care Clause*, Article II, Section 3.
33 U.S. Dep't of Justice, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, Nov. 2, 1994, https://www.justice.gov/file/147181/dl?inline.

ultimate goal of ensuring greater fairness and inclusivity in the practice.

2. Preliminary Findings

At the initial meeting of the Task Force, members shared their own and their colleagues' numerous experiences with ageism, many of which appear to manifest at, or after, the age of forty. One individual was encouraged by their employer to turn over clients to younger attorneys, without prerequisite, thereby losing control over the value of his book of potential future business. Another recalled returning to work from age-related family leave feeling a loss of bargaining power for fair compensation and other work conditions. Another experienced gaslighting, while others felt part of orchestrated firing plans — a tactic believed to be used regularly by sophisticated employers, where an older employee is lumped in with an underperforming group targeted for dismissal as a way to hide the true discriminatory motive. One, a judge at peak efficiency and in great health, was forced into solo practice despite the tremendous caseload that compels the need for more judges in his region of New York State. After such experiences, those who have continued to try and find employment feel certain that, no matter whether their experience exceeds hiring needs, they are compelled to age-proof their resume just to obtain an initial interview.

3. Resources

Many of the ageism issues noted by the NYSBA Special Committee in 2007 persist, but there are now significantly more older lawyers than there were eighteen years ago. The Task Force reviewed a variety of materials, including statistical research, published studies, data, and opinions, and conducted interviews with colleagues, recruiters, and subject matter experts, in addition to reviewing legislation and case law. Unlike studies on gender and race, the Task Force found a paucity of studies on ageism — few studies address ageism's impact on the legal profession, and more data is sorely needed. Even NYSBA's own 2023 DEI report lacked complete data.[34]

4. Report Overview

The Task Force's report covers the following sections:

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34 In terms of age, 38% of members failed to provide age data in 2023, as opposed to only 9% who did not provide this data in 2021. Due to the significant absence of data, it is believed that the ages of all NYSBA members have been significantly undercounted. N.Y. State Bar Ass'n Diversity Report Card, Ninth Edition, 2023, Jan. 2024, https://nysba.org/wp-content/uploads/2022/03/EC-AMENDED-Diversity-Report-Card.pdf#:~:text=There%20was%20also%20a%20significant%20decrease%20in,the%20decline%20of%2016.8%%20in%20NYSBA%20membership (last accessed April 2, 2025). Although diversity data began to be collected by NYSBA in 2005, age data was not added until 2015. See *id.*, 1–2, and NYSBA Diversity Plan, Jan. 31, 2020, https://nysba.org/wp-content/uploads/2020/02/20220816-HOD-Approved-Diversity-Plan.pdf.

- Law & Legal Issues;
- Ageism and the Legal Profession; and
- Task Force Recommendations.

The report examines ageism and encompasses both older and younger members of the workforce. While the Task Force focused primarily on the impact on older legal professionals, it recognizes that, in the future, there should be increased attention paid to younger attorneys as well. We reviewed the current state of applicable laws and disciplinary rules, and any legal issues arising from them. We reviewed mandatory retirement and pension terms tied into non-competition, as well as ageism affecting the state judiciary based on the age limits for judges written into the N.Y.S. Constitution. We touched upon the demographics and sociology of ageism, including the questionable financial health of Social Security, which supports a drive toward legislative and social change in retirement options for older lawyers.[35] This report addresses the history of efforts to eradicate ageism, including prior NYSBA reports and activities. Like the 2007 NYSBA Special Committee on Age Discrimination in the Profession, this Task Force concluded that there is a need for ongoing and deeper studies into the impact of ageism on the legal profession; that is, a more robust effort to collect data over the long-term so as to ascertain trends and the effectiveness of the law and if changing practices has any impact on ageism. We concluded it is essential for the legal professional community to continue to take initiative in furthering this mission.

5. Task Force Recommendations

Therefore, we offer recommendations, which include statutory changes, as well as business practices essential to the profession, not limited to the following:

- Survey and analyze age-related data concerning the legal profession in New York State on an ongoing basis. The format might be one similar to that adopted by the ABA in its lawyer's statistical report's section on age. We recommend additional questions concerning discrimination, retirement, non-compete clauses and other retirement or partial retirement and pension terms and conditions, distinguished by large and small employers, partnership, and private practice, as well as alternate ownership structures as they might

35 Jeffrey M .Jones, *More in U.S. Retiring or Planning to Retire Later*, Gallup, July 22, 2022, https://news.gallup.com/poll/394943/retiring-planning-retire-later.aspx (last accessed March 17, 2023); Juliana Menasce Horowitz, Anna Brown, & Rachel Minkin, *A Year into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans*, March 5, 2021, Pew Research Center, https://www.pewresearch.org/social-trends/2021/03/05/a-year-into-the-pandemic-long-term-financial-impact-weighs-heavily-on-many-americans/ (last accessed March 17, 2023); Internal Revenue Service, *Retirement Topics - Exceptions to Tax on Early Distributions*, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-exceptions-to-tax-on-early-distributions (last accessed March 17, 2023).

emerge or be useful.[36]

- Urge or demand change in all attorney job listings, hiring criteria, and other employment related materials to delete age bias–related terminology. Advertisements that include ceilings in experience (e.g. "3–5 years' experience) are discriminatory, as it is unrelated to the prerequisite skills of any job, thus serving no legitimate purpose. We suggest these prohibited practices are probative evidence of discrimination and a violation of ethics.
- Examine all stereotypical age bias–related terms that are used regularly within NYSBA and member firms, such as "senior" attorneys or "younger associates," opting instead for neutral terms like "experienced" and "new."
- Assist both young and older attorneys with skill refinement, particularly in those areas that are rapidly developing or changing due to advancements in technology and AI. Although this is listed as one of the 50+ Committee's missions, actions taken, future plans, resource usage, and impact remain unclear.
- Promote bidirectional intergenerational mentoring teams, positions, or consulting, which facilitate older lawyers remaining in the legal profession as technology changes while promoting knowledge transfer to new attorneys.
- Monitor, survey, and report to the NYSBA Executive Committee age demographics and other fulsome measures of the effect of the efforts to eradicate age discrimination.
- In studies on AI, incorporate a look at digital age bias footprints to seek suggestions on ways to eradicate this bias.
- Study viability and the cost and number of options available to lawyers who need to reduce the number of hours devoted to practice but desire to remain in the legal profession.
- Enlarge age discrimination training in the DEI requirement for CLE.
- Provide more resources for attorneys and firms that can facilitate transitions for aging attorneys such as converting to solo and remote practice, post-in-house employment, sale of practices, retirement strategies and savings, business healthcare options, and alternate ownership structures.
- Continue to monitor obsolescence of legislation, such as New York's existing exceptions to age discrimination coverage and to laws that treat age discrimination differently from other forms of discrimination.[37]
- Consider promoting blind recruitment methods that narrow the pool of final candidates based on MEI — Merit, Excellence, and Intelligence from standardized written testing and

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36 Clara N. Carson & Jeeyoon Park, *The Lawyer Statistical Report: The U.S. Legal Profession in 2005*, American Bar Found., www.americanbarfoundation.org/wp-content/uploads/2023/05/2005_lawyer_statistical_report.pdf (last accessed May 14, 2025).

37 For example, the standards for review to intervene and amend the ADEA to make consistent with the burden-shifting framework codified in § 107 of the Civil Rights Act of 1991, for plaintiffs to bring mixed-motives claims. (If Congress were to amend the ADEA in this way, the causation standards under Title VII and the ADEA would be identical and the ADEA's goals of deterring discrimination and compensating victims could be fulfilled.)

work samples, rather than individual interviews, which should, if needed, be left for final rounds, and only then consist of a diverse group of interviewers.

- Recommend increasing penalties and statutes of limitations for age discrimination, especially where complex technology facilitates that harm.
- Consider sponsoring paid volunteer programs for experienced attorneys in purposeful ways that might benefit NYSBA, its members and/or the legal profession. (study alternative ownership structures for the NYSBA)
- Consider creating a specialized department within NYSBA dedicated to continuously addressing member needs at each stage of the profession outside of sections or committees.
- Consider potential for compensated pro bono retirement (also through alternative business structures) and other activities that can promote post-retirement wellness.

III. THE LAW AND LEGAL ISSUES

There are federal, state, and local laws banning age discrimination. There are also New York State constitutional protections, along with prohibitions contained within New York's Disciplinary Rules and the ABA's Model Rules of Professional Conduct, against all forms of discrimination. In addition, there is certain legal precedent surrounding the implementation of these protections that impacts their effectiveness.

A. The Age Discrimination in Employment Act ("ADEA")

The Federal Age Discrimination in Employment Act ("**ADEA**")[38] prohibits age discrimination against both applicants and employees in the age class of 40 and older. Prohibitions extend to "disparate treatment" and, *until recently, outcomes that have a harmful impact on a member of, or on, the protected class (known as "disparate impact"), unless the discriminator can prove that the practice is based on a Reasonable Factor Other than Age (RFOA). For instance, a requirement for extensive travel might unfairly impact younger or older workers who have family obligations but might be RFOA if the role hired for was a traveling salesperson.

Interestingly, the Senate Special Committee noted the ADEA, enacted in 1967, aimed "not only to enforce the law, but to ***provide the facts that would help change attitudes***."[39] The Acting Chair of

38 Age Discrimination in Employment Act ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602 (Dec. 15, 1967; eff. June 12, 1968 (180 days after enactment)). See 29 U.S.C. §§ 621–634.
39 U.S. Senate Special Committee on Aging, *Improving the Age Discrimination Law*: *A Working Paper*, , Sept. 1973, 93 Cong. 1st Sess. III (1973).

the EEOC summarized the ADEA's congressional underpinnings in a 2018 Report:[40]

> "Congress crafted a statute based on provisions from both Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act (FLSA). The ADEA shares Title VII's purpose to ***eliminate discrimination*** from the workplace. The ADEA's prohibitions were taken verbatim from Title VII, as was its narrow exception for the use of age as a bona fide occupational qualification (BFOQ). Courts interpret this language from Title VII, including its prohibitions and the BFOQ exception, to apply with "equal force" to the ADEA's substantive provisions. The remedies of the ADEA, by contrast, flow from the FLSA."[41]

The ADEA has had a checkered history; courts vary in determining whether to interpret it differently from Title VII, given its roots lie partly in wage and hours law and partly in discrimination law.[42] The ADEA has been amended through the years, often in response to cases interpreting it as an FLSA-related law or an anti-discrimination law with an upper age cap removed.[43] The core goals of the ADEA remain: to prevent and stop such arbitrary discrimination and to require employers to consider individual ability rather than assumptions about age in making employment decisions.

1. Employees and Exemptions

Unlike local New York laws, which apply to businesses no matter the size, the ADEA only applies to businesses with twenty or more employees, with limited exceptions: state and local governments, employment agencies, labor organizations, and the federal government. The ADEA's bona fide occupational qualification (BFOQ) is a "narrow exception" for an entity who must demonstrate that age is a factor required by the qualifications for the role. Typically, this is invoked for safety concerns, not limited to mandatory retirement — for example, in a role that involves piloting an aircraft. There is also an exemption under the ADEA for mandatory retirement

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40 Victoria Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act*, U.S. EEOC, June 2018, https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment (last accessed May 14, 2025).
41 *Id.*
42 *See id.* at VII.
43 Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, 91 Stat. 1245, Nov. 1, 1977; Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189-93, April 6, 1978. The ADEA was amended in 1974 to expand remedies and in 1978 to raise the private sector age of coverage from 65 to 70, to remove the age cap for federal employees aged 40 and older and to add language to prohibit a seniority system or benefit plan from requiring or permitting involuntary retirement. In 1982, the ADEA was amended to provide for non-discrimination in group health plan coverage for older workers, in 1984 to extend coverage to US citizens employed abroad, and in 1986 to eliminate the upper-age coverage cap, among other matters.

of older bona fide executives, or high policymakers, if entitled to fixed retirement plan benefits.[44] One of the few cases interpreting this provision held that, despite his retirement plan, high salary, and title, the Chief Labor Counsel for Union Carbide Corp. was not deemed to be a high policymaker, given his actual functions.[45]

The ADEA defines an "employee," a definition that excludes elected officials of a state or any political subdivision. State employees are employees under civil service laws, but the ADEA exempts personal staff, appointees, and legal advisors of state officials. This exemption is where elected judges' mandatory retirement practices find a safe harbor. The Supreme Court in *Gregory v. Ashcroft*[46] held that the ADEA did not protect state judges from a mandatory retirement age requirement when subject to periodic retention elections. The Court emphasized judicial independence and the potential challenges of removing judges through impeachment or public elections due to age or performance concerns. It should be noted that in New York State a judge's competence can be challenged and potentially lead to their removal through a formal grievance process (the same is true for attorneys).[47] That said, the Court highlighted the limited accountability of judges compared to other state officials and the potential inadequacy of the election process to determine if a judge's performance has become deficient. The Court acknowledged that while it is not necessarily true that all judges deteriorate significantly at age 70, a state isn't required to create perfect classifications, provided they fit the rational basis test.

a) Legal Professional Organizations

All federal discrimination statutes require the plaintiff to be an "employee." Thus a "partner" may not, on its face, fall under the protection of ADEA. Certain case law supports distinctions for professional associations. In the case of *Clackamas Gastroenterology Associates P.C. v. Wells*, 538 U.S. 440 (2003), the U.S. Supreme Court set out a six-factor test for determining whether a person in a professional organization should be counted as an "employee," and for determining

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44 To be excluded, an employee must have: (1) have attained age 65; (2) have been employed in a bona fide executive or high policymaking position for the two-year period immediately before retirement, ; and, (3) be entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans of the employer, in the aggregate "at least $44,000." 29 U.S.C. § 631.

45 *Whittlesey v. Union Carbide Corp*., 742 F.2d 724 (2d Cir. 1984); *see also Raymond v. Boehringer Ingelheim Pharmaceuticals, Inc*., 653 F. Supp. 2d 151 (D. Ct. 2009) (An attorney who had no hiring or firing authority, no control over the cost center, could not hire or fire, and few contacts with executives was not deemed to be a high policymaker).

46 501 U.S. 452 (1991). The Court affirmed that appointed judges are not protected by the ADEA, because they are "appointees . . . on a policymaking level," and therefore are excluded from the Act's definition of "employee." The Court held that the mandatory retirement provision does not violate the Equal Protection Clause, because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies. *Id*. at 23.

47 NY Const., Art. VI, § 22(a); Judiciary Law § 44(1).

whether an organization meets the employee count threshold to be sued under federal discrimination laws. In *Clackamas*, an ADA case, the plaintiff argued that the physician shareholders should count as "employees," but not "partners." Both the Ninth Circuit and the Supreme Court agreed. The Supreme Court articulated that the basis of distinguishing employees from high-level executives is the level of control. It stated that, "Today there are partnerships that include hundreds of members, some of whom may well qualify as employees because control is concentrated in a small number of managing partners."[48]

The law firm Sidley Austin was sued by the EEOC on behalf of its partners in a class action brought under the ADEA following a three-year complex procedural investigation of its professional legal organization and retirement policy.[49] Two years later, the law firm settled and paid $27.5 million and agreed to injunctive relief that barred any age-adverse retirement policy or partner status change. These partners were considered "employees" because they exercised no control and were involuntarily downgraded, expelled, or retired due to their age, despite their titles belying that that could be the case.

2. Section 1983 of the Civil Rights Act

An age discrimination claim is pursued under § 1983 of the Civil Rights Act,[50] but it is important to note that this is typically in conjunction with other laws, like the ADEA. While § 1983 provides a federal remedy for violations of constitutional rights, it is often employed to challenge governmental actions that violate the Equal Protection Clause of the Fourteenth Amendment. Specifically, it is used in the context of age discrimination to challenge state or local government officials who act under color of law and engage in discriminatory practices. While the ADEA provides a specific remedy for age discrimination in employment, whether it preempts § 1983 claims is a subject of ongoing debate and has been a topic of Supreme Court consideration.[51]

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48 Using the EEOC's six factor test, which focuses on "control," the court laid out the following factors: 1. "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;" 2. "Whether and, if so, to what extent the organization supervises the individual's work;" 3. "Whether the individual reports to someone higher in the organization;" 4."Whether, and, if so to what extent, the individual is able to influence the organization;"5. "Whether the parties intended that the individual be an employee, as expressed by written agreement or contracts;" and 6. "Whether the individual shares in the profits, losses and liabilities of the organization."

49 *EEOC v. Sidley Austin LLP*, N.D. Ill. No. 05 C 0208.

50 Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983.

51 Plaintiff Harvey N. Levin was hired at age 55 as an attorney for the Illinois Attorney General's office. He was terminated six years later and replaced by a female in her thirties. Levin sued for age and sex discrimination under the ADEA, Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983 (a claim available only against state and local governments). He sued his boss in both her individual and official capacities. The district court dismissed Levin's Title VII and ADEA claims because he was not an "employee" under those laws. But the court denied Defendants' motions to dismiss the § 1983 claims.

3. *Equal Protection and Rational Basis Scrutiny*

The Equal Protection Clause of the Fourteenth Amendment[52] guarantees protection under the law. The Supreme Court has not classified age as a suspect classification; therefore, age-based discrimination falls under a "rational basis review."[53] This test requires the challenged law to have a rational connection to a legitimate government interest. As such, if there is any conceivable reason why the law makes a distinction based on age, the court will likely uphold it. Whether right or wrong, this scrutiny is rooted in the idea that age is not a fundamental aspect of an individual's identity and so is not as inherently suspect as, for example, race. It is unnecessary to show that a law is narrowly tailored to meet a compelling government interest.

Notably, the term "rational basis plus" does not have a formal legal definition, but generally refers to a heightened level of scrutiny that may be applied to laws or regulations that discriminate based on factors like age, where the traditional "rational basis" test may be deemed too deferential to the government. This approach, while still lower than intermediate scrutiny and strict scrutiny, places a greater burden on the government to justify its actions and ensures that laws are not based on arbitrary or irrational distinctions, discriminatory, or act as burdens to a fundamental right.[54] It seeks to ensure that the government's actions are not arbitrary and that laws are not based on irrational distinctions. This Task Force favors arguments that the rational basis test is not sufficiently protective of older individuals, particularly in the non-employment context.[55]

4. *But For Causation*

The reach of the ADEA, in a disparate treatment claim, may have been undercut substantially by the U.S. Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). The Court held that a plaintiff must prove that age was the '*but-for cause*' of the challenged adverse action, meaning the action would not have occurred but for the employee's age. In legal contexts, "cause" is the direct and immediate reason for an action or event; it identifies what specifically resulted in that outcome. Intent refers to the reason for an action, while motivation is the psychological drive behind it. This is difficult to prove in an ADEA case. Sophisticated employers

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52 Fourteenth Amendment to the U.S. Constitution: Civil Rights (1868)
53 Thomas Lewis Tandy, *Age Discrimination and the Supreme Court*, EBSCO, 2023, https://www.ebsco.com/research-starters/law/age-discrimination-and-supreme-court (last accessed April 30, 2025).
54 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle Univ. Law Rev. 135, 135–74 (2011), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2059&context=sulr, (last accessed April 14, 2025).
55 Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44(1) UC Davis Law Rev. 213, 213–82 (2010), https://lawreview.law.ucdavis.edu/sites/g/files/dgvnsk15026/files/media/documents/44-1_Kohn.pdf#:~:text=95%20The%20result%20is%20that%20the%20courts,be%20discussed%20in%20Parts%20II%20and%20III (last accessed May 2, 2025).

with intelligent lawyers make it more difficult today than ever to obtain that kind of "smoking gun."[56]

The burden of persuasion does not shift to the employer, as it would in Title VII mixed-motive cases, even if the plaintiff has offered evidence of age discrimination. In *Babb v. Wilkie*,57 the U.S. Supreme Court reasoned that the language of the ADEA's federal-sector provision, which states that personnel actions "shall be made free from any discrimination based on age," was untainted by age discrimination. The Court interpreted "free from any discrimination" to mean that age needs not be a '*but-for cause*', in employment action, to establish a violation. However, to obtain remedies such as reinstatement or back pay, the plaintiff must demonstrate that age was the '*but-for cause*' of the adverse employment outcome. The Court distinguished this provision from other anti-discrimination statutes, clarifying that while age need not be the '*but-for cause*' of the decision, it must be a '*but-for cause*' of discrimination, resulting in differential treatment. It reasoned that employees who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back pay, compensatory damages, or other forms of relief related to the result of an employment decision. If age discrimination played a lesser part in the decision, other remedies may be appropriate.[58] The holding synthesized, in all cases, the object of that causation as "discrimination," i.e., differential treatment, and not the personnel action itself. Reaffirming that the bedrock law is that "requested relief" must "redress the alleged injury."[59]

This Task Force can only hope that Congress might consider an amendment to the ADEA to be consistent with the burden-shifting framework codified in § 107 of the Civil Rights Act of 1991.

5. Circumstantial Evidence

Law firms are often hesitant to hire younger and older attorneys because of unfounded beliefs such as that they will not stay or are set in their ways. This may result in a pattern of behavior or circumstances that, when combined, suggest age discrimination. This might include preferential treatment in promotions, training, or desirable assignments, with others passed over. It may also take the form of negative performance reviews, with unjustified criticism or changes in performance review standards, or even social isolation by excluding older workers from social

56 But see *Wallace v. Esper*, 2019 WL 4805813 (S.D.N.Y. 2019). A JAG officer and former attorney in the Army sufficiently pleaded "but for" to nudge her ADEA claim from the conceivable to the plausible, when she contested her removal from an attorney position. She alleged that her supervisor made overt comments "to and around Plaintiff" about their intent to get rid of "old lawyers and hire" only the youngest, work was given to younger workers, she was the oldest member of her unit, and she was effectively replaced by someone several years her junior.
57 589 U.S. 399 (2020).
58 *Id*. at 402.
59 *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)

activities or meetings. The issue is whether it is discriminatory. Courts have examined cases involving attorneys not selected for employment based on being deemed "overqualified." In *Taggart v. Time, Inc.*, 924 F.2d 43 (2d Cir. 1991), the Court held that refusing to hire an older worker on the sole basis that he was overqualified gives rise to an inference of age discrimination. The Court noted that:

> An employer might reasonably believe that an overqualified candidate — where that term is applied to a younger person — will continue to seek employment more in keeping with his or her background and training. Yet, that rationale does not comfortably fit those in the age group the statute protects; for them loss of employment late in life ordinarily is devastating economically as well as emotionally. Instead, an older applicant that is hired is quite unlikely to continue to seek other mostly non-existent employment opportunities.[60]

However, *Taggart* was interpreted to require that overqualification be the sole reason for rejecting an applicant.[61] In other words, no other circumstantial evidence was included that would be needed to support an inference of age discrimination.[62] Without disparate impact audits or other data, it may be difficult to gather such evidence, because most applicants will never know resumes are glossed over and immediately rejected based on indications of an age.

6. Older Workers Benefit Protection Act ("OWBPA")

The ADEA was amended in 1990 by the Older Workers Benefit Protection Act (OWBPA).[63] Congress restored the original congressional intent in passing and amending the ADEA, which was to prohibit discrimination against older workers in all employee benefits, except when age-based reductions in employee benefit plans are justified by significant cost considerations.[64] The OWBPA amended the ADEA to ensure employers do not engage in subterfuge to evade age-based discrimination laws in benefits, such as (involuntary or voluntary) retirement, pension, or insurance, and to ensure that older workers are not forced to waive their rights under the ADEA without specific information about the program eligibility factors and ages of individuals eligible or selected for the programs.[65] Where age cost differentials are a factor, an employer may be permitted to reduce certain benefits so long as the cost the employer incurs is no less than the cost of providing the benefits to younger workers. Employers may align retiree health benefits with

60 *Taggart v. Time, Inc*., 924 F.2d 43, 48 (2d Cir. 1991).
61 *Focarazzo v. Univ. of Rochester*, 947 F. Supp. 2d 335 (W.D.N.Y. 2013) (*Taggart* not relevant where overqualification was not the sole nondiscriminatory reason for not hiring the applicant).
62 *Parsons v. JPMorgan Chase Bank, N.A*., 16-CV-0408, 2018 WL 4861379 (E.D.N.Y. Sept. 30, 2018).
63 Older Workers Benefit Protection Act**,** Pub. L. No. 101-433, 104 Stat. 978 (eff. Oct. 16, 1990).
64 *Pub. Emp. Retirement Sys. v. Betts*, 492 U.S. 158 (1989).
65 *Id.* at 166; 29 U.S.C. § 623(f)(2).

Medicare or similar state plans.[66]

7. Equal Employment Opportunity Commission (EEOC)

The Equal Employment Opportunity Commission (EEOC) is the sole federal agency that enforces federal employment anti-discrimination laws against businesses and other private employers. The agency also plays a critical role by investigating charges against state and local government employers (including public universities), before referring those charges to the DOJ's Civil Rights division. The EEOC has authority over most employers in age discrimination cases, provided the employer has at least twenty employees. An employer does not need to have a federal contract or receive federal funds to fall under the authority of the EEOC. The EEOC also has authority over employment agencies, labor unions, and training programs.

As with Title VII, there are procedural requirements for filing with the EEOC. Unlike Title VII, no Notice of Right to sue is required for suit once 60 days have passed after filing.[67] A charge must be filed within 180 days of the alleged discrimination, or 300 days if the charge also is covered by a qualifying state or local anti-discrimination law. A claim filed with the EEOC within 300 days of the last discriminatory act has the "overwhelming weight of authority" that the statute of limitations on a plaintiff's federal discrimination claims is not tolled while the matter is pending before the Division of Human Rights.[68] The limitations cannot be shortened by agreement of the parties.[69]

B. State and Local Laws

The New York State Human Rights Law (Executive Law § 296 *et seq*), like the New York City Administrative Code, prohibits discrimination based upon age.[70] Effective January 2025, New York State added a constitutional protection, by enacting the Equal Rights Amendment ("NY ERA"). The NYCHRL covers organizations in New York City that have at least four employees. The New York State Human Rights Law (NYSHRL) applies to all employers in the state, regardless of size. Both laws offer broader protection than federal laws.

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66 U.S. EEOC, *Fact Sheet: Age Discrimination*, https://www.eeoc.gov/laws/guidance/fact-sheet-age-discrimination (last accessed April 15, 2025).
67 U.S. EEOC, *Filing a Lawsuit*, https://www.eeoc.gov/filing-lawsuit (last accessed April 14, 2025).
68 *Scott v. Cayuga Cty. Civil Service Comm'n*, 2025 WL 472681 (N.D.N.Y. 2025), citing *Lomako v. N.Y. Inst. Of Tech*, 2010 WL 1915041 (S.D.N.Y. 20210), *aff'd*, 440 Fed. App'x 1 (2d Cir. 2011).
69 *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2021); *but see In re IBM Arbitration Agreement Litigation*, 76 F.4th 74, 84 (2d Cir. 2023) (Timeliness provision relating to time period for arbitrating claims, including ADEA claims, was enforceable.).
70 *See* N.Y.C. Admin. Code, Title 8: Civil Rights.

1. New York State Human Rights Law ("NYSHRL")

It is worth reiterating that the opening line of the NYCHRL states that given New York City's "great cosmopolitan population, there is ***no greater danger to the health, morals, safety and welfare of its inhabitants,*** than the existence of groups prejudiced against one another and antagonistic to each other, because of their actual or perceived differences, including those based on . . . age." As such, New York has a history of adopting robust protections to stop age discrimination. The Ives-Quinn Anti-Discrimination Bill, introduced in 1945, was renamed the Human Rights Law in 1958. New York State's prohibition against age discrimination (importantly not only discrimination based on one's actual age but their "*perceived age*"[71] as well (e.g., a behavioral component of ageism prevalent in society[72]), is broader than the federal prohibition.[73] [**As AI and other algorithms replace human filters and disparate impact is threatened, this may further develop and prove its importance in establishing cause.] It covers all employers and any employee aged eighteen and over, protecting them from age discrimination in employment, apprentice and training programs, promotions, and termination. Individuals have legal protection against discrimination and harassment. The Division of Human Rights publishes fact sheets on age discrimination.[74]

Effective October 2019, the antidiscrimination provisions of the Human Rights Law protect nonemployees, such as contractors, subcontractors, vendors, consultants, temporary workers, interns[75] and other non-employee persons providing services, pursuant to a contract, "when the employer, its agents, or supervisors knew, or should have known, that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action."[76]

Mandatory retirement is not permitted under the NYSHRL, though exceptions exist for certain executives, individuals in high policymaking roles, and specific occupations. Additionally, New York State Law states:

> "nothing contained in this subdivision, in subdivision one of this section or in article fourteen-A of the retirement and social security law shall be construed to prevent the

71 N.Y.C. Admin. Code § 8-107 1(a).
72 Liat Ayalon & Octavio Bramajo, *Perceived Age Discrimination in the Second Half of Life: An Examination of Age, Period, and Cohort Effects*, 7(8) Innovation in Aging 1, 110 (2023), https://doi.org/10.1093/geroni/igad094 (last accessed May 11, 2025).
73 N.Y. Exec. Law § 296(1).
74 See N.Y. State Div. of Human Rights, *Age Discrimination*, https://dhr.ny.gov/system/files/documents/2024/04/nysdhr-age-discrimination.pdf (last accessed May 14, 2025).
75 N.Y. Exec. Law § 296-c(2) and 3(b).
76 N.Y. Exec. Law § 296-d.

termination of the employment of any person who, even upon the provision of reasonable accommodations, is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of said subdivisions or said article; nor shall anything in such subdivisions or such article be deemed to preclude the varying of insurance coverages according to an employee's age."[77]

Unlike the ADEA, a mixed-motive analysis is applicable under the NYSHRL. Harassment based on age is prohibited under the NYSHRL, whenever it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's age.[78] Thus, it is easier to prove an age case under the NYSHRL as it covers more employers and a broader category of employees and contractors than the ADEA. There is a three-year statute of limitations for filing claims both in court and administratively.[79]

While the NYSHRL has an election of remedies provision for claims brought to the Division of Human Rights administratively, it is possible to circumvent this by requesting to dismiss a claim in the Division for "administrative convenience" to sue.[80] As a result, a case may begin administratively, but then wind up in court; frequently, too, an ADEA case will be coupled with a claim under the NYSHRL. As a result of some recent amendments, the remedies under the NYSHRL have become more expensive, so that they now parallel those available under the ADEA.

2. State Constitutional Protection

Effective January 1, 2025, the New York Equal Rights Amendment offers protection from age discrimination and further clarifies that Article I, § 11 of the New York State Constitution does not invalidate or prevent any future law, program, or practice from preventing or dismantling discrimination (such as the New York State Human Rights Law). While the NYERA provides that "No person shall because of . . . age . . . be subjected to any discrimination in their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state, pursuant to law," the amendment does contain any age parameters.[81]

While the Equal Rights Amendment and the amendment to the disciplinary rules below provide additional avenues for addressing age discrimination and harassment, they are relatively new, and

77 N.Y. Exec. Law § 296(3-a)(g).
78 N.Y. Exec. Law § 296(1)(h).
79 N.Y. Exec. Law § 297(5).
80 N.Y. Exec. Law § 297(3)(c).
81 New. Adopted by Constitutional Convention of 1938 and approved by vote of the people Nov. 8, 1938; amended by vote of the people Nov. 6, 2001; amended by vote of the people Nov. 5, 2024.)

without guidance as to how they will be applied, what remedies they may give rise to, and what standards will be applied. While this has opened the door for partners to sue their professional companies, a general hesitancy to sue remains due to fears of retaliation, potential job loss, the perceived complexity and costs of legal action, emotional toll, and impact to career and reputation.[82]

3. New York's Disciplinary Rules

Illegal discrimination and harassment is prohibited by New York Rules of Professional Conduct Rule 8.4(g).[83] Rule 8.4(g) provides that a lawyer, or law firm, may not engage in conduct in the practice of law that the lawyer or law firm knows, or reasonably should know, constitutes (1) unlawful discrimination or (2) harassment, whether unlawful or not, on the basis of one or more classes that include age. Harassment is defined as "physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is directed at an individual or specific individuals; and is derogatory or demeaning. Conduct that a reasonable person would consider as petty slights or trivial inconveniences does not rise to the level of harassment under this Rule."

This means that lawyers cannot engage in age-based discrimination in their interactions with colleagues *or* clients. Law firm policies mandating the departure of partners at a certain age can be considered age discrimination if the partner is not compensated by virtue of a contract and consideration or subject to an existing retirement policy.

As with New York's Equal Rights Amendment, the Rules do not define whether there are any limits to the age of people protected. Following the amendment of the Rule in 2022, the process for submitting complaints to disciplinary committees has become more streamlined and accessible. It also eliminated the requirement that a victim file a state claim before bringing an ethics complaint. The Task Force believes that there is still insufficient attention to these matters at law firms, whether in CLEs or other forms of legal education surrounding the amended rule. The profession would benefit from greater awareness and education.

4. NY Municipal and Local Laws

Some New York State municipalities have created local anti-age discrimination laws to offer more protection than state and federal regulations. These local laws often expand the protections to more classes or broader remedies. The best known may be New York City's Administrative Code, which prohibits discrimination against employees, contractors, and students aged 18 and older.[84] NYC's

82 *See* EEOC.gov
83 N.Y. Rules of Professional Conduct, Rule 8.4(g), amended June 10, 2022.
84 N.Y.C. Admin. Code § 8-101 *et seq*.

Commission on Human Rights has issued Legal Enforcement Guidance on Employment Discrimination, based on age.[85] It points out that:

> Age discrimination in the workplace is an undeniable reality. Stereotypes about age, whether about being "too old" or "too young," permeate employment spaces. It is particularly insidious because much of age discrimination stems from biases entrenched in and perpetuated through media, caricatures, paternalistic assumptions, and more. Compounding the problem, "[h]istorically, Congress, the courts, and society have viewed age discrimination as less malevolent than race, gender, and other forms of discrimination. Workplace age issues are perceived more as economic issues and not as fundamental civil rights issues."

New York City has prohibited discrimination based on age since 1977. This prohibition covers both actual age discrimination and perceived age discrimination for most employers.[86] Pursuant to Local Law No. 85 (2005), the NYCHRL must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise."[87] Any exemptions to the NYCHRL must be construed "narrowly in order to maximize deterrence of discriminatory conduct."[88]

Other municipalities with their own discrimination laws include Suffolk County and the City of Rochester.[89] The Task Force urges all municipalities to adopt broader remedies, specific to local needs and concerns, against age discrimination.

C. Legal Issues involving Claims

1. Implicit and Intentional Age Discrimination

Age discrimination can manifest as intentional age discrimination, through disparate treatment and retaliation,[90] or through a disparate impact, from the disproportionate effect of seemingly neutral policies on a defined class. Intentional discrimination based upon age can find a remedy under

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85 See NYCHR https://www.nyc.gov/site/cchr/law/age-discrimination-legal-enforcement-guidance.page
86 N.Y.C. Admin. Code § 14-151.
87 Local Law No. 85, § 1 (2005); N.Y.C. Admin. Code § 8-130(a) ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.).
88 Local Law No. 35, § 2 (2016); N.Y.C. Admin. Code § 8-130(b).
89 Suffolk Co. Admin. Code § 528-7 *et seq*.; City of Rochester Code § 63-4.
90 Deb Muller, *Disparate Treatment vs. Disparate Impact*, HR Acuity, July 2, 2024, https://www.hracuity.com/blog/disparate-treatment-vs-disparate-impact/ (last accessed May 6, 2025).

various statutory provisions of law, whereas unintentional discrimination, resulting from implicit bias or disparate impact, may be harder to prove, and more arduous given the need for statistical evidence. However, disparate impact claims — when proven — still violate civil rights laws, unless the employer can justify it as a business necessity and no less discriminatory alternative is available.[91] Allegations of unconscious bias are inadequate to state a claim under § 1983 and the Fourteenth Amendment because they are not purposeful or intentional.[92]

a) Disparate Treatment

An individual may present a claim of disparate treatment if they are subject to discrimination "in compensation or in terms, conditions or privileges of employment" because of their actual or perceived age.[93] To establish disparate treatment, an individual must show that they were treated less well or subjected to an adverse action motivated, at least in part, by discriminatory animus.[94] An individual may demonstrate this through direct evidence of discrimination or indirect evidence that gives rise to an inference of discrimination.[95]

(1) Advertising and Interviews

(a) Ceilings

Law school graduates average 25–27 years of age. Around the age of 40, an unemployed lawyer may apply for a new position that matches all their qualifications, even if they are overqualified, provided it meets their salary needs. Surprisingly, though, opening any number of job ads will often result in this attorney's first encounter with ageism:[96]

- ✓ You exceed the job requirements listed on the hiring description
- ✓ You use data and analysis to make decisions

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91 *Griggs v. Duke Power Co*., 401 U.S. 424 (1971).
92 *See Naumovski v. Norris*, 934 F.3d 200 (2019).
93 N.Y.C. Admin. Code § 8-107(1)(a)(3).
94 See *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009).
95 Examples of direct evidence could include explicit statements by a covered entity that an adverse action was based on a protected status, or explicitly discriminatory policies. *See In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Comm'n Dec. & Order, 2016 WL 1644879, at *4 (Apr. 21, 2016). If plaintiff makes a prima facie showing of discrimination based on indirect evidence, then the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and non-discriminatory reason for its employment decision. *Id.* If the employer articulates a legitimate, non-discriminatory basis for its decision, then the burden shifts back to the plaintiff "to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629–30 (1997). *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Fields v. Dep't of Educ. of New York*, No. 154283/2016, 2019 WL 1580151 (Sup. Ct., N.Y. Co. Apr. 12, 2019).
96 Rich Cruz, *Fight Ageism, Fuel Growth with Inclusive Hiring & Retention*, Harmonious Workplaces, Feb 15, 2024, https://harmoniousworkplaces.com/fight-ageism-fuel-growth-with-inclusive-hiring-retention/.

- ✓ You can make a difference
- ✓ You have practice experience with a substantial understanding of the clients' industries
- ✓ You have strong leadership skills and a *history* of motivating others
- ➢ **2–7 years**
- ➢ **Culture fit**
- ✓ The salary range meets expectations.

This ad demonstrates a subtle and pervasive form of discrimination common in legal hiring ads today. It is based on age, because it sets a ceiling on experience and a hurdle in the form of a subjective and undefined standard: the "culture fit."[97] If a candidate can even make it to an interview, e.g., their resume demonstrates experience beyond that seven-year ceiling, because the threshold value is not indicative of any rationale for such a limit, they then face not fitting into an undefined culture and a question of whether they should have applied at all.

(b) Culture Fit

"Culture fit" refers to aligning employees with company values and culture. It can serve as a subtle means to exclude people by age, as its subjectivity allows for personal bias. Companies may unknowingly favor candidates who resemble existing employees, perpetuating stereotypes and leading to a homogenous workforce, thus hindering the innovation and creativity that can come from employees with varying backgrounds. In tech, the term can be a subtle dog whistle for ageism if a candidate does not "fit" the youthful, tech-savvy image of a company. Workers aged 45–64 account for a substantial portion of long-term unemployment.[98] Many older candidates struggle to change course or reenter the workforce due to unfounded stereotypes suggesting they are less adaptable and not as technologically adept, despite the ample evidence that exists to the contrary.[99]

Instead of relying on subjective "culture fit," companies should define their core values and assess candidates based on their alignment. This should compel prioritizing skills over compatible traits. Otherwise, culture-fit interview questions should be abandoned.

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97 Tara Becker & Susan T. Fiske, *Age Discrimination, One Source of Inequality* in *Understanding the Aging Workforce: Defining a Research Agenda* (Nat'l Academies of Sciences, Engineering, and Medicine, 2022), https://www.ncbi.nlm.nih.gov/books/NBK588538/.

98 Drystan Phillips, *Hidden and Persistent Unemployment Among Older Workers*, The New School Schwartz Ctr. for Econ. Policy Analysis, Dec. 20, 2023, https://www.economicpolicyresearch.org/resource-library/hidden-and-persistent-unemployment-among-older-workers (last accessed April 26, 2025).

99 Matt Bush, *Insights: Is Culture Fit Discrimination?*, Great Place To Work, Mar. 4, 2021, https://www.greatplacetowork.com/resources/blog/is-culture-fit-discrimination (last accessed April 26, 2025).

b) Disparate Impact

A disparate impact claim arises where a facially neutral policy or practice disproportionately harms a protected group. The Supreme Court has recognized that the ADEA authorizes recovery in disparate impact cases.[100] In April 2025, President Trump signed an Executive Order to eliminate the use of disparate-impact liability in various contexts.[101] This raised questions about whether the disparate impact claim will remain a legally viable method of challenging otherwise neutral policies. An impact standard can be a broad sword. Due process requires that a statute apprises a person of reasonable intelligence of the nature of prohibited conduct. Otherwise, a statute that lacks sufficient clarity could be unconstitutionally vague. Employers feel compelled to conduct audits and balancing tests to identify statistical disparities in neutral practices, with the aim of preventing discrimination lawsuits. This is because the Supreme Court has held that the "because of" language in statutes only requires causation, not intent. The argument against these searches for statistics is that they are futile. Employers are urged by the government to uncover longstanding patterns to comply with civil rights laws, which can then increase the likelihood of discrimination suits brought by the government.102 The reason lies in the statutes themselves. The claim is that statutes do not properly apprise government enforcement agencies (like the EEOC) of the actual prohibited conduct. In any event, private litigants may still file disparate impact claims under Title VII, or under parallel state and local laws. The wide range and scale of liability for disparate impact claims often prevents summary judgment, leading most defendants to settle.

Interestingly, given the potential of finding the impact standard unconstitutional, an alternative analyzed by a Cincinnati College of Law professor in 2014 contemplated the application of tort law:

> . . . the Supreme Court is strongly imbuing discrimination law with a tort conception and meaning and increasingly viewing statutes through the interpretive device of textualism. As such it may be a necessary option to consider what tortification and textualism mean for the discrimination statutes, as both arguments have been used to broaden the scope of discrimination law. This may radically challenge current ideas about statutory

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100 *Smith v. City of Jakson, Miss.*, 544 U.S. 228 (2005).
101 See Exec. Order 14281, *supra* note 9, and The White House, *Fact Sheet: President Donald J. Trump Signs Landmark Order to Restore Equality of Opportunity and Meritocracy*, April 23, 2025, https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-signs-landmark-order-to-restore-equality-of-opportunity-and-meritocracy/.
102 James Scanlan, *Is the Disparate Impact Doctrine Unconstitutionally Vague?*, Fed. Society, May 5, 2016, https://fedsoc.org/commentary/fedsoc-blog/is-the-disparate-impact-doctrine-unconstitutionally-vague (last accessed April 26, 2025).

interpretation and the fixed meaning of statutory terms.[103]

Similarly, should the disparate impact theory be eliminated, expanding the concept of implicit bias may help to fill the void. Implicit bias and disparate impact are interconnected concepts, yet traditionally addressed through distinct approaches. Employment lawyers often discuss implicit bias, which refers to unconscious attitudes or stereotypes that affect judgments and actions toward others without conscious intent to discriminate.[104] Disparate impact, by contrast, occurs when a neutral policy or practice disproportionately harms a protected group. Historically, disparate impact claims focus on outcomes, while implicit bias theory focuses on individual decision-making processes. In *Yu v. Idaho State University*, the Ninth Circuit declined to address whether implicit bias may be probative or used as evidence of intentional discrimination under Title VI, indicating that this issue remains unresolved.[105] Amicus briefs in the same case argued that implicit bias could be probative evidence of intentional discrimination. In *Martin v. F.E. Moran, Inc.*, the court noted that susceptibility to implicit bias does not prove actionable discrimination.[106] The extent to which implicit bias results in unfair prejudice is not a simple undertaking, and while it can be considered, implicit bias alone is not currently sufficient to establish intentional discrimination.

(1) Digital Ageism

Today, the use of automated systems, including those sometimes marketed as "artificial intelligence" or "AI," is common in our daily lives. The term "automated systems" is used broadly to mean software and algorithmic processes, including AI, used to automate workflows that help people complete tasks and make critical decisions that can impact individuals' rights and opportunities, including fair and equal access to a job. Automated systems are often advertised as providing insights and breakthroughs, increasing efficiencies and cost-savings, and modernizing existing practices. However, their use also has the potential to perpetuate unlawful bias, automate unlawful discrimination, and produce other harmful outcomes.[107] Employers must actively monitor and address potential adverse impact when using AI and algorithms in employment selection. In 2023, the EEOC issued new guidance on the use of artificial intelligence in

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103 Sandra F. Sperino, *Let's Pretend Discrimination Is a* Tort, Univ. of Cincinnati Coll. of Law, https://scholarship.law.uc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1296&context=fac_pubs (last accessed April 26, 2025).
104 Kang, Jerry, Implicit Bias: A Primer for Courts, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009. ABA *Task Force on Implicit Bias* https://www.americanbar.org/groups/litigation/about/diversity/task-force-implicit-bias/what-is-implicit-bias/ (last accessed April 16, 2025).

105 15 F.4th 1236 (9th Cir. 2021).
106 2018 U.S. Dist. LEXIS 54179 (N.D. Ill. Mar. 30, 2018).

employment related matters, but that guidance was removed during the President Trump administration.[107] The EEOC's guidance emphasized employer responsibility for ensuring the fairness of these tools, even if developed or administered by third parties. Also in 2023, New York City enacted a law prohibiting employers and employment agencies from using an automated employment decision tools unless a bias audit has been conducted and required notices are provided.[108] However, age was not one of the factors required to be measured in a bias audit.[109]

(2) Ageism and Women

Studies reveal that there is significant overlap and intersectionality between discrimination against women lawyers and older lawyers.[110] Not only does ageism exist, but it is also more visible than we may want to believe.

- 80.7% have witnessed women in the workplace being treated differently because of their age.
- 46.2% or near half of that number reports it to be an ongoing issue.

One major issue for women in the legal profession is the expectation that they serve as the primary caretaker of children and other family members. Given the demands of the profession, especially the additional workload and travel requirements of partnership, women are forced to take significant time off, or worse, leave the profession altogether until they are able to reenter the workforce, often at a much older age. These women reentering the legal world are then likely subject to both sex and age discrimination.[111] While ageism is often thought as something that impacts people in the latter years of their careers, the reality is ageism can have negative implications at all ages and stages. The data revealed notable peaks in the initial decade of work and later years.

- 40.7% of respondents experienced age-based discrimination within the first decade of

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107 U.S. EEOC, *Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, May 18, 2023, https://data.aclum.org/storage/2025/01/EOCC_www_eeoc_gov_laws_guidance_select-issues-assessing-adverse-impact-software-algorithms-and-artificial.pdf.
108 Local Law No. 144 of 2021; see also https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf.
109 Rules of the City of N.Y. § 5-301.
110 Judith Droz Keyes , *Senior Attorneys and Ageism: The Next DEI Frontier*, Jan. 19, 2023, https://www.americanbar.org/groups/senior_lawyers/resources/experience/2023-january-february/senior-attorneys-ageism-next-dei-frontier/.
111 Stephanie A. Scharf & Roberta D. Liebenberg, *Walking Out the Door: Facts and Figures of Experienced Women Lawyers in Private Practice*, Am. Bar Ass'n and ALM Intelligence, 2019, https://www.americanbar.org/groups/diversity/women/initiatives_awards/long-term-careers-for-women/walking-out-the-door/.

their professional journey.

- More than half (55.9%) encountered ageism after surpassing 21 years in their career.[112]

The pressure to maintain a youthful appearance, or "lookism," is a significant aspect of gendered ageism.[113] Online representations and media often perpetuate negative stereotypes of older women, contributing to digital ageism.

D. Statute of Limitations

In New York, the statute of limitations for age discrimination claims:

- Federal: The Age Discrimination in Employment Act (ADEA) requires filing a charge with the EEOC within 300 days.
- New York State Human Rights Law (NYSHRL) has a three-year statute of limitations.
- The New York City Human Rights Law (NYCHRL) has a three-year statute of limitations for filing a civil action related to discrimination, including age discrimination.
- State Agencies: The period to file with an agency (such as the New York State Division of Human Rights) is three years for discrimination claims occurring on or after February 15, 2024, and for sexual harassment claims occurring on or after August 12, 2020.

Wage-related claims allow for longer periods; NY Labor and Equal Pay Laws state allows for six years.114

E. Damages and fees under State and Federal law

Interestingly, while prevailing in a discrimination case may entitle the plaintiff to out-of-pocket expenses, such as attorney's fees, court fees, and fees for expert witnesses, discrimination laws are inconsistent.

In cases of willful violations, the ADEA allows for liquidated damages, which are essentially a form of punitive damages, but not compensatory or punitive damages in the traditional sense.[115]

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112 Women of Influence, *New Survey Reveals that Almost 80 per cent of Women Face Ageism in the Workplace*, Feb. 26, 2024, https://www.womenofinfluence.ca/2024/02/26/ageism-in-the-workplace/.
113 The Free Dictionary, *Lookism*, https://www.thefreedictionary.com/lookism (last accessed May 6, 2025); Megumi Hosoda, Eugene F. Stone-Romero, Gwen Coats *The effects of physical attractiveness on job-related outcomes: A meta-analysis of experimental studies*, 56(2) Personnel Psychology 431, 431–62 (2003), https://psycnet.apa.org/doi/10.1111/j.1744-6570.2003.tb00157.x.
114 N.Y. Lab. Law § 198.
115 "The Court agrees with Defendant that Plaintiff is not entitled to punitive damages under the ADEA." See *Boise*

New York State and New York City's human rights laws permit compensatory and punitive damages, and all three permit the recovery of attorneys' fees.

IV. RETIREMENT, SALE OF PRACTICES, NON-COMPETES, PENSIONS

While not related to ageism, statutes, case law, and ethical opinions dealing with retirement, sales of practices, alternative business forms and non-competes are outlined in **Appendix B**. It is important to note that the definition of retirement may vary depending on the context. There are Rules of Professional Conduct that cover the sale of a law practice, the division of legal fees between lawyers in different practices, and the payment of fees to a lawyer formerly associated with a firm.

1. Pensions

New York pension laws significantly influence lawyer retirement decisions, primarily due to the nature of pension plans as a source of income and the potential for early retirement options.[116] Lawyers, particularly those with access to defined benefit plans, must consider the impact of pension forfeiture and the potential for early retirement benefits when making retirement plans, as some plans condition payment on non-competition. Many lawyers, including those in the Unified Court System, can retire early while still adding significant years of service to their pension credit, potentially increasing their retirement income. New York State mandates that certain private sector employers offer employees retirement savings plans, potentially impacting how lawyers, particularly those in private practice, plan for retirement.

2. Mandatory Retirement of New York State Judges

The New York State Constitution requires most judges in New York State to retire at age 70.

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v. Boufford, 121 Fed. App'x 890, 892 ("To the extent Boise sues NYU to recover punitive damages, this court has ruled that such relief is not available under the ADEA.") (citing *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146–48 (2d Cir. 1984)); *Burlingame v. Martin*, No. 122-CV-24 (BKS) (CFH), 2022 WL 2315617, at *2 (N.D.N.Y. June 28, 2022) ("The Second Circuit has held that, under the ADEA, plaintiffs cannot recover punitive damages or compensatory damages for emotional distress.") (citing *Johnson*, 731 F.2d at 147–48); *Walsh v. Scarsdale Union Free Sch. Dist.*, 375 F. Supp. 3d 467, 482 (S.D.N.Y. 2019) ("It is well-settled that the ADEA does not allow plaintiffs to recover for emotional distress, pain and suffering, or any other non-economic damage."); *Sohen v. Charter Communic., Inc*., 761 F. Supp. 3d 556 (E.D.N.Y. 2025).

116 Office of the N.Y. State Comptroller, N.Y. State and Local Ret. Sys., *What is a Defined Benefit Plan?*, https://www.osc.ny.gov/retirement/members/defined-benefit-plan#:~:text=Payments%20are%20not%20guaranteed%20to%20last%20through%20retirement.&text=Benefit%20amount%20is%20fixed%2C%20based,accumulated%20contributions%20and%20investment%20returns.

Article VI Section 25b states:

> "Each judge of the Court of Appeals, Justice of the Supreme Court, Judge of the Court of Claims, Judge of the County Court, Judge of the Surrogate's Court, Judge of the Family Court, Judge of a Court for the City of New York . . . and Judge of the District Court shall retire on the last day of December in the year in which he or she reaches the age of seventy."[117]

Under this restriction, Supreme Court judges can "recertify" for up to three two-year extension terms, which allows them to remain as Justices until 76. New York State's mandatory judicial retirement age first became law in 1869.

In 1869, the life expectancy in the United States was about 49 years. At the end of 2024, life expectancy was 78–1/2 years.[118] The age limitations on judges continuing in service appears based on longstanding stereotypes attributed to older people, namely senility, physical restrictions, and dementia. In fact, the issue of mandatory retirement for judges was debated at the time the U.S. Constitution was under consideration by the United States. In Federalist No. 79, Alexander Hamilton said in his argument for judicial permanence that certain groups were concerned about "the imaginary danger of a superannuated bench." He stated that, for judges, "few outlive the season of intellectual vigor." When Hamilton wrote those words, life expectancy was 40 years and New York mandated retirement of judges at 60 years of age.

Mandatory retirement of judges is prevalent. Thirty-one states and the District of Columbia have a form of mandatory age requirement for judges.[119] Of course, federal judges have no such restrictions as their appointment is for life. In 1952, the US Senate did pass a bill allowing federal judges to remain on the bench only until age 75. This bill never became law.

As the bulk of judges in New York State work under a constitutional restriction, modification of the restriction is difficult. A constitutional amendment requires approval from two consecutively elected legislative terms, the signature of the governor, and subsequent endorsement by voters in a referendum. The last attempt was in 2013, when the referendum failed 58% to 42%.

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117 Excused from this constitutional mandate are City Court Judges outside the City of New York, who are required by statute (see Judiciary Law § 23) to retire at age 70, and Town and Village Court Justices, who have no mandatory retirement requirement.

118 Life expectancies do vary by gender, race and ethnicity. See Ctrs. for Disease Control and Prevention, *Nat'l Vital Statistics Reports: United States Life Tables, 2023*, July 15, 2025, https://www.cdc.gov/nchs/data/nvsr/nvsr74/nvsr74-06.pdf.

119 BallotPedia, *Mandatory retirement*, https://ballotpedia.org/Mandatory_retirement (last accessed Aug. 27, 2025)..

V. TASK FORCE RECOMMENDATIONS

In brief, the Task Force recommends that the 50 plus and Young Lawyer sections determine within six months of the report's adoption which recommendations are feasible to implement for NYSBA to advocate in a variety of settings, and that the NYSBA advocate in any variety of settings that the Association influence legislation and spearhead best practices and other changes that may identify, deter, and reduce ageism, not limited to the following:

A. General Best Practices

Most older workers feel employers should do more to counteract ageism.[120] A comprehensive approach is needed to identify and remediate ageism in the workplace. By fostering lifelong learning, embracing inclusive hiring practices, creating age-diverse teams, and establishing robust policies against age discrimination, workplaces can significantly mitigate the effects of ageism. Achieving a work environment where individuals of all ages can excel and contribute to their fullest potential not only enhances diversity and inclusivity but also boosts innovation and competitiveness.

In its 2007 Task Force Report on Mandatory Retirement, the Special Committee on Age Discrimination in the Profession adopted a "best practice" template to govern retirement age decisions faced by attorneys and law firms, emphasizing flexibility and communication. These "best practices" should be reviewed annually and updated as they continue to develop, as the profession will benefit from regular review of the effectiveness of practices after their implementation. We believe the following general recommendations would benefit the profession, if promoted as "best practices":

- Review all job descriptions and recruitment materials to eliminate language and criteria that may disproportionately disadvantage certain candidates.
- Consider implementing blind applicants and interview practices and using unbiased hiring technology and methods before final interviews with a diverse group.
- Urge employers to restructure the hiring process by seeking merit excellence and intelligence (MEI). Emphasize looking at talent, knowledge, and wisdom rather than "years of experience" to prove that a candidate is valuable.

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120 Am. Ass'n of Retired Persons, *As Economy Improves, Age Discrimination Continues to Hold Older Workers Back*, 2021, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2021/older-workers-age-discrimination-covid-19-pandemic-infographic.doi.10.26419-2Fres.00445.003.pdf?mkt_tok=MjUwLUNRSC05MzYAAAGMMDJySC1jBGdslPw2nH7zICVwKX7ZfzP-a4Dk2W7iY1FFWHDEv0xwJ1OMRqtIwfS540hXB4VqPGJWVB5LrQROAuaQmI5sMYZqv3SvTiHbxz_Mug (last accessed May 10, 2025).

- Avoid putting a maximum number of years of experience in a job posting, to encourage all candidates to apply, including workers who may exceed the requirement. For example, firms shall not advertise with a maximum ceiling for years of experience. (e.g. 3–5 years)
- Ensure that both externally and internally facing materials, including recruitment materials, reflect the entity's age diversity and do not exclusively target a specific age group.
- Avoid hiring requirements that may have a disparate impact, based on age, such as requiring that a letter of recommendation be provided from a college professor.[121] An employer should allow for letters of recommendation from previous employers, co-workers, and others who have relevant knowledge of the applicant's skills.
- Eliminate job application questions that require birth dates or dates of graduation, as such practices may deter or disadvantage older applicants. This is illegal, but firms and companies need to remember not to address those questions in interviews.
- Avoid terms in job descriptions that suggest a bias based on age, such as "senior," "young," "youthful energy," "digital native," "fresh-minded," or even "career potential." As an alternative, consider words that reflect the job requirements in an age-neutral way.122
- Include age in diversity and inclusion efforts in order to foster a multigenerational workforce.[123] Intergenerational work teams must be made a reality.
- Avoid exclusively recruiting applicants from campus job fairs and instead ensure that recruitment is conducted in ways that captures a diversity of applicants, including through posting on different job search websites, through community job fairs, and through professional associations and networks.
- Unless firms define their core values, assess candidates based on alignment with those principles, and prioritize skills over compatible traits, job advertisements and interview questions regarding "culture fit" should be abandoned.
- Hiring managers and HR professionals should undergo regular training to recognize and challenge their unconscious biases to ensure that they base employment decisions on merit and potential rather than age. Hiring managers, HR and the interview decision team should reflect a mix of ages.
- As older workers enter a new life stage and wish to express generativity — passing their knowledge to the next generation — encourage working in teams or mentorship programs that facilitate the exchange of experience from older employees and fresh perspectives and technological savvy from younger ones to foster mutual respect and understanding.

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121 Kate Rockwood, *Hiring in the Age of Ageism*, Soc'y for Human Resources Mgmt., Jan. 22, 2018, https://www.shrm.org/hr-today/news/hr-magazine/0218/pages/hiring-in-the-age-of-ageism.aspx.
122 *See* Insperity Staff, *6 Top Tips for Preventing Ageism in the Workplace*, Insperity, https://www.insperity.com/blog/preventing-age-discrimination/ (last accessed July 20, 2020).
123 One survey found that only 8% of employers' diversity and inclusion strategies included the goal of increasing age diversity. Lori A. Trawinski, *Leveraging the Value of an Age-Diverse Workforce*, SHRM Found., at 1, https://www.shrm.org/content/dam/en/shrm/foundation/Age-Diverse%20Workforce%20Executive%20Briefing.pdf (last accessed July 20, 2020).

- Encourage employees and supervisors to take implicit bias training related to age discrimination.
- Create training programs accessible and relevant to employees of all ages with clear ties to career paths that can bridge gaps in knowledge, skills, and abilities (KSAs). This might include:
  - specialized certifications, as a value add, practitioners capable of transforming existing skills into more specialized areas of law e.g. tax, patent, or SaaS.
  - simple workshops and seminars, specifically geared solely toward gaining insights into the newest industry trends, techniques, and experience voids.
- Allocate equitable resources to training and retraining older workers and young workers.
- Create and incorporate structured interviewing as a part of employer implicit bias training.
- When offering voluntary buyouts during layoffs, avoid targeting employees based on age, but instead proceed in an age-neutral fashion and provide transparency regarding the terms of the buyouts.
- Employers should not restrict internships or apprenticeship programs to younger individuals or otherwise limit access based on age. These programs must be open to all applicants regardless of age, and employers must consider applicants based on qualifications, experience, and merit.
- Review the organization age mix to ascertain whether there is a disparate diversity of age in the organization, in termination or forced retirement, and identify what or whether organization policies and practices are the cause of this and how to remediate.

1. Bar Associations

Recommendations below are a few strategies that can promote cross-generational collaboration and support the next generation of Bar Association Leaders:

- **Empower young lawyers.** Strive to uplift less experienced colleagues by creating opportunities for their participation and advancement. Seek to "pass the torch" of knowledge and experience to younger lawyers within the organization. Proactively delegate tasks and give greater responsibility on established matters, including opportunities for direct client interactions. Provide formal professional development opportunities, including mentorship programs with more experienced attorneys.
- **Empower retired or semi-retired attorneys.** There are opportunities for retired attorneys to impact policy and leadership, including partnering with or mentoring aspiring leaders. The bars must provide opportunities to share these skills.
- **Leverage cross-generational engagement.** Deliberately include junior lawyers in organizational decision-making and leadership positions. For example, be transparent about the firm's economics and involve them in business management decisions and

succession planning. Be open-minded and actively listen to suggestions and feedback even if divergent from the long-term status quo. For example, younger attorneys may have more familiarity and/or experience with implementing updated technology.

- **Recognize that we are stronger together.** Treat all attorneys as valued members of the team who contribute to and share in the organization's success. Leverage age differences in a team as a means for creative collaboration and innovative thinking. Approach different perspectives, among older and younger team members, as opportunities to generate constructive dialogue and learn from each other. Connecting with colleagues, regardless of age, can offer mutual career support, as well as reduce feelings of isolation.

B. NYSBA Priorities

This Task Force's collective conclusion on age discrimination is that it impacts not just older lawyers, but young lawyers as well, with a greater impact on women. The Task Force also determined there is difficulty in proving ageism in New York. Often, an employee fears retaliation given the control employers wield over their financial security at any given time.

Therefore, the Task Force has crafted recommendations that NYSBA might undertake to spearhead education and advocate for effective changes to practices and behaviors, as well as strengthen legislation and measure the impact of the actions it chooses to take on. This includes education to dispel myths and stereotypes and raise awareness of the impact of ageism; intergenerational interventions, which create cooperation and empathy between age groups; and law and policy changes, which can reduce inequity and discrimination.

Employers should offer more professional development and initiative-taking opportunities for inexperienced lawyers to learn and advance careers by assigning projects, delegating tasks such as interacting with clients and allowing them to shadow senior attorneys. Training should also include allowing less experienced attorneys to participate in important decisions made within an organization, along with opportunities to take on leadership roles. Leadership should take the initiative to listen to younger employees' thoughts and ideas, even if their suggestions contradict the status quo or seem unconventional.

While the 2007 NYSBA Report on Mandatory Retirement Practices in the Profession anticipated that there would be continued vigilance by the Special Committee, this has not been the case. Given that the issues concerning age discrimination have not changed, the Task Force strongly recommends that NYSBA be a more vigilant advocate and catalyst for change in the profession. This includes monitoring how technological changes might require strengthening laws that can more effectively deter ageism.

We recommend the following:

1. Internal Practices

The Task Force found practices that perpetuate age bias in the legal industry include practices that incorporate bias labels. Therefore, NYSBA and law firms might consider:

- Examining age-related terms such as "senior" attorneys or "younger lawyers". For example, rename the Young Lawyers Section to Newly Admitted Lawyers.
- In lieu of descriptive labels like "young" or "50+" lawyers, use alternates like "new" *or* "experienced" that do not perpetuate age bias.

2. Data Surveys

There is a paucity of data surrounding issues related to age and New York legal professionals. The New York State Bar Association has reported that 38% of its members do not identify their age.[124] Surveys help identify areas of age discrimination in the profession, and NYSBA is uniquely situated to conduct such inquiries from its section and members. NYSBA might create forms that encourage self-reporting of a member's age and status. The resulting statistics should be shared with the Executive Committee, or the committee charged with implementing suggestions, such as those in this Report. The 50+ Section, or a separate department within NYSBA, might be given the responsibility of developing and publishing such surveys, ensuring that they sufficiently detail any discrimination and collating the results into recommended action items. This effort should measure the progress on eradicating age discrimination along the way.

The scope should at a minimum encompass the areas identified in 2007*:*

- hiring and firing;
- mandatory retirement;
- "up-or-out" policies;
- age-based hierarchical staffing of cases;
- policies concerning retaining of counsel;
- the fixing of time charge rates;
- non-compete clauses, combined with mandatory retirement policies, which prevent retired attorneys who otherwise might wish to continue to practice law for a number of

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124 NYSBA Special Committee on Age Discrimination in the Profession, *Report and Recommendations on Mandatory Retirement Practices in the Profession*, Jan. 2007, https://nysba.org/wp-content/uploads/2020/02/Age-Discrimination-Report.pdf?srsltid=AfmBOoqJSQyf_PaFELM77SZHTKyrItGxy2WappHALFQmV1Hwz1ValtEa (last accessed May 14, 2025).

years from engaging in such practice; and
- other age-discriminatory practices.

3. Reporting

There should be ongoing reports to the NYSBA Executive Committee of age demographics and measurements of the effect of the efforts to eradicate ageism.

4. Section Studies

The Young Lawyers and 50+ Sections (or the newly named sections once changed), as well as all NYSBA Sections, should regularly review ageism and its impact on their members to make continuing recommendations and to continually identify areas of concern.

5. Establish within NYSBA a Department Dedicated to SAGE

NYSBA anticipated, after its 2007 report, that the Age Discrimination Special Committee would continually monitor ageism, but that has not happened. A Senior Attorneys Group with Experience/Enthusiasm/Energy/Excellence (SAGE) within NYSBA could be established as a permanent internal department that would continue the work recommended by these Task Forces. SAGE might increase the value of continued NYSBA membership by supporting members' professional needs through education and planning across different ages and career stages, from law school through retirement. This department's primary goals might involve the collection and analysis of data for monitoring the health of the profession and emerging issues and technology, as well as advising on legislation and industry best practices, including but not limited to matters of education, licensing, professionalism and development. In addition, such a group may serve as an on-call resource for member questions. Guided by member's needs, SAGE can provide resources on legal skills, business, retirement, and succession development and planning; connect members to promote intergenerational communication, knowledge development and preservation; and address topics beyond traditional CLE programs, such as cognitive decline and the impact of age on legal practice. SAGE can foster the NYSBA member community by fostering camaraderie between and among new and senior attorneys, members, and other legal and professional organizations and companies across all Sections, rather than reinforcing separation by age. As part of the value proposition of the Association, SAGE can also highlight the importance of social and mental health in retaining NYSBA membership past retirement.

C. Recommended Legislative and Regulatory Changes

Years after the enactment of age discrimination laws, ageism persists from attitudes that often go unchecked. This speaks to failure of the mission and purpose for establishment of these laws,

which is to eradicate age discrimination. Therefore, while these existing laws have prohibited age discrimination, they need strengthening. To do so, we recommend considering the following:

- Reaffirm the importance of eradicating age discrimination as a priority for the health and welfare of New York legal professionals.
- Advocate that age discrimination should be treated like other forms of discrimination and should be included in tests like bias audits.
- The Age Discrimination in Employment Act (ADEA) was designed to prevent and eliminate discrimination, based on stereotypes about age at the time of enactment. Given an ever-increasing healthier aging population, age may not accurately reflect an individual's abilities. Therefore, focus should be on assessing individual capabilities rather than applying broad age-based rules. Currently, there is no protection under federal law from age discrimination, for those under 40. The ADEA should be amended to prohibit age discrimination for a population comparable to that under New York Law, age 18 and beyond.
- Legislative changes should treat age discrimination, like other forms of discrimination, eradicating the more difficult burden of proof imposed as a result of case law.[125]
- Obsolete provisions from both federal and State law containing exemptions from age discrimination coverage should be eliminated. While the BFOQ qualification may be appropriate, the exemption for policymakers seems to be an anachronism.
- At the least, damages under the ADEA should mirror those that can be obtained under other anti-discrimination laws, including compensatory and punitive damages.
- Consider recommending enhanced penalties, punitive and compensatory awards and other actions that are significant enough to deter violations, including where AI is involved, as examples:
    - Substantially increasing fines
    - Allow for greater compensatory damages to victims in ADEA cases
    - Introduce or increase punitive damages in ADEA cases
    - Define how to establish cause when AI or software is used to make decisions
    - Consider treble damages, (like those under the ADA) for *per se* violations in

125 This Task Force can only hope that Congress might consider an amendment to the ADEA to be consistent with the burden-shifting framework codified in § 107 of the Civil Rights Act of 1991. The purposes behind the ADEA, including its relationship with Title VII, and Supreme Court cases shaped the analysis of disparate treatment discrimination claims prior to *Gross*. The majority and dissenting opinions in *Gross* and subsequent courts have treated ADEA cases in the wake of the Supreme Court's decisions in ways that may conclude that *Gross* does not necessarily alter the prior *McDonnell Douglas* framework for ADEA plaintiffs. Therefore, Congress should consider stepping in so that plaintiffs may bring mixed-motives claims. If Congress were to amend the ADEA, in this way, the causation standards under Title VII and the ADEA would be identical and the ADEA's goals of deterring discrimination and compensating victims would be fulfilled.

advertising and facilitation in job listings, by employers and employment agencies.
    - Award attorney fees
    - Promote comprehensive anti-discrimination training for all employees, especially management and HR personnel, within a specified timeframe after a violation is found.
    - Increase individual penalties for senior management and impose personal liability for willful blindness
- Consider additional transparency policies for employee access to HR files and responses to software that impacts employment decision making.
- Consider recommending increase statute of limitations for state claims to 6 years, to parallel wage claims.
- Recommend that NYC AI regulations include audits based on age.
- Review the various definitions of retirement to determine whether there should be a uniform definition of retirement
- Survey or census detailed information about age and ageism.
- Review law firm compensation systems to determine whether they promote ageism, i.e., lockstep systems that do not reward performance may be biased against younger attorneys;[126] systems that require older attorneys to turn over clients to younger ones may be biased against older attorneys.[127]
- Government Contracts and Funding:
    - Prohibit companies with repeated or severe age discrimination violations from bidding on or receiving government contracts for a specified period.
    - Withdraw eligibility for government subsidies, grants, and other financial assistance for companies found guilty of ageism for a specified period.
- Increased Oversight and Monitoring
        - Subject companies with a history of age discrimination to regular audits and monitoring by government agencies to ensure compliance with anti-

126 Martha Neil, *Illustration of a Lockstep Progression Income Distribution Plan Tied to Objective Performance Criteria*, John P. Weil & Company, https://web.archive.org/web/20000115202654/http:/www.weilandco.com/new/lockstep.html (last accessed on Aug. 27, 2025); James D. Cotterman, Lockstep Compensation: Does It Still Merit Consideration?, . Altman Weil, Inc. Report to Legal Management, at 3, April 2022, https://www.altmanweil.com/wp-content/uploads/2022/04/Lockstep-Compensation-Does-It-Still-Merit-Consideration.pdf; David Dias, *Lockstep vs. Eat-What-You-Kill: Compensation statistics highlight Dewey LeBoeuf's folly*, Lexpert Magazine – Blog, Sept. 27, 2012, https://lexpertmag.wordpress.com/2012/09/27/comparison-stats-highlight-dewey-leboeufs-folly/.

126 Rebecca Howlett & Cynthia Sharp, *Creating the Law Firm of the Future: Combating Age Bias*, Am. Bar Ass'n, Nov. 22, 2021, https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/creating-law-firm-future-combating-age-bias/ (last accessed on May 6, 2025).

127 Axel P. Gosseries, *Are seniority privileges unfair?*, 20(2) Econ. and Philosophy 279, 279–305, https://doi.org/10.1017/S0266267104000215.

discrimination laws.
    - Encourage firms or companies to keep workforce age demographics and to perform significant comparisons.
- Tax incentives such as an "age-diverse employer certificate" for meeting certain requirements or creating senior work programs or flexible phased retirement programs and work hours for pro bono programs.
- Training and Policy
    - Mandatory age policies such as those required for sexual harassment and mandatory interactive training could be required for all employers once a year or biannually.
- Facilitate easier filing with the EEOC by streamlining process and increasing support.

1. Specific Statutory Changes:

The following are examples of possible statutory changes that NYSBA might recommend:

a) Expand Definition of Age Discrimination for ADEA

No person, employer, labor organization, employment agency, or joint labor-management committee shall, directly or indirectly, refuse to hire, promote, discharge, or otherwise discriminate against any individual in the terms, conditions, or privileges of employment based on their age or perceived age, which shall include any individual 18 years or older.

b) Requirement for Objective Evaluation

Employers must demonstrate that employment decisions, including hiring, promotion, pay, and termination are based on qualifications and performance rather than actual or perceived age.

c) Training Requirement for Employers

Employers with more than 20 employees are required to certify that management and human resources personnel are qualified by experience or annual training in preventing age discrimination. Such training should include at a minimum, an understanding of implicit age bias, the legal ramifications of age discrimination, and methods for fostering an inclusive, age-diverse workplace.

d) Age Restrictions for Judges

The bulk of judges in New York State work under a constitutional restriction, and modification of

the restriction is difficult.[128] In 1991, the U.S. Supreme Court in the case of *Gregory v. Ashcroft*[129] upheld age restrictions for judicial retirement of state judges in Missouri, stating the rule did not violate the Fourteenth Amendment. The Court did so by applying the rational basis test rather than the intermediate scrutiny test to examine the applicable statute.[130]

There are positives and negatives to having an age restriction or mandatory retirement age for judges. The positives are that it helps to develop and maintain a kinetic rather than static culture for judicial selection. It helps to diversify the judiciary as people of different genders, cultures, races and ethnicities move into positions for consideration. Age restrictions also help in eliminating the occasional judge that may be too feeble or intellectually unable to continue. Yet there are also clear negatives of such a restriction. The rules clearly discriminate because of age, although courts have held that a "state does not violate the Equal Protection Clause merely because its laws are imperfect."[131] Not only are judges living longer, but their experience, wisdom and judgment is surely needed, as court cases become ever more complex and intertwined with numerous new issues. Further, and most importantly, older judges are maintaining their mental and physical capabilities longer into life. Continued ability and desire to keep working are obvious.[132]

Given the difficulty in amending the NYS Constitution to specifically attack this provision, one possibility is to review the mandatory retirement provision in view of the newly passed constitutional protection against age discrimination. A second line of attack may be to advocate the more intense intermediate scrutiny review, created by the Supreme Court in 1976 in the case of *Craig v. Baron*.[133] This type of review is used when there is discrimination directly affecting a protected class. Aged people (in this case, judges), like those defined by sex or gender, should be

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128 The New York State Bar Association has studied this issue for decades — for further examination and discussion of the state constitutional provisions, we recommend *Report and Recommendations of the New York State Bar Association Committee on the New York State Constitution: The Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts*, 2017, https://www.nysba.org/wp-content/uploads/2020/02/Report-on-Judiciary-Article-1.pdf, at 51.

129 501 U.S 452 (1991).

130 A new attack on age discrimination was recently added to the New York State Constitution. In Nov. 2024, Proposition 1 passed by referendum, amending the New York State Constitution's Bill of Rights. It expanded the classes protected from discrimination to include age. See N.Y. State Constitution, Article l, Section ll. A law, statute or regulation must pass a strict scrutiny review by a court as to its constitutionality. A lawsuit is now pending to declare Article VI, § 25 and Judiciary Law § 523 unconstitutional based upon the amendment. See *Williams et ano vs. The State of New York et al.*, CV 092445/25 (Sup. Ct., Wayne Co. 2025). *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

131 *Dandridge v. Williams*, 397 U.S. at 485.

132 See Univ. of Michigan, Institute for Social Research, *Health & Retirement Study – National Survey of Older Americans*. https://hrsonline.isr.umich.edu/sitedocs/databook/flipbook/?page=22 (last accessed May, 13, 2025); Ryan Park, *Supremely Old, Supremely Sharp, Supreme Court*, The Atlantic, Feb. 20, 2016, https://www.theatlantic.com/business/archive/2016/02/supreme-court-justices-mental-sharpness/470175/.

133 429 U.S. 190 (1976).

considered a protected class. A regulation based solely on the age of a person is inherently suspect. Unlike a rational basis review, the retirement rule based on age might thereby be presumed unconstitutional.

Another alternative is to expand the judge certification process for remaining on the bench after the age of 70 to all judges. This would not interfere with the goal of diversification of the judiciary because the certified judge's position is filled with a new judge and the certified judge remains working, similar to a federal judge that takes senior status.

New York State might consider raising the age of mandatory retirement to meet the demands of a healthier modern world and permit a more balanced and orderly approach to judicial transitions. The wisdom and experience of older judges is essential to address the systemic delays caused by the ever-increasing volume of cases and the need to mentor new and inexperienced judges.

Additionally, the Office of Court Administration, in a letter supplied to the New York Law Journal, pledged to absorb the cost of enacting the bill, estimated at $3.8 million or more.

NYSBA is in a unique position to conduct a poll of its members about a constitutional amendment or other action to eliminate mandatory retirement of state court judges.

2. Strengthen Enforcement and Penalties

a) Enforcement

The New York State Human Rights Division (NYSHRD) must be empowered to review complaints of age discrimination more swiftly and thoroughly. The Division is authorized to conduct random inspections to ensure compliance with age discrimination laws.

b) Reporting Requirements

Employers with 50 or more employees shall submit an annual report to the NYSHRD detailing workforce composition, hiring and firing practices, pay disparities across age groups, and actions taken to prevent age discrimination in the workplace.

Where an employer must file an EEO-1, a copy shall also be filed with the Division or made available to the Division where a discrimination claim has been filed.

c) Awareness Campaigns

The State of New York should fund and coordinate public campaigns aimed at raising awareness about the issue of age discrimination, promoting diversity in age, and highlighting the benefits of

multigenerational teams in the workplace.

d) Municipalities

The Task Force recommends lawmakers urge all municipalities to adopt broader remedies, specific to local needs and concerns, against age discrimination.

e) Quantify The Economic Benefits of Reducing Discrimination

NYSBA should consider developing a deep economic model to estimate the benefits of reducing discrimination for Social Security's financial health, taking into account the interplay between labor force participation, productivity, retirement savings, and Social Security revenues and expenditures. The model would need to incorporate various demographic, economic, and policy factors.

Given the data, the key assumptions are that reducing age discrimination creates greater participation and extends working years; this in turn enlarges the labor force, which may not only improve retirement savings but strengthen the financial health of Social Security. The key to these changes includes providing innovative training that can enhance productivity and gives lawyers a greater chance of job relevance. This may delay retirement and reduce the amount of Social Security benefits paid over time as more workers increase payroll tax revenue.

Social Security benefits are paid to retired individuals based on their earnings and the age at which they start receiving benefits. The effect of reducing age discrimination and mandatory retirement requirements (e.g., raising the age from 65 to 80) may lower Social Security expenditures by reducing the number of people collecting benefits. Increased participation in the workforce can also lead to increased savings for those who are financially insecure.

By quantifying these relationships, the total impact of reducing ageism on Social Security's financial health can be measured, providing policymakers with actionable data to assess potential reforms.[134] NYSBA might contribute to this effort by regularly sharing survey data on the legal professional community. This is just a conceptual framework, and empirical data would be needed to fill in the parameters, calibrate the model, and test different scenarios.

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134 Jeffrey M. Jones, *More in U.S. Retiring, or Planning to Retire, Later*, Gallup, July 22, 2022, https://news.gallup.com/poll/394943/retiring-planning-retire-later.aspx; Juliana Menasce Horowitz, Anna Brown, & Rachel Minkin, *A Year into the Pandemic, Long-Term Financial Impact Weighs Heavily on Many Americans*, Pew Research Center, March 5, 2021, https://www.pewresearch.org/social-trends/2021/03/05/a-year-into-the-pandemic-long-term-financial-impact-weighs-heavily-on-many-americans/; Internal Revenue Service, *Retirement Topics – Exceptions to Tax on Early Distributions*, https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-exceptions-to-tax-on-early-distributions (all links last accessed April 17, 2025).

The Task Force recommends that NYSBA advocate in a variety of settings for rules that require timely and accurate collection and public reporting of data on disparate outcomes in the areas identified above. This data will be used to determine the ongoing impact of structural ageism in these areas and form the basis for efforts to eliminate or reduce disparities.

VI. CONCLUSION

The NYSBA Special Committee on Age Discrimination, in its 2007 report on mandatory retirement, recognized that ageism had a detrimental impact on the legal profession. The Committee not only suggested best practices for addressing ageism but also implemented processes for change, such as forming the Age Discrimination Committee of the 50+ Section. In the 18 years since then, much has changed, but the toll taken upon the profession from ageism has not. It is time for NYSBA to take the logical next step by implementing additional changes to eradicate the negative effects of ageism.

Legal professionals are living and practicing law longer, and that trend is expected to continue. Societal and legal changes are recommended to accommodate these trends, along with actions to measure whether change has occurred. The Task Force believes that the words of the NYC Human Rights Commission bear repetition:

> Age discrimination in the workplace is an undeniable reality. Stereotypes about age, whether about being "too old" or "too young," permeate employment spaces. It is particularly insidious because much age discrimination stems from biases entrenched in and perpetuated through media, caricatures, paternalistic assumptions, and more. Compounding the problem, "[h]istorically, Congress, the courts, and society have viewed age discrimination as less malevolent than race, gender, and other forms of discrimination. Workplace age issues are perceived more as economic issues and not as fundamental civil rights issues."

In summary, the U.S. workforce over the next 30 years will see a significant increase in the proportion of older workers, with implications for workforce management, policy, and economic structures. This shift necessitates proactive measures to leverage the strengths of all age groups effectively and an understanding of existing trends demonstrating that attorneys are continuing to work beyond the average worker's age. For all the aforementioned reasons, we believe it urgent that NYSBA resumes the path it began in 2007 to eradicate ageism in the profession, along with the help of legislative changes.

Appendix A: Ageism and the Legal Profession Supporting Materials

While there does not appear to be a universal definition of "ageism" or what it encompasses, the World Health Organization's definition of ageism is: "stereotypes, prejudice, and discrimination towards others or oneself based on . . . Age."[135] In general, the term *ageism*, as defined by Merriam-Webster Dictionary, is: "prejudice or discrimination against a particular age-group and especially the elderly."[136] Like race and sex, age is one of the nine personal characteristics that is illegal to discriminate against. Ageism differs from other protected characteristics in that – by holding ageist beliefs and attitudes and engaging in ageist behaviors – we are, in effect, targeting our future selves. Everyone who is lucky enough to grow old will likely experience ageism in their lifetime. Yet ageism often seems a socially acceptable form of prejudice. Though federal, state, and local laws protect most individuals,[137] including attorneys in New York, most are not free from experiencing discrimination. The Task Force concluded ageism is the pervasive ill-conceived perceptions and assumptions about abilities, worth, or relevance. It manifests through exclusion and bias treatment in hiring and other workplace practices, resulting in the limiting of opportunities that results in marginalization.

1. Workforce Demographics

The U.S. population is aging, with Baby Boomers continuing to move through their later working years. In proportion to the population, those aged 65 and over are expected to grow, from about 17% in 2024 to around 25% by 2054, according to the Congressional Budget Office. The age composition of the U.S. workforce over the next 30 years will continue to evolve, influenced by demographic trends, economic factors, policy changes, advances in technology and shifts in societal attitudes towards work and retirement. Projections for those aged 55 and over on their need to remain in the labor force continue to rise. The BLS projects the participation rate for this demographic will increase from 19% in 2022 to 21% in 2032. This trend is based upon:

- changes in retirement policies (like increases in the full retirement age for Social Security);
- economic necessity due to insufficient retirement savings;
- longer life expectancies; and
- desire for social engagement and personal fulfillment.

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135 World Health Org., *Ageing: Ageism*, April 28, 2025, https://www.who.int/news-room/questions-and-answers/item/ageing-ageism (last accessed March 30, 2025).
136 *See* https://www.merriam-webster.com/dictionary/ageism (last accessed April 14, 2025).
137 The reason why "most" are covered is because state and federal laws still contain exemptions which allow discrimination in certain instances.

While younger worker (16–24) projections decline or, at best, remain level given:

- lower birth rates lead to a smaller youth population;
- continued trend towards higher education delaying entry into the full-time workforce; and
- possible economic conditions that might not favor youth employment.

2. Employment Decisions

A 2023 report by the Society for Human Resource Management (SHRM) sheds light on a troubling reality: nearly one-third of HR professionals acknowledge that age plays a role in employment decisions.[138] This revelation underscores the prevalence of ageism and signals an urgent need for systemic changes to address and mitigate these biases. Even if managers make hiring decisions based on implicit bias — unconscious attitudes and associations that individuals hold about specific groups — leaders should find ways to include older workers.[139] Studies show a direct correlation between lower levels of education and training and decreased employment rates.[140] This dynamic highlights a systemic challenge: older workers may be disadvantaged in employment due to shifting demands that increasingly link educational qualifications with technological skills. While training and development correlate strongly with self-efficacy, older workers participate less in training activities, which may put them at a disadvantage.[141] According to human capital theory, organizations derive their value through the people who work there. However, those workers *loan* their respective value to the organizations they serve, and they take that value with them when they leave.[142] Organizations risk the loss of valuable human capital with the attrition of experienced workers.[143] Specifically, the protected class of workers age 40 and older — mainly those of retirement age, above the age of 60 — threaten the value of organizations when they leave workplaces either through retirement, due to the perception of insufficient technological competence, or dissatisfaction with their jobs. Furthermore, because of stereotypes and biases, this

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138 Society of Human Resources Mgmt., *New SHRM Research Details Age Discrimination in the Workplace*, May 11, 2023, https://www.shrm.org/about/press-room/new-shrm-research-details-age-discrimination-workplace.
139 Tara Becker & Susan T. Fiske, *Age Discrimination, One Source of Inequality* in *Understanding the Aging Workforce: Defining a Research Agenda* (Nat'l Academies of Sciences, Engineering, and Medicine, 2022), https://www.ncbi.nlm.nih.gov/books/NBK588538/.
140 OECD/Generation: You Employed, Inc., *The Midcareer Opportunity: Meeting the Challenges of an Ageing Workforce*, 2023, https://www.generation.org/wp-content/uploads/2023/10/The-Midcareer-Opportunity-Oct2023.pdf.
141 Yixuan Li, Konrad Turek, Kene Henkens, & Mo Wang, *Retaining retirement-eligible older workers through training participation: The joint implications of individual growth need and organizational climates*, 108(6) J. of Applied Psychology 954, 954–76 (2023), https://psycnet.apa.org/doiLanding?doi=10.1037%2Fapl0001065.
142 Kaifeng Jiang & Jake Messersmith, *On the shoulders of giants: a meta-review of strategic human resource management*, 29(1) Int'l J. of Human Resource Mgmt. 6, 6–33, https://doi.org/10.1080/09585192.2017.1384930.
143 Richard Eisenberg, *A 'massive brain drains' is looming as boomers and Gen X-ers retire. Can flextirement help workers and businesses?*, MarketWatch, Feb. 13, 2024, https://www.marketwatch.com/story/a-massive-brain-drain-is-looming-as-boomers-and-gen-x-ers-retire-can-flextirement-help-businesses-bcae1a3a.

class of workers often finds it difficult to secure new employment, particularly positions involving the use of technology.[144]

3. *Economic Security*

Aging is an inevitable facet of life and threatens one's economic security.[145] While 50% of seniors rely on Social Security to keep from absolute poverty, Social Security's cost has exceeded its non-interest income since 2010. Thus, the magnitude of fighting ageism for lawmakers seems clear. To paraphrase Martin O'Malley, former Commissioner of Social Security: if more people are contributing to Social Security, and wage growth and job creation increases with low unemployment, then Social Security can continue to pay benefits.[146] Social Security is running out of money.[147]

Older workers report that treatment at the workplace begins to deteriorate around age 50, often contributing to decisions to retire earlier than planned.[148] Additionally, older workers are more likely to be laid off, and once out of a job, studies show that this same age group is much more likely to remain unemployed or underemployed than younger workers.[149] Persistent and hidden unemployment faced by older workers affects many facets of their labor and lives. Even employed older workers face diminished bargaining power, limiting their ability to negotiate fair compensation and acceptable working conditions.[150] Many older households also have little capacity to cope with prolonged unemployment — and when faced with significant financial

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144 Am. Ass'n of Retired Persons, *As Economy Improves, Age Discrimination Continues to Hold Older Workers Back*, 2021, https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2021/older-workers-age-discrimination-covid-19-pandemic-infographic.doi.10.26419-2Fres.00445.003.pdf?mkt_tok=MjUwLUNRSC05MzYAAAGMMDJySC1jBGdslPw2nH7zICVwKX7ZfzP-a4Dk2W7iY1FFWHDEv0xwJ1OMRqtIwfS540hXB4VqPGJWVB5LrQROAuaQmI5sMYZqv3SvTiHbxz_Mug (last accessed May 10, 2025).

145 Social Security Admin., *Historical Background and Development of Social Security: Traditional Sources of Economic Security*, https://www.ssa.gov/history/briefhistory3.html (last accessed April 17, 2025).

146 Aimee Picchi, *Social Security projected to cut benefits in 2035 barring a fix*, May 7, 2024, https://www.cbsnews.com/news/social-security-benefits-cut-2035-trust-fund-trustees-report/ (last accessed April 17, 2025).

147 Social Security Admin., *A Summary of the 2024 Annual Reports*, https://www.ssa.gov/oact/trsum/ (last accessed April 17, 2025).

148 Peter Gosselin, *If You're Over 50, Chances Are the Decision to Leave a Job Won't be Yours*, ProPublica, Dec. 28, 2018, https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement.

149 *See* Patricia Cohen, *New Evidence of Age Bias in Hiring, and a Push to Fight It*, N.Y. Times, June 7, 2019, https://www.nytimes.com/2019/06/07/business/economy/age-discrimination-jobs-hiring.html; *see also* Kenneth Terell, *Age Discrimination Goes Online*, AARP, Nov. 7, 2017, https://www.aarp.org/work/working-at-50-plus/info-2017/age-discrimination-online-fd.html (one study found that older applicants for jobs, who demonstrated the same skill set as younger employees, received significantly fewer callbacks that younger employees).

150 Aida Farmand & Teresa Ghilarducci, *Why American Older Workers Have Lost Bargaining Power*, The New School for Social Research, Schwartz Ctr. for Econ. Policy Analysis and Dep't of Econ., 2019, https://www.economicpolicyresearch.org/images/docs/research/retirement_security/bargaining-power-wp.pdf.

hardship they may start claiming Social Security earlier to replace lost wages.[151] These early claims will reduce guaranteed lifetime income and increase financial fragility.[152] This highlights the need for targeted policies and support for older individuals in the workforce.

In summary, the U.S. workforce over the next 30 years will see a significant increase in the proportion of older workers, with age discrimination implications for workforce management, policy, and economic structures.

4. Legal Profession Statistics

One-fourth of all the lawyers in the country are in just two states: New York (187,656 lawyers) and California (175,883 lawyers). Combined, these states have 28% of the nation's lawyers, according to the 2024 ABA National Lawyer Population Survey.[153] New York City is responsible for approximately 117,000 of that total.

The fact that the legal profession skews older today than most occupations in the U.S., according to the U.S. Bureau of Labor Statistics, might be cited as evidence against ageism. The median age for U.S. lawyers was 46 years old in 2023 compared to 42.1 for all workers. Put another way, among all 386 occupations evaluated by the U.S. Bureau of Labor Statistics, lawyers rank among the oldest — No. 66 on the list from oldest to youngest, based on median age. There appear to be two reasons for this. First, very few lawyers are younger than 25, though roughly 13% of all American workers are. Second, a considerable number of lawyers continue their professional practice beyond the age of 65. More than 13% of all lawyers — about 1 in 8 — are 65 or older. Only about 7% of all U.S. workers are 65 or older. The age of a typical lawyer goes up and down a bit each year, but it held steady in 2023.[154]

Because older workers are especially at risk of being pushed-out of long-term positions, it could

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151 Monique Morrissey, Siavash Radpour, & Barbara Schuster, *The Older Workers and Retirement Chartbook*, Econ. Policy Institute, Nov. 16, 2022, updated Feb .9, 2023, https://www.epi.org/publication/older-workers-retirement-chartbook/.

152 Drystan Phillips& Teresa Ghilarducci, *Older Workers Claim Social Security While Working, Upending Beliefs About Raising the Retirement Age*, The New School for Social Research, Schwartz Ctr. for Econ. Policy Analysis and Dep't of Econ., July 11, 2023, https://www.economicpolicyresearch.org/jobs-report/older-workers-claim-social-security-while-working-upending-beliefs-about-raising-the-retirement-age.

153 *See* Am. Bar Ass'n, *Profile of the Legal Profession 2024: Demographics*, https://www.americanbar.org/news/profile-legal-profession/demographics/#:~:text=One%2Dfourth%20of%20all%20the,roughly%20half%20the%20national%20average (last accessed Aug. 28, 2025).

154 The median age of lawyers dropped each year during the COVID-19 pandemic in 2020, 2021 and 2022, but it's not clear if that was caused by the pandemic or something else. Going back several decades, the typical lawyer was younger than today. In 1980, the median age for all U.S. lawyers was 39 — seven years younger than the median age of 46 in 2023.

be argued that lawyers are more at risk of ageism.[155] Moreover, attorneys' economic value declines with age, because they are expected to turn clients over to other attorneys as they age. A lawsuit addressing these issues was recently filed in the Southern District of New York. In *Herman v. Katten Muchin Rosenman LLP et al*., Case 1:25-cv-03162-JHR, filed April 12, 2025, the plaintiff contends that the law firm targeted a successful aircraft-finance practice group because of ageism, and falsely told the attorneys that they had no rights under-age discrimination law.

155 Peter Gosselin, *If You're Over 50, Chances Are the Decision to Leave a Job Won't be Yours*, ProPublica, Dec. 28, 2018, https://www.propublica.org/article/older-workers-united-states-pushed-out-of-work-forced-retirement.

Appendix B: Retirement, Sale of Practice, Alternative Business Forms and Fee Splitting or Payment

1. Retirement

Discussing retirement in the context of age discrimination is important because it can be a key factor in how ageism manifests in the workplace. It also highlights the potential for employers to pressure or force older workers into retirement unfairly. Understanding this link is crucial for protecting employees' rights, ensuring fair employment practices, and promoting a positive work environment for all ages.

In New York, lawyer retirement is remarkably complex.[156] Variations of the word "retire" are used in different contexts with distinct meanings and disparate outcomes. There is a labyrinth of potentially applicable ethics rules that intertwine with certain court rules on retirement: Rule 1.17 of the New York Rules of Professional Conduct on the sale of a geographically defined law practice (and the related exemption contained in Rule 5.6(b) for sales of practice under Rule 1.17 from the prohibitions contained in of Rule 5.6(a)); Rule 1.5(g) on the division of legal fees by lawyers not associated in the same law firm; and Rule 1.5(h)'s exception to Rule 1.5(g) for payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

For purposes of registration, the defining feature of being "retired" is not the forbearance from performing legal services or engaging in acts that constitute the practice of law, but compensation. Section 118.1(g) of the Rules of the Chief Administrative Judge contains requirements for the filing of biennial registration statements, which include a filing status that exempts the "retired" attorney from the biennial fees and requirements relating to continuing legal education. "An attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law. For purposes of § 118.1(g), the "practice of law" is described as "the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector." That interpretation is supported by the following material from the Second Department: "If a person registers as a retired attorney, he or she may still perform legal services without compensation (22 NYCRR 118.1[g]) and his or her only obligation will be to complete and file the biennial

156 N.Y.L.J., *Lawyer Retirement and Future Payouts: Ethical Complexities and Gray Areas*, June 21, 2021, https://www.mosessinger.com/publications/lawyer-retirement-and-future-payouts-ethical-complexities-and-gray-areas.

registration form with the Office of Court Administration."[157]

2 Sale of Law Practice

Under Rule 1.17(a), an attorney "retiring from a private practice of law" may sell their law practice, including goodwill, to one or more attorneys or law firms who may purchase the practice. The prohibitions of Rule 5.6, which restrict a lawyer's ability to practice after leaving a firm or partnership (except for certain situations like retirement benefits) do not apply to the sale of a law practice pursuant to Rule 1.17. Retiring pursuant to Rule 1.17 means something different from ceasing to practice law entirely or changing an attorney registration status to retired. Rather, as Rule 1.17(a) provides, "Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted." Comment [4] to Rule 1.17 clarifies that it "permits a sale of an entire practice attendant upon retirement from the private practice of law within a geographic area." The comment further makes it clear that Rule 1.17 retirement need not be a retirement from the profession: "Its provisions therefore accommodate the lawyer who sells the practice on the occasion of moving to another city and county that does not border on the city or county." Rule 1.17's focus on geographic areas within the state can be perceived as somewhat antiquated given the increasing trend of virtual law practices and the current reality of remote work for many lawyers.

NYSBA Ethics Opinion 961 (2013) addresses whether a retiring attorney may sell a law practice and retain the right to receive a portion of fees for legal services that will be provided after the sale date. It concludes that such an arrangement is acceptable where the payment is in proportion to the services performed by the selling lawyer prior to the sale or fairly represents the value of the "goodwill" of the retiring lawyer. The opinion notes that the retiring lawyer may not condition future referrals (i.e., after the sale) on payment of a portion of the fees earned from the referred matters. Opinion 961 observes that goodwill reflects "the likelihood that satisfied existing clients will use the firm again when new matters arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." The opinion clarifies that "Rule 1.17 must be viewed as an exception to Rule 1.5(g) — that is, that the payment for 'goodwill' that is explicitly permitted by Rule 1.17 permits a payment that is made in the future after the fees that reflect

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157 See Sup. Ct. of the State of N.Y., Appellate Div., Second Jud. Dep't, *Attorney Matters, Resignation for Non-Disciplinary Reasons from the Bar of the State of New York*, https://www.nycourts.gov/courts/ad2/attorneymatters_NondisciplinaryResignation.shtml (last accessed Aug. 28, 2025). The language of § 118.1(g) is difficult to interpret. See also NYSBA Ethics Op. 1201 (2020), discussed below, to the effect that under certain circumstances a referral fee can be paid to a registration retired attorney.

'goodwill' are earned." According to the opinion, the question is "the extent to which lawyers can structure the payment for the law practice as a payout over time measured by the actual fees earned by the practice after the sale." Moreover, the opinion warns that there are "necessarily limits to such arrangements" by which goodwill is sold with a law firm practice — limits should be incorporated as to amount (i.e., the amount paid over the course of time for goodwill) and duration (i.e., how long the fee-sharing payments are made to the selling attorney).

3. Fee Sharing & Referral Fee

Rule 1.5(g) prohibits fee-sharing among attorneys who are not associated in the same law firm, unless: (1) the fee division is proportionate to the services performed by each lawyer, or by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client consents in writing to the arrangement after a full disclosure of the fee division, including the share each lawyer will receive; and (3) the total fee is not excessive. Comment [7] to Rule 1.5 states, "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Although Rule 1.5(g) prohibits fee-sharing among unaffiliated lawyers, Rule 1.5(h) provides an exception to the rule by permitting payments by firms to formerly associated lawyers "pursuant to a separation or retirement agreement."

NYSBA Ethics Opinion 1218 (2021) considers whether a law firm may pay to a lawyer previously affiliated with the firm a share of legal fees otherwise due and owed to the lawyer after the previously affiliated lawyer has assumed a public office. The opinion concludes that unless the payment is otherwise unlawful (e.g., under laws governing a public official's receipt thereof), a law firm may pay a formerly affiliated lawyer a share of legal fees in matters on which the former lawyer rendered services. Such payments must be in keeping with the parties' agreement and the firm's standard compensation practices in amounts equal to what the former lawyer would have been paid if the former lawyer were still affiliated with the firm, notwithstanding that the former lawyer has since assumed public office. The opinion observes that Rule 1.5(h) does not require the agreement to be in writing or to require client consent.

NYSBA Ethics Opinion 1201 discusses whether a lawyer may pay a referral fee to a lawyer who is in "retired" registration status under § 118.1(g) discussed above (a Registration Retiree), despite the provision in that section stating that a Registration Retiree may not receive compensation for services while in such status. The opinion concludes that such a referral fee may be paid if the referring lawyer assumed joint responsibility for the referred matter. It explains that a Registration Retiree is still a fully licensed lawyer, notwithstanding the change of registration status to retired, and may share a referral fee if he or she undertakes joint responsibility for a referred matter under Rule 1.5(g) by fulfilling the role akin to a supervisory lawyer in a law firm consistent with Rule 5.1(a). The opinion further clarifies that "a retired lawyer remains a member of the bar. The change

in registration [with the Office of Court Administration] does not strip the lawyer of a license to practice law but instead places parameters on the lawyer's practice." Interestingly, NYSBA Ethics Opinion 1201 modifies NYSBA Ethics Opinion 1172 (2019) which previously concluded that joint responsibility could be undertaken only if an attorney continued to maintain OCA registration status as a lawyer not in retirement status.

4. Non-Competes and Packages

Many companies and firms tie up lawyers by conditioning lucrative buyouts or other retirement packages upon not competing after leaving the firm. In *Ipsos-Insight, LLC v. Gessel*, 547 F. Supp. 3d 367 (S.D.N.Y. 2021), the District Court held as a matter of first impression that a noncompete, between a company and its in-house counsel, was '*per se'* unenforceable, under N.Y. law. Rule 5.6(a) of the N.Y. Rules of Professional Responsibility prohibits an agreement that restricts the right of a lawyer to practice after termination of the relationship, "except an agreement concerning benefits upon retirement." *See also Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 551 N.Y.S.2d 157 (1989) (Partnership agreement which conditioned payment of earned but uncollected partnership revenues upon a withdrawing partner's noncompetition is unenforceable as against public policy). While NYSBA issued a report and recommendations on mandatory retirement practices in the profession,[158] it is possible that older lawyers are still being forced out of practice because of reduced compensation and benefits and then prohibited from finding other work because their retirement funds or buyouts are tied up with non-compete provisions.

5. Alternative Business Structures

Some jurisdictions allow law firms to operate as Alternative Business Structures (ABS). This structure allows the holding of ownership interests or managerial roles, promoting access to legal services and the diversification of funding. This structure may allow opportunities for lawyers seeking to manage a firm rather than practice law, retire from their existing firms, pause or sell their practice. ABS firms allow attorneys to share ownership of a law firm and combine efforts with private equity. Other options include exploring the diverse ways the ABS might play into retirement savings plans, such as 401(k) plans, IRAs, and Roth IRAs, and considering profit-sharing plans.

In New York, a retired attorney cannot be the Managing Partner of a law firm and manage its

158 See NYSBA Special Committee on Age Discrimination in the Profession, *Report and Recommendations on Mandatory Retirement Practices in the Profession*, Jan. 2007, https://nysba.org/wp-content/uploads/2020/02/Age-Discrimination-Report.pdf?srsltid=AfmBOoqJSQyf_PaFELM77SZHTKyrItGxy2WappHALFQmV1Hwz1ValtEa(last accessed May 14, 2025).

operations. The belief is that the limitations on compensation and practice associated with a retired attorney's status are incompatible with the role of Managing Partner, which requires managing a firm and its financial aspects. While a retired attorney cannot be the Managing Partner, they can still contribute to a firm's operations by engaging in pro bono work or offering advice to younger attorneys.

Additionally, New York might reconsider allowing retired attorneys to be involved with an ABS, making legal services more affordable and accessible and providing greater access to justice. This is especially relevant because retired attorneys aren't precluded from providing legal services if they are not compensated. It seems far more plausible to create semi-retirement methods that allow firms and senior attorneys to engage in *pro bono* services, for some compensation up to the living wage threshold for that locale (maybe even tax-free or with a tax credit), which in turn can supplement the strain on social security and increase costs (before coming out of retirement completely is required). This may reduce the burden from the IOLA fund as well.