ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

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To: RAP

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The Supreme Court has established that an employer **does not** violate the ADEA by providing preferential treatment to older worker over younger ones, even where the younger workers are over the age of 40.

In the discrimination case, *General Dynamics Land Systems, Inc v. Cline, No. 02-1080*, 540 U.S. (2004), the company and its union negotiated a collective bargaining agreement that offered retirees health benefits only to those employees who were at least 50 years of age at the time of the agreement. A group of employees who were in their forties sued, claiming that the age requirement constituted illegal age discrimination in violation of the ADEA.

The question revolved around what it means to discriminate on the basis of "age." Since race discrimination includes discrimination against white workers because of their race, see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (Title VII prohibits discriminating against whites in favor of racial minorities), and since sex discrimination includes discrimination against men because of their sex, see *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998) (Title VII prohibits harassment of men, by men, because they are male), it is not entirely implausible to think that discrimination because of age could include discrimination because of relatively younger age as well as discrimination because of relatively older age. After all, as the Court observed, the statutory "reference to 'age' carries no express modifier and the word could be read to look two ways." Slip op. at 3 (emphasis added).

The Court addressed this problem of statutory construction, as it often does, by reviewing the process by which the ADEA became law, including the testimony before the congressional committees that considered the bill, the committee reports that approved it, and the subsequent congressional debates. Virtually all of this legislative history referred to problems that older workers experienced because of negative stereotypes directed at older workers and the ways that society and employers favor youth and younger employees. The Court also noted that if the statute was supposed to protect the younger worker from discrimination in favor of the older one, it is unlikely that the statute would have limited its protections to those who are age forty and above.

Justices Scalia, Thomas, and Kennedy dissented, pointing to an EEOC regulation which provides, in pertinent part, that "if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." (29 C.F.R. § 1625.2(a) (2003). Justice Scalia's dissent argued that the Court should have accorded deference to this EEOC regulation.

Nonetheless, the majority concluded that "age discrimination" under the ADEA means discrimination against older workers. A contrary holding would have wreaked havoc with employee benefit plans and many other employer practices that tend to favor older and longer-tenured employees. In summary, **the Supreme Court held that the ADEA only prohibits discrimination in favor of younger employees and does not address discrimination that favors older workers**.

The same holds true for California law. The California Fair Employment and Housing Act (FEHA) states that it is unlawful to discriminate against “any person” over the age of 40 because of their age. (Gov. Code, § 12926, subd. (b).) As such, an employer does not violate the FEHA by providing preferential treatment to an older worker over a younger worker.

Notwithstanding any of the above, your policy appears to be neutral on its face and therefore even assuming someone under 40 could argue they are being discriminated against due to age, the policy it and of itself is neutral and not discriminatory.