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Are Law Firm Mandatory Retirement Policies Enforceable? In This Instance – Yes.

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Von Kaenel v. Armstrong Teasdale, LLP, No. 18-2850 (8th Cir. 2019)

The question whether an individual is covered by the definition of "employee" under various civil rights laws often is dispositive of the case. Indeed, the first step in any meaningful and practical analysis of exposure is whether a litigant meets the specific statutory requirements for protection, and the failure to engage in that exercise might compromise a defense for an employer. An equity partner at Armstrong Teasdale LLP recently found himself on the wrong side of such a determination when the Eighth Circuit concluded that he was not an employee covered by the Age Discrimination in Employment Act (ADEA). Although the ruling was favorable for Armstrong Teasdale, law firms—particularly those with multitiered partnerships—should take caution in applying this decision.

In *Von Kaenel v. Armstrong Teasdale, LLP*, No. 18-2850, an equity partner at the firm was forced out at age 70 at the conclusion of 2014. He alleged that but for the firm's mandatory retirement policy, he would have retired at or around 75. After his departure from the firm, Von Kaenel continued to practice law, rendering him ineligible for a two-year severance benefit available to retiree lawyers pursuant to the firm's policies. Von Kaenel filed charges with both the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights. The Missouri Commission determined that Von Kaenel fell outside the protected age group, and the EEOC separately terminated its proceedings and issued a Right to Sue. Von Kaenel then filed suit in federal court, where the central issue was whether he was an employee covered under the ADEA.

Essentially, the question before the Eighth Circuit was whether Von Kaenel was an owner in the firm or an employee subject to protections of the ADEA. In 2003, the United States Supreme Court established a six-factor test in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), to determine whether an individual is likely an owner or an employee. The six factors established by *Clackamas* include:

1. whether the organization can hire or fire, or set rules for the individual's work;
2. whether and to what extent the organization supervises the individual's work;

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3. whether the individual reports to someone higher in the organization;
4. whether and to what extent the individual is able to influence the organization;
5. whether the parties intended the individual to be an employee, as expressed in written contracts or agreements; and
6. whether the individual shares in the profits, losses, and liabilities of the organization.

It should be noted that the Supreme Court was clear that this is a facts and circumstances test and no one factor is controlling.

The Eighth Circuit also cited favorable decisions from the Seventh, Eleventh, and Tenth Circuit involving shareholders in closely held corporations and bona fide partners in professional firms. There were facts Von Kaenel could not argue around. These included that he: (1) was required to make a capital contribution for his equity; (2) had the right to vote on changes proposed to the partnership agreement;(3) benefited from the firm's profits; (4) had the right to vote on the admission of new partners; and (5) was protected from involuntary expulsion and could lose his job and equity only through a vote by the partners or the operation of the mandatory retirement provision.

Significance of Decision

Law firms should be careful in applying this decision. Not all partners in every firm are created equally, and firms with multitiered partnership levels should tread carefully. Most non-equity partners—and even some equity partners, those with little or no management authority, and few voting rights—potentially could be considered employees under the ADEA. Firms that have or are considering a mandatory retirement policy should evaluate their partnership governance policies and procedures in light of the *Clackamas* factors discussed in this alert to determine whether a partner or tier of partners could successfully challenge a mandatory retirement policy under the ADEA.