

EEOC v. Kelley Drye & Warren LLP: The Sequel

Several months ago, the EEOC filed a complaint against the international law firm Kelley Drye & Warren LLP on behalf of a partner at the firm, alleging that Kelley Drye's policy of stripping partners of their equity at age 70 constitutes an unlawful employment practice in violation of the Age Discrimination in Employment Act (ADEA). Moses & Singer's Client Alert discussing the EEOC complaint may be accessed [here](#). Kelley Drye recently filed its answer, claiming that partners are employers, not employees, and thus are not entitled to protection under the ADEA.

A One-Two Punch

The crux of Kelley Drye's defense is that because partners (i) are defined and referred to as partners in the firm's partnership agreement, (ii) participate in the adoption and approval of "life partner" provisions in the firm's partnership agreement, (iii) represent internally and externally that they are Kelley Drye partners, (iv) participate in firm elections, including the election of the firm's executive committee which manages the business, property, and affairs of the partnership, (v) participate in monthly partnership meetings, (vi) have access to financial and other confidential firm information, (vii) receive IRS forms K-1 reflecting annual income, (viii) supervise Kelley Drye lawyers and staff, (ix) autonomously handle client matters, and (x) are involved in client billing, they fall outside the purview of the ADEA, which only protects employees. Kelley Drye additionally argues that the complaining partner's compensation since he turned 70 has been non-discriminatory and non-retaliatory, given that his billable hours over the past five years have been "7 to 10 times less, annually, than the hours he billed prior to becoming a life partner." The answer further accuses the partner of having a "history of objectionable behavior inconsistent with the expectations for a Kelley Drye partner."

Firm Retirement Policies May Face Changes on the Horizon

Just a few days after Kelley Drye filed its answer, the firm announced that it had amended its partnership agreement to allow equity partners to continue working past age 70. According to the firm's chairman, senior partners will now be judged solely on their performance, like all other partners. Partners may still retire and receive life-partner payments under the revised policy, but those who elect life-partner status will no longer be eligible for bonuses.

This case is being closely monitored by those in the legal profession because of its potential implications for situations in which law firm partners could be treated as employees under federal law. While the EEOC claims that Kelley Drye partners are employees entitled to protection under the ADEA, Kelley Drye disagrees. Although the American Bar Association recommended in 2007 that firms drop mandatory retirement policies, many New York firms maintain them. In fact, a survey published in 2008 by Altman Weil Publications Inc. found that 58 percent of firms with more than 100 lawyers had a mandatory retirement policy in place. Some argue that these policies are necessary at firms with large institutional practices in order to maintain partner turnover and high profits per partner. Depending upon how the Southern District of New York decides *EEOC v. Kelley Drye & Warren LLP*, however, this argument may lose its persuasiveness.

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