

Labor & Employment ADVISORY

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EEOC Issues Final Rule Regarding “Reasonable Factors Other Than Age” Defense to ADEA Disparate Impact Claims

On March 30, 2012, the Equal Employment Opportunity Commission (EEOC, or “the Commission”) issued its final rule revising the Commission’s Age Discrimination in Employment Act (ADEA) regulations. The EEOC has described the new regulations as an attempt to incorporate the holdings of two recent Supreme Court cases regarding disparate impact claims under the ADEA and provide guidance to courts and employers regarding the ADEA’s statutory “Reasonable Factors Other Than Age” (RFOA) defense. As discussed in more detail below, the new rule places significant burdens on employers seeking to avoid disparate impact liability. It is therefore important for employers to understand the implications of the new rule and take affirmative steps to reduce exposure to potential disparate impact claims under the ADEA in connection with reductions in force, hiring practices, performance assessments and other employment actions.

Background Regarding Disparate Impact Claims Under the ADEA

In *Griggs v. Duke Power*, 401 U.S. 424 (1971), the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964—in addition to prohibiting disparate treatment (or intentional discrimination) based on the characteristics protected by the statute—also prohibited employment actions, policies and practices that have a disparate impact (or discriminatory effect) on individuals in a protected class, even in the absence of intentional discrimination, unless such actions are justified by “business necessity.” The Supreme Court did not address the issue of whether such disparate impact claims are cognizable under the ADEA until its 2005 decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). Prior to *Smith*, lower federal courts had reached conflicting conclusions on the question. In *Smith*, the Supreme Court resolved the split of authority and held that the ADEA does permit disparate impact claims. In reaching this conclusion, the Court emphasized that in disparate impact cases, the RFOA defense contained in the ADEA¹ plays a crucial role by precluding liability under a disparate impact claim if the challenged action was based upon a reasonable non-age factor.² The Court also made clear that the RFOA defense under the ADEA is a lower standard than the “business necessity” defense under Title VII.³

Three years later, the Supreme Court took up the RFOA defense once again. In *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), the Court held that the RFOA concept under the ADEA is an affirmative

¹ See 29 U.S.C. § 623(f)(1).

² 544 U.S. at 239.

³ *Id.* at 243.

defense and, accordingly, found that employers, rather than employees, have the burden of proof to show that an action that produced a disparate impact was based on a reasonable factor other than age. The Court also re-emphasized the difference between the ADEA's RFOA defense and Title VII's business necessity test, stating that "the business necessity test has no place in ADEA disparate-impact cases."⁴

Substance of the EEOC's New RFOA Rule

It was against this backdrop that the EEOC sought to revise its ADEA regulations to incorporate several of the concepts and rules set forth by the Supreme Court and provide guidance as to its interpretation of the meaning of RFOA, which is not defined in the statute and had not previously been described in any detail by the EEOC's regulations. The final rule provides for extensive revisions to 29 C.F.R. § 1625.7, which is the pre-existing regulation addressing the RFOA defense.

The revised regulation makes clear that a plaintiff asserting a disparate impact claim under the ADEA "is responsible for isolating and identifying the specific employment practice that allegedly causes" the alleged disparate impact.⁵ The regulation also states that the employer bears the burden of proof with respect to the RFOA defense, and that the RFOA defense is not available in connection with disparate treatment claims.⁶

Perhaps most controversially, the final rule's guidance regarding the meaning of RFOA places significant burdens on employers attempting to establish the defense. First, the regulation defines RFOA as "a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances," thus incorporating a tort law concept of reasonableness into RFOA analysis.⁷ Second, the regulation states that whether a "differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation."⁸ Third, the regulation indicates that in order to establish the RFOA defense, an employer must prove that the employment practice in question is both (1) *reasonably designed* to further a legitimate business purpose and (2) *administered in a way that reasonably achieves* that purpose in light of all the facts that were known to, or should have been known by, the employer.⁹

Finally, the revised regulation provides a non-exhaustive list of considerations relevant to whether an employment practice is based on a reasonable factor other than age. Such factors are:

- the extent to which the factor is related to the employer's stated business purpose;
- the extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

⁴ 554 U.S. 84, 85 (2008).

⁵ 29 C.F.R. § 1625.7(c).

⁶ 29 C.F.R. § 1625.7(d).

⁷ 29 C.F.R. § 1625.7(e)(1).

⁸ *Id.*

⁹ *Id.*

- the extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- the extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- the degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.¹⁰

Implications of the New Regulation for Employers

The overall impact of the EEOC's new rule will be to make it more difficult for employers to defend against disparate impact claims under the ADEA. The RFOA factors articulated in the new regulation provide a roadmap for plaintiffs and courts to challenge employment actions by attacking employers who do not address all of the listed factors, and by attempting to second-guess employers' efforts to comply with some or all of the steps. In particular, the presence of significant supervisor discretion in connection with challenged decisions will be used to attempt to defeat the RFOA defense, and use of clear criteria will be even more important than in the past. Moreover, by injecting a tort law reasonableness standard into the RFOA analysis and emphasizing that the RFOA defense must be examined on a case-by-case basis, the new regulation will make it very difficult for employers to win summary judgment with an RFOA defense in disparate impact ADEA claims. Both of these critical implications of the new regulation could very likely lead to an uptick in disparate impact age discrimination claims, and both demonstrate the importance of employers taking steps now in connection with their employment decisions, both to reduce their chances of being hit with such claims and to ensure that they have the evidence necessary to establish the RFOA defense in the event that they are.

Although employers should consult with counsel to determine what specific steps are appropriate for reducing exposure to ADEA disparate impact claims given their own particular situations and circumstances, the following is a list of actions that employers should consider when working through reductions in force, furloughs, benefit reductions or other group decisions that could have an adverse impact on older workers:

- Ensure ample planning time to set appropriate criteria, assess results and take other appropriate steps.
- Reduce the amount of unfettered discretion given to decision-makers.
- Decide ahead of time what the criteria for such decisions will be.
- Document the criteria and the business reasons for choosing the criteria.
- Make sure that there is a non-age criterion that relates closely to the stated business purpose.
- Provide advice and/or training to the people making selections on how to use and apply the criteria.

¹⁰ 29 C.F.R. § 1625.7(e)(2)

- Review the results of the criteria on a preliminary basis before they are finalized in order to determine whether there is an adverse impact and whether any changes are to be made before finalizing the decisions.
- Revise stated business purpose in light of any change to selection criteria during the process.
- Before making changes to a policy or an employment decision, assess in advance whether there may be an adverse impact on older workers.
- Take steps to reduce harm to older workers, and keep written documentation of steps.
- Involve counsel in the choice of criteria and the preliminary and final analysis of results in an effort to keep them under the protection of privilege.

The EEOC's final rule is available [here](#) from the Federal Register. The new rule takes effect on April 30, 2012.

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