



EEOC Final Rule Clarifies Age Discrimination in Employment Act Defense

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On March 29, 2012, the Equal Employment Opportunity Commission ("EEOC") issued a final rule amending the Age Discrimination in Employment Act ("ADEA") regulations in the wake of the United States Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Lab.* Specifically, the rule expressly recognizes disparate impact claims under the ADEA. In the context of the ADEA, disparate impact claims address neutral employment practices that disproportionately affect individuals 40 years or older. Employers are prohibited from using employment practices and policies that have a disparate impact, unless the employer can show that the policy or practice is based on a reasonable factor other than age ("RFOA"). The final rule also provides employers with guidance regarding how the EEOC will handle RFOA defenses.

The EEOC's final rule defines a 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." Further, while the EEOC maintains that the RFOA is a fact-specific determination, the rule provides a non-exhaustive list of considerations to help determine if an employment practice is "reasonable" and whether a factor is "other than age." These factors are not required elements or duties under the RFOA defense; however, the final rule states that they are "manifestly relevant to determining whether an employer has met the threshold for the RFOA defense." The factors include:

- 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;
- 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.

Notably, these considerations continue to expose employers to disparate impact claims based on allegations of subjective discrimination. Specifically, they allow the decision-maker to consider a manager's or supervisor's discretion in

the RFOA analysis. Therefore, an employer can be liable under a disparate impact claim if the employer allocates too much employment discretion to its management, thereby allowing management to engage in subjective age discrimination.

Finally, consistent with the EEOC's previous position, the RFOA standard places a greater burden on employers than the rational basis or non-arbitrary standard. Thus, employers who seek to assert the RFOA defense cannot simply demonstrate that their actions were rational or not arbitrary. Instead, the employer's reliance on the asserted non-age factors must be reasonable in design and application. Some employers feared that this elevated threshold would place the RFOA standard on par with the Title VII business necessity standard; however, the final rule indicates that the RFOA standard does not rise to the level of the Title VII business necessity. The final rule also eliminated language that suggested that employers were required to demonstrate that they considered proposals, including the asserted non-age factors, and chose the least discriminatory option. However, the EEOC notes that the removal of this language does not preclude consideration of the availability of obvious and less discriminatory alternatives in a RFOA analysis.

As expected, these changes will make it more difficult for employers to defend themselves against disparate impact age discrimination claims. As such, employers should familiarize themselves with these changes. The final rule becomes effective 30 days after publication in the Federal Register. It was published March 30, 2012.

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