EMPLOYER
LEGAL BRIEF

APRIL 2012 Published by Personnel Concepts

THE FINAL EEOC REGULATION ON REASONABLE FACTORS OTHER THAN AGE UNDER THE ADEA

On March 31, 2012, the Equal Employment Opportunity Commission ("EEOC") issued its final and long-awaited regulation on disparate impact discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), and the availability of the reasonable factor other than age ("RFOA") defense to employers. It is entitled "Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act." The rule and the law applies to employers with 20 or more employees.

Types of Age Discrimination under the ADEA

There are two types of ADEA age discrimination cases: disparate treatment and disparate impact. The former class of case arises where the employer intentionally uses age as a factor in making employment decisions. The latter is when age is not a clearly intentional factor, but the employment action has a disproportionately adverse impact on workers over age 40. The final ADEA regulation deals with disparate impact discrimination; that is where an employment decision is not expressly based on age, but has a greater adverse impact on workers over age 40.

> An RFOA is a non-age factor that an employer exercising reasonable care would use to avoid limiting the opportunities of older workers, in light of all the surrounding facts and circumstances.

Reasonable Factor other than Age

RFOA is a defense to a claim of disparate impact age discrimination. Section 4(f) of the ADEA [29 U.S.C § 623(f)] provides in relevant part that it "…shall not be unlawful for an employer, employment agency, or labor organization-(1) to take any action otherwise prohibited… where the differentiation is based on reasonable factors other than age… ." Once the employee raises disparate impact as a basis of the claim, then the burden of "production and persuasion" for showing a RFOA shifts to employer. This comes from previous case law and is codified at 29 CFR § 1625.7(d) of the final regulation.

SCOTUS and RFOA

The Supreme Court addressed the application of RFOA in Smith v. City of Jackson, 544 U.S. 228 (2005) and Meacham v. Knolls Atomic Laboratory, 128 S.Ct. 2395 (2008). Smith and Meacham rejected the notion that an employer must meet the Title VII "business necessity" test in order to successfully raise the RFOA defense in an ADEA case. Instead, the employer need only show that the employment decision was based on a "reasonable factor other than age," an interpretation consistent with the statutory language of ADEA and not found in Title VII. However, it also concluded that an employer must show more than a "rational basis" for its decision as some courts had previously stated. It resolved a split in federal circuits as some federal appeals courts did not recognize disparate impact ADEA claims at all. The new standard and the final regulation declared it is still more favorable to employers than the Title VII regulation standards for non-age discrimination and is more consistent with the statute's language.

Smith involved a decision to give raises to police officers and dispatchers who had less than five years of tenure in order to make these positions' starting salaries comparable with the regional average. Thus, police officers with fewer than five years of seniority received proportionately greater raises than police officers with more seniority, a large number of who were over the age of 40. The Court held that disparate impact claims can be brought under the ADEA without any requirement of having to show "business necessity." It was enough that the decision was based on RFOA. Consequently, the City of Jackson was able to successfully defend the action. However, the opinion was silent on whether the employer

or the employee had the burden of proving or disproving the RFOA defense.

Meacham took up that question. The company used a scoring system to identify employees for layoff. The scoring criteria given to managers took into account "performance," "flexibility," and "critical skills" as well as points for years of service. Thirty of the thirty-one employees eventually laid off were over the age of 40. The critical holding in Meacham was that an employer has the burden of "production and persuasion" in proving RFOA as an affirmative defense in an ADEA case.

EEOC Hits the Drawing Board

These two U.S. Supreme Court decisions eventually led to the new EEOC final regulations. The agency needed to update its regulations to comply but the road to that destination was bumpy. The rule revises two earlier notices of proposed rulemaking, one published on March 31, 2008, and another on February 18, 2010, which addressed issues resulting from Smith and Meacham. The final regulation attempts to define reasonableness and allowable factors.

The EEOC issued its first proposed new rule on March 31, 2008 (73 FR 16807), which would have revised 29 CFR § 1625(d) to state that an employment practice that has an age-based adverse impact on individuals within the protected age group is discriminatory unless justified by a "reasonable factor other than age," and that the individual challenging the practice has the burden of isolating and identifying the particular practice responsible for the adverse impact. The proposed rule would also revise Sec. 1625.7(e) to state that the employer has the burden of showing that a reasonable factor other than age exists factually.

In response to comments, the commission published a second proposed rule on February 18, 2010 (75 FR 7212), which, addressing the meaning of "reasonable factors other than age," would have revised Sec. 1625.7(b) to state that an RFOA determination will be based on the facts and circumstances of the particular situation. It also defined a "reasonable factor" as objectively reasonable when viewed from the position of a reasonable employer in like circumstances. It further stated that the RFOA defense is only available when the challenged practice is not age-based; and, provided a non-exhaustive list of factors relevant to the determination of whether an employment practice is reasonable and whether a factor is "other than age." The EEOC went on to include a clarification that the listed "…factors are not required elements or duties, but considerations that are manifestly relevant to determining whether an employer demonstrates the RFOA defense…."

General Principles of the Final Rule

Neither proposed rule was entirely well received by commentators. Relenting in the face of the comments, the final regulation acquiesces (more or less) to the following principles laid down by the U.S. Supreme Court:

- An RFOA is a non-age factor that an employer exercising reasonable care would use to avoid limiting the opportunities of older workers, in light of all the surrounding facts and circumstances.
- The RFOA provision is an affirmative defense for employers in disparate impact cases, but is unavailable in disparate treatment cases.
- An employer defending an ADEA disparate impact claim bears the burdens of production and persuasion in showing the existence of an RFOA (more or less the burden of proof). Determining whether an employment practice is based on an RFOA involves a fact-intensive inquiry.

EMPLOYER RECOMMENDATIONS

- The Mission Statement. Have a written business "Mission Statement" and circulate it among all supervisors and managers. The regulation states that an important factor is whether the employment decision was related to or furthered the employer's "business goals." State those goals as clearly as possible. The statement should focus as much as possible on quantifiable concepts, such as targeted markets, products, customer satisfaction, profitability goals, standing relative to competition, cost control, error levels and such, not simply "maximizing profit," "offering cutting edge solutions," "providing leadership for the next generation" and the like.
- Training. Provide formal supervisor and manager training regarding the new rule, particularly on avoiding the use of "subjective criteria" as much as possible. This would include strict avoidance of factors using age-related "buzzwords" such as "fresh ideas," "new blood," "highly energetic," "flexibility," "eliminating deadwood," etc., not only in written materials, but in oral communications as well. The ill-advised water cooler comment can be just as damaging in the courtroom as the smoking gun memo or policy statement.

The Final Regulation Reference to Tort Law

The final regulations recognize the RFOA defense only where the employment practice is reasonable AND based on factors other than age. It is a two-part test. One part of the proposed regulations that survives in the final rule is the reference to tort law as providing the standard for analyzing reasonableness, the first prong of the test. In doing so, the EEOC rejects the notion that discrimination case law is the sole guidepost and precedent for determining what a reasonable employer would do in a given situation. Instead, it looks to the entire body of state law on negligence liability. The stated theory is that tort law is more developed on the question than discrimination law. Unfortunately, it is also far more extensive and in many situations, may yield conflicting results. EEOC also rejected the concern raised by some commentators that tort law should not provide the framework for analyzing reasonableness unless other tort law concepts, such as contributory negligence and assumption of the risk, are incorporated as well. At this time, there is no means of being certain how much courts may defer to this part of the rule.

Factors Used by EEOC Under the Final Rule

The second part of the RFOA test is whether the employment practice is based on factors other than age. The factors the EEOC will consider include the extent to which:

- The factor is related to the employer's stated business goals (goodbye business necessity, hello defined business goals);
- The factor was applied accurately and fairly;
- Managers were given training on how to apply the factor to avoid discrimination;
- Manager discretion was appropriately limited (especially in highly subjective situations subject to age-based stereotypes);
- The employer analyzed potential adverse impact on older workers;
- Age-protected individuals were harmed; and
- The employer took steps to reduce potential harm.

What EEOC Expects

The EEOC expects the rule to have several positive effects, including:

- Reduction of employer uncertainty over the RFOA standard following the Supreme Court's recent holdings in Smith and Meacham.
- Reducing unemployment among older workers by discouraging employer practices which adversely affect older workers.

Drawbacks of the New Rule to Employers

While the final rule clarifies and provides some guidance for employers on the RFOA defense, the EEOC's test for the reasonableness of employment practices leaves unclear how potentially numerous fact-based issues should be resolved. This can be an impediment to the level of success employers previously enjoyed in resolving age discrimination claims through summary judgment relatively early in the litigation process. Consequently, it may lead to costlier, more protracted litigation, trials and appeals.

To better protect against age discrimination claims and bolster their positions in eventual lawsuits, employers will need to closely consider the new standards of

- Decision Making Guidelines. Upper management should publish written guidelines to be adhered to by supervisors and mid- to lower-level management in making employment decisions, including what factors may be considered and when, and which emphasize that there should be no deviation from these guidelines without the approval of identified high-level authority within the company.
- Pre-Action Matrix. Before final action is taken, a matrix analysis of some kind should be done to assess whether the proposed action will have a disparate impact on employees over age 40. If it will, final action should be approved only at a very high company level (such as VP of HR, at a minimum), and approval of corporate counsel should be sought wherever possible before the decision to take the action is made.
- Correction and Review Procedures. A procedure to correct errors and review decisions upon receipt of employee, prospective employee and former employee complaints should be formalized and implemented.

reasonableness when assessing the impact of employment practices on older workers. It is probably imperative that employers should also consider incorporating this new rule into anti-discrimination training.

Decisions having a disparate impact on older workers will be deemed discriminatory under the new rule unless the employer can justify the decisions based on RFOA.

Benefits of the New Rule to Employers

The Court in Smith stated that "under Title VII, once the plaintiff demonstrates that the employer's policy or practice has had a statistically adverse impact on a protected group, the employer must demonstrate that the policy or practice "is job related for the position in question and consistent with business necessity." Relying on the "reasonable factors other than age" provision of the ADEA, the Court held that employers were not required to show strict "business necessity" to successfully raise an RFOA defense to an age discrimination disparate impact claim but need only demonstrate that its policy or practice is "reasonable." Thus, as the Court ruled, "disparate impact liability under the ADEA is narrower than under Title VII." The new EEOC regulation acknowledges this concept of a more favorable affirmative defense standard in disparate impact age cases than exists for employers in other types of federal discrimination cases. To that extent, the new rule removes some of the uncertainty for employers and narrows their potential liability for such claims. This makes it probable that EEOC will, in the future, be less likely to support disparate impact claims if employers otherwise comply to its satisfaction to the various structures of the new rule.

Early Reactions to the New Rule

Like its two predecessors, the final regulation has not been universally welcomed. A number of business community representatives have already criticized it. For example, executive director for labor law policy Michael Eastman stated that the final regulations "…represent an attack on employers' subjective decision-making and will require employers to undertake costly disparate impact analyses for virtually every employment decision." The rule will allow EEOC and plaintiffs' lawyers to "…'second guess' even 'routine' business decisions affecting older workers." (Eastman, BNA Daily Labor Report, March 29, 2012).

Of course, one can surmise that the reaction of older worker advocates may well say "that's the whole idea."

The author believes this regulation will add substantial compliance costs for prudent employers desiring to take all reasonable steps to avoid liability for disparate impact age discrimination. The main cost driver will likely be the requirement of analyzing the impact of the potential decision on older workers prior to implementation. The best reading of this would seem to be the need for a prior actual impact study to effectively defend an employer's subsequent decision. A secondary, but also significant cost driver will be the necessity of new company-wide training.

Effective Dates

The final regulation becomes effective on April 30, 2012.◆

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