The Diverse Workforce

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EEOC Issues Final Rule on "Reasonable Factors Other than Age" Under the ADEA

On March 30, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) published, in the Federal Register, the "Final Regulation on Disparate Impact and Reasonable Factors Other than Age" (RFOA) under the Age Discrimination in Employment Act of 1967 (ADEA). The final rule clarifies that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on a reasonable factor other than age. The rule explains the meaning of the RFOA defense and makes EEOC's regulations consistent with Supreme Court case law. The new regulations, which have an effective date of April 30, 2012, apply to private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations.

On March 31, 2008, EEOC published in the Federal Register, a Notice of Proposed Rulemaking ("NPRM") to address issues related to the United States Supreme Court's decision in Smith v. City of Jackson. The Court ruled that disparate-impact claims are cognizable under the ADEA but that liability is precluded when the impact is attributable to a reasonable factor other than age. Subsequently, on February 18, 2010, EEOC published in the Federal Register, a second NPRM to address the meaning of "reasonable factors other than age." The Commission considered all comments received in response to both notices of proposed rulemaking and made the appropriate changes to the proposed rules in response to those comments.

An employment practice is based on an RFOA when it was **reasonably designed and administered to achieve a legitimate business purpose** in light of the circumstances, including its potential harm to older workers. The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It

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GINA Recordkeeping Rules Promulgated by EEOC

The Genetic Information Nondiscrimination Act (GINA), which applies to businesses with 15 or more employees, took effect on Nov. 21, 2009, prohibiting the use or disclosure of employees' confidential genetic information in any employment transaction or decision. Now, two years later, the Equal Employment Opportunity Commission (EEOC) has finally issued regulations on GINA recordkeeping, extending the documentation requirements of Title VII of the Civil Rights Act to GINA.

Basically, what this requirement means is that any paperwork created that includes genetic information (e.g., voluntary wellness program testing results) must be retained by the employer for one year, or in the case of an involuntary termination, for one year after the termination. In one sense, then, the final rule creates a recordkeeping requirement only when GINA is violated or suspected of being violated, which means that recordkeeping should be minimal. As the EEOC explains it: "Based on the fact that these regulations do not require employers to create any records and do not impose any reporting requirements, but merely require employers to maintain the records that they do create, we estimate that it would take each new firm ten minutes or less to comply."

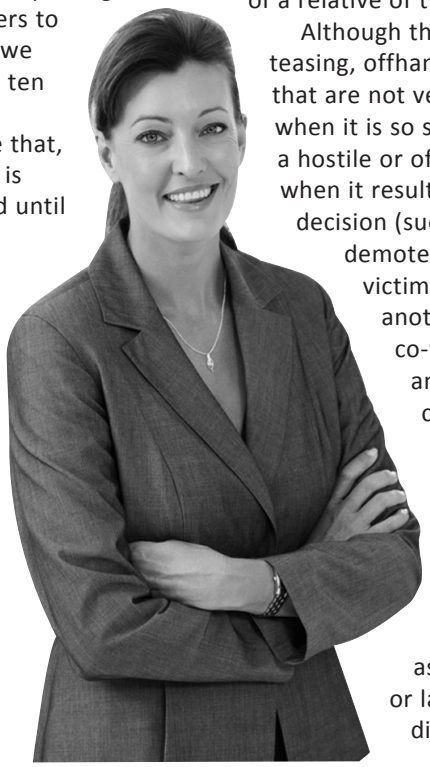
However, employers should take note that, when a GINA-based discrimination charge is filed, all relevant records must be retained until the case has reached "final disposition."

Genetic information includes data about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future.

Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work.

Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee.



Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area of the workplace, a co-worker, or someone who is not an employee, such as a client or customer.

Under GINA, finally, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination. ◆

Basically, this requirement means that any paperwork that includes genetic information (e.g., voluntary wellness program testing results) must be retained for one year, or in the case of an involuntary termination, for one year after the termination. In a big sense, then, the final rule creates a recordkeeping requirement only when GINA is violated or suspected of being violated.

FAQ: Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" under ADEA

Q: What does the ADEA do?

A: It prohibits discrimination against workers because of their older age with respect to any aspect of employment. In addition to prohibiting intentional discrimination against older workers (known as "disparate treatment"), the ADEA prohibits practices that, although facially neutral with regard to age, have the effect of harming older workers more than younger workers (known as "disparate impact"), unless the employer can show that the practice is based on a Reasonable Factor Other than Age (RFOA). **The final rule concerns only disparate impact discrimination and the Reasonable Factors Other than Age defense** to such claims.

Q: What is the purpose of the rule?

A: The rule responds to two Supreme Court decisions in which the Court criticized one part of the Commission's existing ADEA regulations. The Court upheld EEOC's longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the regulations which said that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a "business necessity." The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA. The Court also said that the RFOA defense is easier to prove than the business necessity defense but did not otherwise explain RFOA.

Q: Who is required to follow the rule?

A: The rule applies to all private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations.

Q: When does an employer have to show that its practice was based on an RFOA?

A: An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and established that the practice harmed older workers substantially more than younger workers.

Q: What determines whether an employment practice is based on Reasonable Factors Other than Age?

A: An employment practice is based on an RFOA when it **was reasonably designed and administered to achieve a legitimate business purpose** in light of the circumstances, including its potential harm to older workers.

The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It includes the following list of **considerations relevant to assessing reasonableness:**

- 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.

Q: Must employers show that they used each of the considerations listed in the EEOC's regulation to establish the defense?

A: No. The considerations merely describe the most common characteristics of reasonable practices. The rule makes clear that the defense could be established absent one or more of the considerations, and that there could even be a situation in which the defense is met absent any of the considerations. Similarly, the defense is not automatically established merely because one or more of the considerations are present.

Q: Must an employer keep special documentation to prove that it reasonably designed and administered the practice to achieve a legitimate business purpose in light of potential harm to older workers?

A: No. If disparate impact is established, the employer can support an RFOA defense with evidence that would be admissible in court, including testimony. However, being able to document the reasons for the design and administration of a practice can help an employer establish the RFOA defense. ◆

The rule does two things:

- It makes the existing regulation consistent with the Supreme Court's holding that the defense to an ADEA disparate impact claim is RFOA, and not business necessity; and
- It explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

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includes the following list of **considerations relevant to assessing reasonableness:**

- 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.

While most employers already comply with the non-discrimination requirements under the ADEA, it appears that it will now be more difficult to defend against disparate impact age discrimination claims should they occur. Employers are advised to examine their workplace policies and procedures and correct those that could possibly have a negative impact (even a non-intentional one) on older workers. ◆

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Retaliation Filings Top EEOC's Docket for 2011

The Equal Employment Opportunity Commission (EEOC) received 36,344 retaliation complaints in fiscal year 2011, an increase of three percent from the year prior, making them the largest single category of filings. In all, the EEOC fielded 99,947 discrimination complaints, a slight increase from the previous year's 99,922. Fiscal year 2011 ended Sept. 30th.

Through its enforcement, mediation and litigation efforts, the EEOC also said it obtained a record $455.6 million in relief during fiscal 2011, up $51 million from the previous year.

Other complaints involved sex discrimination (28.5 percent of the total, but at 28,534 filings down 1.7 percent from the previous year); disability discrimination (25,744 and 25.8 percent of the total filings); and age discrimination (23,465 and 23.5 percent of the total).

"I am proud of the work of our employees and believe this demonstrates what can be achieved when we are given resources to enforce the nation's laws prohibiting employment discrimination," said EEOC Chair Jacqueline A. Berrien.

Coming on the heels of the results for 2011, the EEOC also issued a new strategic plan for 2012-2016 and held a public commentary period through Feb. 1, 2012.

The draft plan envisions three strategic goals: I) "to combat employment discrimination through strategic law enforcement"; II) "to prevent employment discrimination through education and outreach" and by establishing community partnerships; and III) "to ensure that the EEOC delivers excellent service through effective systems, updated technology, and a skilled and diverse workforce."

"In approving the Strategic Plan, the EEOC is taking a significant step toward realizing the Commission's vision of ending employment discrimination and promoting equal opportunity in the American workplace," said EEOC Chair Berrien. "I am very pleased with the hard work of staff across the agency who provided assistance throughout the planning process, and I look forward to the successful implementation of the plan."

The EEOC is required by law to issue strategic plans every four years. As the current one is expiring, the EEOC is working to strategize and implement its objectives for the next four years. Since the commentary period is now closed, the Commission will now begin finalizing its vision. ◆