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EEOC Proposes Amended Regulations for Age Discrimination Defense Based on "Reasonable Factors Other than Age"

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On February 18, 2010, the EEOC published a "Notice of Proposed Rulemaking" in the Federal Register, soliciting comments to its proposal to amend regulations addressing the age discrimination defense of "reasonable factors other than age" (RFOA). 75 Fed. Reg. 32, 7212-18 (Feb. 18, 2010); http://edocket.access.gpo.gov/2010/2010-3126.htm. If adopted as proposed, the new RFOA regulations will substantially impact employers that use applicant testing or a formulaic approach to determining eligibility for promotions and/or selection for termination of employment in reductions in force.[1]

Background. The RFOA defense is unique to claims brought under the Age Discrimination of Employment Act (ADEA). The relevant statutory text, in place for more than 42 years, states that an employer may legally "take any action" that the ADEA would otherwise prohibit if "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The EEOC's current RFOA regulations, set forth at 29 C.F.R. § 1625.7, have been in effect for more than 28 years (since September 29, 1981). The EEOC states in its recent notice that two U.S. Supreme Court cases — *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008) — created a need to "clarify the scope of the RFOA defense."

In *Smith*, the Supreme Court resolved a 30-year debate when holding that a disparate-impact theory of recovery is cognizable under the ADEA. The disparate-impact theory involves employment practices that are facially neutral, such as applicant examinations, but which adversely impact a protected class to a statistically significant degree. The *Smith* Court held that the "principle role" of the RFOA defense is to preclude liability in ADEA disparate-impact cases when the adverse impact is attributable to a reasonable nonage factor. *Smith*, 544 U.S. at 239. The RFOA defense "significantly narrows" coverage of the ADEA. *Id.* at 233.

In *Meacham*, the court held that the RFOA defense is a true affirmative defense. This means that the employer must carry both the burden of production of evidence to raise the defense, and the ultimate burden of persuasion that the defense is meritorious.

Summary of Proposed Amendments. There are three aspects of the EEOC's proposed amended regulations for employers to note.

[1] Federal law requires general notice of proposed rule-making in the Federal Register, before the EEOC can adopt final regulations. 5 U.S.C. § 553(b). The EEOC will consider comments to its proposal. Comments may be submitted before **April 19, 2010**, through a variety of means including electronically through the federal eRulemaking Portal: http://www.regulations.gov

1. **Totality of the Circumstances Test.** The EEOC's proposed regulations make it clear that a determination as to whether the RFOA defense applies "must be decided on the basis of all the particular facts and circumstances surrounding each individual situation." While this was already reasonably clear from the Supreme Court cases discussed above, articulation of this point in the proposed regulations is good for employers.

2. **Standard for Reasonableness.** In what is likely to be the most controversial aspect of the EEOC's proposed regulations, tort law concepts are used to set the standard for "reasonableness" when reviewing the RFOA defense. The EEOC defines a "reasonable factor" as one that is "objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances." As stated above, the employer carries the burdens of persuasion and production on this point. The EEOC lists six factors to be considered when assessing whether an employment practice is reasonable:

   - Whether the employment practice and the manner of its implementation are common business practices;
   - The extent to which the factor is related to the employer's stated business goals;
   - The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
   - The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
   - The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
   - Whether other options were available and the reasons the employer selected the option it did.

The last factor, regarding other options, would cause employers that regularly use testing of any sort for making application or promotion decisions to carefully think through all available options, and prepare a rebuttal to the eventual argument that other options would not have caused whatever adverse impact on older workers is alleged.

3. **Defining "Other than Age."** Out of an obvious concern about supervisors who are given "unchecked discretion to engage in subjective decision making," the EEOC's proposal for determining whether the criteria or practice relied on by the employer is "other than age" lists three factors to consider:

   - The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
   - The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
   - The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

Bottom line. If adopted as final, the EEOC's proposed regulations will substantially impact employers that make use of any sort of applicant testing or formulaic approach to determining eligibility for promotions and/or selection for termination of employment in reductions in force. Such employers will need to carefully work through how they would satisfy their burden of persuasion on the RFOA defense, paying particular attention to other available options, and the degree of subjectivity and discretion afforded to supervisors.

For more information, email the author(s) at **leadvisory@bipc.com**.

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