Paul Hastings
StayCurrent
A Client Alert from Paul Hastings
March 2010

EEOC Issues New Proposed Rule Regarding the RFOA Defense Under the ADEA

BY NEAL D. MOLLEN AND EMILY DILLINGHAM

In 2005, the Supreme Court held for the first time that plaintiffs can pursue disparate impact claims under the Age Discrimination in Employment Act ("ADEA"). *Smith v. City of Jackson*, 544 U.S. 228 (2005). It also held, however, that the burden imposed by the most frequent defense to such a claim – the "reasonable factor other than age" ("RFOA") defense – was not onerous, requiring only that the employer's practice be a "reasonable" method of "respond[ing] to the [employer's] legitimate goal[s]."

Now, five years later, the Equal Employment Opportunity Commission ("EEOC") has issued for public comment a proposed rule that purports to interpret that decision.[1] If the proposed rule is adopted and survives a court challenge, however, it would largely dispel any sense of comfort employers might have drawn from the relatively forgiving "reasonableness" standard applied in *Smith*. Indeed, the standard embraced by the proposed rule would require that employers make effectively the same evidentiary showing they must make under Title VII's more stringent "business necessity" defense. Such a result would make ADEA disparate impact litigation much more attractive to the plaintiffs' bar and a much greater threat to employers.

Self-evident Reasonableness Under *Smith*

The 2005 *Smith* decision provided little concrete guidance on the parameters of the RFOA defense. There, the City-employer had limited funds for pay increases to its police officers. By analyzing how its rates of pay stacked up against those of neighboring localities, the city determined that its entry-level salaries were below the market. It therefore allocated what money it had to provide relatively larger increases to junior officers and smaller increases to more senior officers, where its existing rates were more competitive: "The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market." *Smith*, 544 U.S. at 242.

Without any evidentiary record – indeed, without any facts *at all* beyond the allegations of the complaint – the Court affirmed dismissal of the case based on the observation that such an allocation of resources was *self-evidently* reasonable: "Reliance on seniority and rank is un-questionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities." *Id*.

EEOC Embraces "Reasonableness" as Defined in Tort Law

Although the RFOA defense appeared after *Smith* to be a relatively forgiving standard, the EEOC's proposed regulation would impose something far more muscular. The proposal embraces a standard that, according to the EEOC, is based on principles derived from the law of torts. Under the proposed new standard, an employer seeking to invoke the RFOA defense would have to demonstrate that the employment practice in question was: (1) reasonably designed to further or achieve a legitimate business purpose, and (2) administered in a manner that reasonably achieves that purpose in light of the particular facts and circumstances known, or that should have been known, to the employer. Under this standard, the practice also must be objectively reasonable when viewed from the perspective of a reasonable employer under like circumstances.

Under this "prudent employer" standard, the EEOC advises employers to consider factors such as:

- whether the employment practice at issue, and the manner of its implementation, are common to the employer's community or industry;
- the extent to which the practice is related to the employer's stated business goal;
- the extent to which the employer took steps to define and apply the practice fairly and accurately (*e.g.*, training, guidance, instruction of managers and supervisors about how to avoid discrimination);
- the employer's awareness of a possible age-adverse impact before making the employment decision in question;
- steps taken by the employer to assess "accurately and fairly" the impact of the decision upon older employees, as well as steps taken to mitigate unnecessary harm to older workers; and
- the existence of a lesser discriminatory alternative and the reasons why the employer selected the option it did.

No single factor would be dispositive of reasonableness, the EEOC explains, but an employer is more likely to succeed on the RFOA defense if the bulk of these factors tilt in its favor.

In addition, although the Agency admits that the RFOA defense does not require an employer to use the least discriminatory alternative to the challenged employment practice (as does Title VII's "business necessity" standard), the EEOC's proposed rule would require employers to (a) measure the impact and (b) consider alternative practices that could accomplish its goal with a less significant impact. Although the EEOC claims that an employer's practice is not *necessarily* unreasonable when it is adopted in preference to a "less discriminatory" alternative, the Agency's rule would effectively obligate the employer to *consider* any such alternative. The proposed rule does not explain what factors might save an employer that refuses to adopt a "less discriminatory" alternative. Rather, the Agency notes that knowledge of and failure to use a less discriminatory but equally effective alternative will weigh against a determination of "reasonableness." This would seem a thinly veiled effort to incorporate the business necessity standard into ADEA litigation phrased in terms of "reasonableness."

Emphasis on Objective Criteria

The proposed rule also opens a new front in the Agency's war on "subjective" employment criteria. The proposed rule discourages the use of subjective factors which, it claims, are often based on age stereotypes. Thus, the EEOC frowns on the use of such evaluative factors as employee "flexibility," the ability to learn new skills, and a willingness to learn. The proposed rule would also ask courts 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.

Unchecked discretion, the use of subjective "age-based" factors, and the failure to train managers would, according to the EEOC, would all militate against a finding of reasonableness.

Leaving *Smith* Behind

In *Smith*, the Supreme Court did not borrow (or even mention) tort law concepts of reasonableness, nor did it consider any of the "reasonableness" factors discussed above. Nothing in the decision suggests that the City measured the disparate impact its practice caused, considered alternatives, or trained its managers. Rather, the Court approved of the City's plan because it was, simply, one "reasonable" method of "respond[ing] to the [employer's] legitimate goal[s]." In fact, the district court in *Smith* had dismissed the case based solely on the content of the Complaint and the Answer, and it was on this limited "record" that the Supreme Court affirmed.

Nothing in *Smith*, then, provides support for the EEOC's apparent effort to raise the bar on employers for establishing "reasonableness" to something that looks quite like the business necessity defense – the defense the Supreme Court to great pains to *distinguish* from the RFOA defense in *Smith.* The factors enumerated by the EEOC can be relevant in a Title VII case, but none of them were considered by the *Smith* Court in applying the RFOA defense.

The proposed Rule is not final, and it is possible that the EEOC will make additional modifications based on comments it receives. Until then, however, employers should appreciate that disparate impact age discrimination cases may become far more likely and far more challenging than one might have expected in the immediate wake of *Smith*.

Application of the New Standard

Assuming that these proposed rules establish the new threshold for the RFOA defense, what should employers consider before implementing a business practice with a possible adverse impact on older employees or applicants? Here are a few considerations:

- Are the practice at issue and its method of implementation common in other similar businesses?

- Is the practice closely related to the employer's stated business goal?
- What steps has the employer taken to control application of the allegedly discriminatory criterion?
- Has the employer assessed the potential for an adverse impact on older employees and applicants (first in a privileged study, and later in an analysis that can be used in possible defense of the action)?
- How many older workers would be impacted by the practice, and how severely would they be impacted?
- What steps have been taken to mitigate the severity of the harm to impacted workers?
- Have managers and supervisors been trained on the implementation of the practice?
- If other alternatives to the practice are available, what rationale does the employer have for selecting the practice in question?

Even in the absence of these new proposed rules, it has always been good practice for employers to monitor carefully, and in a privileged way, compensation and selection practices so that they identify and mitigate potential adverse consequences for all relevant groups. If these proposed rules survive, preparing well in advance to defend each choice made in deploying a decision-making process will be more difficult but also more important for all employers.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta
Leslie Dent
404-815-2233
lesliedent@paulhastings.com

Los Angeles
Heather A. Morgan
213-683-6188
heathermorgan@paulhastings.com

Orange County
Stephen L. Berry
714-668-6246
stephenberry@paulhastings.com

Chicago
Kenneth W. Gage
312-499-6046
kennethgage@paulhastings.com

New York
Zachary D. Fasman
212-318-6315
zacharyfasman@paulhastings.com

Washington, D.C.
Neal D. Mollen
202-551-1738
nealmollen@paulhastings.com

[1] The proposed rule also reiterates the Agency's prior view – confirmed in *Meacham v. Knolls Atomic Power Company*, 128 S.Ct. 239 (2008) – that the RFOA issue is an affirmative defense as to which the employer bears the burden of proof.