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ADEA Changes: EEOC Muddles the RFOA Defense to Disparate-Impact Age Bias Claims

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On March 30, 2012, the Equal Employment Opportunity Commission ("EEOC") issued the final rule to amend its Age Discrimination in Employment Act ("ADEA") regulations concerning the reasonable-factors-other-than-age ("RFOA") defense to disparate-impact claims. The revised EEOC regulations take effect on April 30, 2012.

In its 2005 ruling in *Smith v. City of Jackson*, 544 U.S. 228, the Supreme Court held that ADEA, like Title VII of the Civil Rights Act of 1964, reaches disparate-impact claims. Because legitimate employment criteria like length of service and experience are often correlated with increasing age, Congress in the RFOA provision[1] took care to insulate reasonable business decisions from challenge even when they disproportionately affect older workers. *Smith* makes clear that "the scope of disparate-impact liability under ADEA is narrower than under Title VII." 544 U.S. at 240. Whereas the employer's defense to Title VII disparate-impact claims requires a showing of "business necessity," ADEA's RFOA defense "preclud[es] liability if the adverse impact was attributable to a non-age factor that was 'reasonable.'" *Id*. at 239. In *Smith,* the RFOA provision sheltered the municipal employer's policy of basing pay raises on seniority and position for the purpose of meeting the competition, even though there were other means of retaining employees with less adverse impact on older workers. As the Court reasoned: "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Id*. at 243.

Despite this clear language, the EEOC has always advocated a narrow construction of the RFOA defense, seeking to equate it, as far as possible, with the business necessity concept applicable under Title VII. In the agency's new regulations, the viability of the RFOA defense will depend on the employer's ability to show that the challenged practice was *objectively reasonable* when viewed from the position of a "prudent employer" mindful of its responsibilities under the ADEA under like circumstances.

The Commission states that the new rule does no more than conform its regulations to *Smith* and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 94 (2008), a later decision confirming that the RFOA defense is a true affirmative defense requiring the defendant to carry the burden of persuasion. There is reason to believe, however, that the revised regulation attempts to go beyond existing law to impose a more rigorous standard for application of the defense, or at the very least, create more opportunity for factual disputes and litigation.

The new regulation adopts the perspective of a "prudent employer" to determine whether or not an employer has relied upon "reasonable" non-age factors in making the challenged employment decision. This standard – the agency informs – is based on principles derived from tort law that impose a duty to avoid harm: "Whether a factor is reasonable can be determined only in light of all of the surrounding facts and circumstances, including the employer's duty to be cognizant of the consequences of its choices."[2] In effect, though seemingly in conflict with the Supreme Court's decision in *Smith*, the new rule allows plaintiffs to argue that it imposes a duty on employers to assess and measure the impact of employment practices on older workers before implementing them.

The Revised Rule

The most significant change is to the former 29 C.F.R. § 1625.7(b), which provided little guidance on the RFOA defense, stating only that "[n]o precise and unequivocal determination can be made as to the scope of the phrase 'differentiation based on reasonable factors other than age.' Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation."[3] This section is replaced with §1625.7(e)(1) which provides that:

- "A reasonable factor other than age is [one] that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances."
- Whether a differentiation is based on a non-age factor "must be decided on the basis of all the particular facts and circumstances surrounding each individual situation;" and
- To establish the RFOA defense, "an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer."

Of particular interest to employers is the non-exhaustive list of considerations that the final rule provides at §1625(e)(2), to help determine whether an employment practice is based on a reasonable factor other than age:

1. The extent to which the factor is related to the employer's stated business purpose;
2. 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;
3. 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;
4. The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
5. 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.

In addition to this catalogue of possible factors, the EEOC cautions that "[n]o specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense."[4]

EEOC's "Questions and Answers" on the New Rule

Concomitant with issuing the new rule, the EEOC published a document entitled: *Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967*.[5] The document provides some additional guidance for interpreting the five factors listed as relevant considerations to the reasonableness of the practice.

Stated Business Purpose:

"The 'stated business purpose' is the business reason articulated by the employer for adopting, or implementing, the employment practice in question. 'Stated' does not mean that the purpose must be written." [6]

This consideration "focuses on the method that the employer used to achieve its purpose, rather than the purpose itself. For example, if a police department is concerned about losing its employees to neighboring departments and decides to raise police officer salaries to match those in surrounding communities, the goal of retaining officers is not relevant to the determination of reasonableness. On the other hand, the extent to which the chosen method (raising salaries for certain employees) relates to the purpose (retaining staff) is relevant to the determination of reasonableness." [7]

Defining and Applying the Factor Fairly and Accurately:

This factor refers to the steps the employer took to make sure that it designed and applied the practice to achieve the employer's intended goal while taking into account potential harm to older workers. To illustrate, the EEOC provides the following example: "A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers." [8]

The EEOC further states that this consideration does not *require* employers to train their supervisors or provide a certain type of training. However, "showing that it provided guidance or training in appropriate circumstances will help the employer establish that its actions were reasonable." [9] The EEOC recognizes that training needs or expectations will vary depending on the circumstances. "For example, a smaller employer might reasonably rely entirely on brief, informal, oral instruction." [10]

Limited Supervisor Discretion / Emphasis on Objective Criteria:

This consideration does not mean that it is unreasonable to use subjective decision making. Rather, it "recognizes that giving supervisors unconstrained discretion to evaluate employees or applicants using subjective criteria may result in disproportionate harm to older workers, because it allows supervisors' biases and stereotypes to infect the decision making."[11]

Thus, the rule discourages the use of subjective factors which, the EEOC claims, are often based on age stereotypes. Specifically, the EEOC frowns on the use of such evaluative factors as "productivity, flexibility, willingness to learn, and technological skills." [12] While the EEOC concedes that those factors

may be crucial for an employer, and that the rule does not preclude employers from seeking those qualities in its workforce, it advises employers to provide guidance when asking supervisors to evaluate those criteria. "For example, an employer that wants its supervisors to evaluate technological skills might attempt to reduce possible harm to older workers by instructing managers to look specifically at objective measures of the specific skills that are actually used on the job." [13]

Assessed Adverse Impact:

This consideration does not *require* an employer to perform an adverse impact analysis of its employment practices, but is "simply one way of determining whether the employer considered the potential harm to older workers." However, the response goes on to state that adverse impact analysis may be "warranted" where there is a facially neutral practice affecting more than one person.[14]

"Where an assessment of impact is warranted, the appropriate method will depend on the circumstances, including the employer's resources and the number of employees affected by the practice. For example, a large employer that routinely uses sophisticated software to monitor its practices for race- and sex-based disparate impact may be acting unreasonably if it does not similarly monitor for age-based impact. Other employers, lacking the resources or expertise to perform sophisticated monitoring, may show that they acted reasonably by using informal methods of assessing impact." [15]

Degree of Harm:

This consideration "reflects the fact that an employer can increase its ability to defend against a claim of age-based disparate impact if it can show that it balanced the potential harm to older workers against the cost and difficulty of taking steps that would still accomplish its business goal but reduce the harm on older workers. For instance, where the impact of an employment practice on older workers is minimal, the fact that an employer failed to take multiple steps to reduce harm would not mean that its chosen method is unreasonable. However, the greater the potential harm, the more likely an employer would be expected to avail itself of available options that would reduce the harm without unduly burdening the business." [16]

Although the rule does not require an employer to search for options and use the one with the least severe impact on older individuals, the EEOC states that "the availability of options is manifestly relevant to the issue of reasonableness."[17] According to the EEOC, where the circumstances are such that the employer knew, or should have known, of a way to noticeably reduce harm to older workers without sacrificing cost or effectiveness, it could be unreasonable for the employer to fail to use such an option. [18]

Practical Considerations for Employers

Although there are reasons to believe that the new regulation is not faithful to the Supreme Court's teachings in *Smith* and *Meacham*, it nevertheless is likely to generate new ADEA litigation, both individual and class claims, and may be accorded deference in the courts. Employers should consider how the EEOC and plaintiffs will use the revised regulations to attack employer policies that may be considered to have an adverse impact on older workers. In light of the five relevant "considerations" identified by the EEOC, if your company is sued for disparate impact age discrimination under the ADEA, you can anticipate that your executives will be questioned by the EEOC and/or private counsel along the following lines:

- What is the business purpose for the practice and how closely is the practice related to that goal?

- Did you consider the potential adverse impact on older employees and applicants?

    - The courts have demanded that plaintiffs identify a specific employment practice having the claimed adverse impact and to demonstrate that this practice is in fact causing the complained-of impact.

    - If you do an adverse impact study, you should consider attorney-client privilege issues before you commence the study.

- Did you consider whether alternatives to the practice are available? What rationale did you showing for selecting the practice in question?

    - Are there ways of articulating the business justification that are better able to convince a government agency or court of the reasonableness of the decision?

- What steps did you take to mitigate the impact of the decision on older workers? Did you analyze whether the criteria used to make decisions about hiring, employee assessments, and promotions may involve age-based stereotypes?

You should anticipate that plaintiffs or the EEOC likely will focus their attack on use of "excess subjectivity" in employment decisions. They will claim that the employer failed to articulate concrete performance criteria and thereby allowed "excessive subjectivity." While many of the terms that the EEOC has targeted, such as "flexibility," may be totally legitimate, in light of the regulations it is desirable to avoid the EEOC's "red flag" terms and to provide concrete examples of the varied tasks the employer expects the incumbent to perform.

It is always desirable to provide appropriate guidance and/or training to managers and supervisors on the implementation of rating factors for employees.

Age Statistics Are Different from Race/Sex Statistics

Unlike sex and race, immutable characteristics that almost never have any relationship to job performance, age is a progressive condition that can affect job performance. Failure to take this difference into account frequently warps statistical analysis. Our partners, Paul Grossman and Paul Cane, co-authored with economist Ali Saad a groundbreaking article on why an adverse impact statistical analysis of age must be undertaken in a very different fashion from a traditional race/sex analysis. Upon request we will be happy to send you a reprint of that article, Grossman, Cane and Saad, "Lies, Damned Lies, and Statistics: How *The Peter Principle* Warps Statistical Analysis of Age Discrimination Claims," 22 *The Labor Lawyer* 251 (2007). Furthermore, many courts have held that for adverse impact under the ADEA, the analysis must be limited to a comparison of over-40 versus under-40. Subcategories, such as over-50 or over-60 compared to under-40, according to these courts, are prohibited because virtually any employer action can be broken down into age cohorts that will show a disparate impact. We will be happy to provide guidance on the unique nature of age discrimination statistical analysis.

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

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[1] The ADEA provides that an employer may take an action "otherwise prohibited" under the Act if "the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).
[2] *See* 77 FR 19080-02, 2012 WL 1048780, at *8.
[3] The final rule re-designates former 29 C.F.R. § 1625(d) as 29 C.F.R. § 1625(c), and former Sec. 1625.7(e) as Sec. 1625.7(d).
[4] 29 C.F.R. § 1625(e)(3).
[5] Hereinafter referred to as "EEOC Q&A on Final Rule."
[6] *See* EEOC Q&A on Final Rule, No. 10.
[7] *Id.*
[8] *See* EEOC Q&A on Final Rule, No. 11.
[9] *See* EEOC Q&A on Final Rule, No. 13.
[10] *Id.*
[11] *See* EEOC Q&A on Final Rule, No. 14.
[12] *Id.*
[13] *Id.*
[14] *See* EEOC Q&A on Final Rule, No. 15.
[15] *Id.*
[16] *See* EEOC Q&A on Final Rule, No. 16.
[17] *See* 77 FR 19080-02, 2012 WL 1048780, at *21.
[18] *See* EEOC Q&A on Final Rule, No. 17.