



For your information

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EEOC Amends Regulations on Defending Disparate Impact Claims Under ADEA

The EEOC recently issued final regulations under the Age Discrimination in Employment Act on justifying employer action that adversely affects older employees based on a “reasonable factor other than age.” The regulations take effect on April 30, 2012.

Background

The Age Discrimination in Employment Act (ADEA) generally prohibits employers from discriminating against job applicants and employees because of their age. ADEA prohibits both intentional employment discrimination (disparate treatment) and, in some cases, facially neutral employment practices that are not intended to discriminate but disproportionately affect individuals who are age 40 or older (disparate impact).

In [Smith v. City of Jackson](#), the Supreme Court held that ADEA exposes employers to liability for employment decisions that disparately impact older employees unless those decisions are based on “reasonable factors other than age” (RFOA). In [Meacham v. Knolls Atomic Power Laboratory](#), the Supreme Court confirmed that the RFOA exception is an affirmative defense, and placed the burden squarely on the employer to prove that its actions were motivated by non-age factors and that those factors were reasonable. The *Meacham* Court also made clear that ADEA, unlike Title VII, does not require an employer to satisfy a more rigorous business necessity test to avoid liability. (See our July 16, 2008 [For Your Information](#).)

In 2008, the EEOC proposed revisions to its ADEA regulations to address the meaning of reasonable factors other than age. In 2010, the EEOC proposed additional revisions to clarify the scope of the RFOA defense by defining what factors are reasonable.

EEOC Final Regulations

On March 30, 2012, the EEOC issued [final regulations](#) amending its ADEA regulations on disparate-impact claims and the RFOA defense. The regulations apply to all private employers with 20 or more employees and to state and local government employers, and are substantially similar to those proposed in 2010. The regulations, which confirm that the RFOA affirmative defense is not available in disparate treatment cases, define an RFOA as “a non-age factor that is objectively reasonable when

viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.” To establish an RFOA defense under the new regulations, employers must show that the challenged employment practice was reasonably designed and administered to achieve a legitimate business purpose.

The regulations identify a range of considerations the EEOC will use in determining whether an employment practice that has a disparate impact on older workers is objectively reasonable and based on a factor other than age. A non-exhaustive list of considerations relevant to assessing reasonableness includes:

- 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
- 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 doing so.

The regulations make clear that the presence or absence of one or more of these considerations will not automatically establish that an employer acted reasonably or preclude an RFOA defense. Rather, whether differentiations are based on RFOA must be determined in light of the particular facts and circumstances of each situation. [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](#), which the EEOC released in tandem with issuing the new rule, provide additional guidance on interpreting each of the five considerations.

Among other things, the regulations make clear that the degree of subjectivity in decision-making factors into the determination of employer liability. Although the EEOC generally discourages the use of subjective factors, it also recognizes that often an employer may need to assess employee or applicant qualities subjectively. However, if an employer gives too much discretion to its managers, the employer still can be liable for age discrimination under a disparate impact theory.

Although the regulations do not require employers to consider various options and choose the least discriminatory one, the EEOC notes that an RFOA analysis may still consider the availability of less discriminatory alternatives. Thus, an employer can increase its ability to defend against an age-based

disparate impact claim by showing that it balanced the potential harm to older workers against the cost and difficulty of taking other steps to accomplish its business goal with lesser harm.

INSIGHT

Although anti-harassment training may establish an affirmative defense to hostile work environment claims under Title VII, the EEOC's final ADEA regulations do not consider anti-discrimination training as an affirmative defense against age claims. However, the EEOC does include training as a consideration in evaluating the RFOA basis of employer conduct.

Conclusion

The final regulations, which take effect April 30, 2012, make clear that the defense to an ADEA disparate impact claim is RFOA, and provide guidance on how the EEOC will look at RFOA claims. Particularly as companies seek to cut employment-related costs or downsize, employers can expect increased scrutiny by the EEOC and more difficulty in defending disparate impact age claims.

Buck Can Help

- Evaluate the impact of the EEOC's regulations on your employment policies and practices
- Review and update employment practices, policies, and processes
- Train and educate managers and supervisors on ADEA and other antidiscrimination laws

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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