

EEOC Issues Proposed Rule Clarifying RFOA Defense Under ADEA

The Equal Employment Opportunity Commission (EEOC) has released a proposed rule which, if adopted, would clarify the term “reasonable factors other than age” (RFOA) as used in the Age Discrimination in Employment Act (ADEA).

The ADEA states 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). The Supreme Court has interpreted this provision in two recent decisions, *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008).

In *Smith*, the Supreme Court held that the ADEA authorizes recovery for disparate impact discrimination claims. However, the ADEA’s coverage of disparate impact claims is narrower than Title VII’s coverage, due to the ADEA’s inclusion of the RFOA provision.

In *Meacham*, the Court held that in an ADEA disparate-impact case, RFOA is an affirmative defense, but the employer bears both the burden of production and the burden of persuasion relating to that defense.

The EEOC’s proposed rule is intended to clarify the scope of the RFOA defense after *Smith* and *Meacham*. The proposed rule would amend 29 C.F.R. § 1625.7(b), which provides 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 circumstance surrounding each individual situation.”

The proposed rule significantly expands this section and provides guidance to employers and courts in interpreting the phrase “reasonable factors other than age.” It first states that determination of whether a differentiation is based on RFOA “must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.”

The proposed rule then discusses the definition of “reasonable,” stating that “[a] reasonable factor is 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. 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.” Relevant factors in determining whether an employment practice is reasonable include:

- whether the employment practice and the method of its implementation are common business practices;
- the extent of relation between the factor and the employer’s stated business goal;

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- whether the employer took steps to define the factor accurately and apply it fairly and accurately;
- whether the employer took steps to assess the adverse impact of the practice on older workers;
- the severity of the harm to individuals in the protected age group;
- whether the employer took steps to minimize the harm; and
- whether alternatives were available.

The proposed rule also discusses the term “factors other than age,” stating that the RFOA defense applies in disparate impact cases only if the employment practice is not based on age. However, “[w]hen disparate impact results from giving supervisors unchecked discretion to engage in subjective decisionmaking . . . the impact may, in fact, be based on age because the supervisors to whom decision making was delegated may have acted on the bases of conscious or unconscious age-based stereotypes.” In determining whether a factor is “other than age,” the following factors will be considered:

- the degree to which the employer gave supervisors unchecked discretion to carry out subjective assessments of employees;
- the extent to which supervisors were asked to evaluate employees based on factors subject to age-based stereotypes; and
- whether supervisors were given guidance about how to apply the factors and avoid discrimination.

The EEOC will accept public comments on the proposed rule for sixty days after its issuance. Comments may be submitted via fax at (202) 663-4114, via the internet at <http://www.regulations.gov>, or via mail to:

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If you have questions regarding this proposed rule, please contact one of the Labor & Employment Relations partners listed below.

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