



Labor: EEOC issues final rule on reasonable factors other than age under the ADEA

The burden is on the employer to prove this defense against a disparate impact claim

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On March 30, the Equal Employment Opportunity Commission (EEOC) published its final rule, meant to clarify the “reasonable factors other than age” (RFOA) defense available under the Age Discrimination in Employment Act (ADEA) (foreshadowed by InsideCounsel). The clarification, however, invites more questions, as it imposes a highly fact-intensive analysis that does little to assist employers in complying with the ADEA.

The ADEA protects employees who are 40 years and older by prohibiting discrimination based on age. In *Smith v. City of Jackson*, the Supreme Court recognized the validity of a disparate impact claim under the ADEA. A disparate impact claim does not require a showing of intentional discrimination, but rather is based on an employer’s adoption of a facially neutral policy that adversely affects a protected category of workers—in this case, older workers. In *Smith*, the high court also recognized a defense to such a claim when the adverse impact is based on “reasonable factors other than age.” The employer has the burden to prove the defense.

The EEOC’s final rule generally tracks the two proposed rules issued by the EEOC on this subject in 2008 and 2010. It confirms that the RFOA defense is available only in disparate impact cases—it does not apply in disparate treatment cases, which examine whether an employer has intentionally discriminated against an employee based on age. It defines an RFOA as one that “is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances.”

To successfully assert the 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.”

Under the final rule, which took effect on April 30, considerations relevant to whether an employment practice is based on a reasonable factor other than age include the following:

- The extent to which the factor is related to the employer’s stated business purpose
- The extent to which the employer defined 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 were 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 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 response to comments received on the proposed rule, the EEOC clarified in the final rule that these “factors are not required elements or duties, but considerations that are manifestly relevant to determining whether an employer demonstrates the RFOA defense.”

Some commentators claim that the EEOC has gone too far with its rule and that the rule is inconsistent with the Supreme Court’s holding in *Smith*. In *Smith*, the court differentiated a disparate impact claim under Title VII from a disparate impact claim under the ADEA, finding that only in the former must the employer show that the challenged practice was a “business necessity.”

The “business necessity” test examines whether the employer could have met its objective in a way that did not result in a disparate impact. Under the ADEA, according to the Supreme Court, the employer must show only that the practice was “reasonable.”

Critics of the EEOC’s rule claim that it lands too close to the line separating business necessity from reasonableness. Regardless, employers should assess the anticipated outcomes from group employment actions and consider their burden to prove the RFOA affirmative defense prior to taking such action if it appears the action may adversely affect older workers.