

# EEOC Final Regulations on Reasonable Factors Other Than Age May Have Broad Impact on Employer Policies/Practices

**April 3, 2012**

The U.S. Equal Employment Opportunity Commission published new regulations Friday setting forth the agency's interpretation and position on the scope of the "reasonable factors other than age" ("RFOA") defense to disparate impact claims under the Age Discrimination in Employment Act (the federal law prohibiting discrimination against employees age 40 and over). The regulations take effect 30 days after publication. While the EEOC insists that the regulations are "not intended to impose unwarranted burdens on employers," the reality is that they will make many employers' decision-making processes far more complex, and will make it far more difficult for employers to successfully assert the RFOA defense than ever before. The regulations are also likely to lead to increased disparate impact litigation, as plaintiffs exploit the more onerous defense standards. Meanwhile, how courts will interpret these regulations, and what deference they will give them, remains to be seen, meaning, at least in the short term, a great deal of uncertainty.

*Background*

The EEOC has explained that its goal in drafting the regulations was to bring EEOC regulations in line with the United States Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Lab.* In those cases, the Court held, among other things, that while the ADEA authorizes recovery for disparate impact claims, the RFOA test, rather than the more stringent business necessity test, is the appropriate means of determining the lawfulness of a practice that disproportionately affects older individuals. Unlike the business necessity test, which asks whether there is any other way for the employer to achieve its goals that would not result in a disparate impact on a protected class, the RFOA defense requires only that the employer's actions be "reasonable." While the individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes a disparate impact, as the Supreme Court held in *Meacham*, the employer defending an ADEA disparate-impact claim bears both the burden of production and the burden of persuasion on the RFOA defense.

### *The New Regulations*

Per the new regulations, whether a particular employment practice is based on a reasonable factor other than age turns on the facts and circumstances of each particular situation. A reasonable factor other than age, says the EEOC, is "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 the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and was administered in a way that reasonably achieves that purpose in light of the facts and circumstances that were known, or should have been known, to the employer.

The new regulations contain a non-exhaustive list of "considerations" that will be examined to determine whether a practice is based on a reasonable factor other than age. What other factors courts will consider remains an open question. The EEOC has made clear that no specific consideration or combination of considerations need be present to establish the RFOA defense, nor does the presence of one of these considerations automatically establish the defense.

The enumerated "considerations" are:

- (i) The extent to which the factor is related to the employer's stated business purpose;
- (ii) 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;
- (iii) 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;
- (iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- (v) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of people adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

These new considerations will be examined whenever an employment decision that has an adverse impact on older employees is challenged. Practically speaking, this means that employers are going to be held to a higher standard, and may be under closer scrutiny, than ever before. It will be crucial that employers ensure not only that the factors used in making employment decisions are related to their business goals, but that the processes they use in implementing policies or practices that may have a disparate impact on those 40 and over can withstand scrutiny.

### *Employer Take-Aways*

In light of these new regulations, employers should anticipate that employment decisions which are alleged to have an adverse impact on older employees will be challenged. Hence, in order to prepare for and rebut the inevitable litigation that is sure to follow, prudence dictates that employers consider the following steps now:

- Examine and document goals – Before taking action that might have an adverse impact on employees age 40 and over, employers should thoroughly examine (and document) their needs and goals, and confirm that the proposed course of action, and the factors to be used in decision-making, will produce the desired results.

- Offer training opportunities to employees regardless of age – If an employer is going to make decisions based on comparative skill, it is important that all employees have had equal access to training on those skills.
- Document performance issues – If an employer is going to make employment decisions based on performance, it will be crucial to have accurate performance records to justify these decisions. Managers and supervisors evaluating performance should be trained on how to conduct these evaluations fairly.
- Review employment decisions for hallmarks of age bias – When younger employees are favored over those age 40 and over, particularly when decisions are made by local managers or supervisors, it is important to scrutinize the reasoning behind the decisions for hidden age bias. Beware comments that the younger employees are more flexible, adaptable, or work better with others. The more objective the criteria, the better.
- Conduct adverse impact analyses – Employers, particularly sophisticated employers, are not going to be able simply to "stick their heads in the sand." The EEOC expects employers to determine whether their policies will have an adverse impact on older employees *before* implementing such policies. While the regulations do not require employers to use the least discriminatory alternative, if implementation will have an adverse impact, employers are expected to consider whether other courses of action might produce the same results with less impact.
- Train decision-makers on the ADEA – Employers are expected to train their executives, managers, and supervisors on ADEA issues, and how to craft and implement policies fairly.

As noted, we expect to see an increase in disparate impact litigation arising from the new regulations and, because the regulations are untested, there remains a great deal of uncertainty as to how to proceed with actions that may have an adverse impact on older employees. This uncertainty will likely be compounded by the EEOC's issuance of Qs & As regarding the new regulations, which in various places appear at odds with the regulatory language and the agency's discussion in the preamble to the regulations.

Seeking the advice of counsel at the early stages of decision-making can be immensely helpful in heading off issues before they become problems. If you have any questions or concerns, do not hesitate to contact your Proskauer relationship attorney or any of the attorneys listed in this alert.