

PUBLICATION

EEOC Announces Proposed Regulations for ADEA

March 18, 2010

On February 18, 2010, the Equal Employment Opportunity Commission (EEOC) published its Notice of Proposed Rulemaking, soliciting comments to its proposed amended regulations under the Age Discrimination of Employment Act (ADEA). The proposed regulations address the age discrimination defense related to "reasonable factors other than age" (RFOA). If the proposed regulations are adopted as they are currently drafted, they will impact employers that use testing or formulas to determine eligibility for either termination or promotions of employees. Therefore, employers should carefully evaluate these proposed regulations and assess their potential impact on the employer's decision making process for hiring, promotions, terminations and reductions in force.

The ADEA has always included a unique defense. Specifically, employers may take any action that the ADEA might otherwise prohibit if the employer can demonstrate that the action was based on reasonable factors other than age. 29 USC § 623(f)(1). The EEOC's current regulations on the ADEA, including the RFOA defense, have been in effect for more than 28 years. The EEOC's proposed regulations were drafted primarily to address two Supreme Court decisions. According to the EEOC, the Supreme Court's decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008) resulted in a need for clarification and guidance with respect to the scope of the RFOA defense.

Smith v. City of Jackson : The *Smith* decision resolved a longstanding debate as to the impact of a disparate impact claim under the ADEA. According to *Smith*, the disparate impact theory provides that courts evaluate employment practices that may be neutral on their face, but may adversely impact a protected class to a significant degree from a statistical standpoint. The Court found that the RFOA defense in disparate impact cases precludes claims when the adverse impact can be attributed to a reasonable nonage factor.

Meacham v. Knolls Atomic Power Laboratory : In *Meacham*, the Court found that the RFOA defense is an affirmative defense that should be asserted by the employer and for which the employer bears the burden of proof. In other words, the employer must assert RFOA as a defense, and it must prove that there is evidence to support the adverse employment decision was based on reasonable factors other than age. In addition, the employer must present evidence that the defense has merit or was a legitimate nonage factor. As a result, the EEOC regulations address what evidence is "reasonable" to demonstrate that the adverse employment decision was based on factors other than age, and the employer bears the burden to prove it.

First, the regulations make it clear that the RFOA defense must be decided on the basis of the particular facts and circumstances for each individual. Although this standard was well established based on the case law, its establishment in EEOC regulations is a benefit to employers. However, the significant issue in the proposed regulations is the guidelines for the standard for "reasonableness." Under the proposed regulations, the EEOC defines "reasonable factor" as one that is objectively reasonable when viewed from the position of a reasonable employer. In other words, the employer is not evaluated by a subjective standard, but in the light of a prudent employer who is aware of, and factors into its decision-making process, reasonable nonage factors. It is important to remember that the employer has the burden of proof on these issues.

The most important aspect of the proposed EEOC regulations is the guidance or factors that the EEOC set forth to assist in the determination as to what is "reasonable" under the circumstances. The employer should:

1. Evaluate whether the employment practice and the method in which it was implemented are common business practices.
2. Demonstrate that the factor is legitimately related to the employer's stated business goals.
3. Demonstrate that it defined the factors accurately, and applied them fairly and accurately through training, instruction and guidance.
4. Demonstrate that it evaluated whether the factors would adversely impact older workers.
5. Show the harm to individuals within the protected group, i.e., the number of workers affected and the degree of the impact, and what measures the employer took to prevent, correct or minimize the severity of the impact.

Finally – and this is the catch-all guideline – the employer must evaluate whether other options were available and articulate the reasons the employer chose the option it did. Clearly, these factors, especially the last one, should warrant careful consideration by employers who are considering adverse employment decisions, especially reductions in force and terminations, involving individuals who are in a protected age class. Employers should be hesitant to give unrestricted subjective decision-making to supervisors with respect to termination and reductions in force where individuals in a protected age class are affected.

Employers should carefully monitor the status of the proposed regulations and, if appropriate, submit comments on them. The potential impact on the employer's decision-making process when evaluating employees for hiring, promotion, termination and/or reductions in force is significant. Employers should carefully evaluate how their decision making impacts the factors proposed in the regulations and document the reasonable factors which were evaluated in the decision making process. Otherwise, employers may be exposing themselves to claims because they have not established that the decision was based on reasonable factors other than age.

The proposed regulations carry a 60-day public comment period. Written comments should be submitted by April 19, 2010, to Stephen Llewellyn, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street, NE, Suite 4NW08R, Room 6NE03F, Washington, D.C. 20507. Comments may also be submitted electronically at www.regulations.gov.