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EEOC's New Age Discrimination Regulations

By: Emily J. Bordens

The Equal Employment Opportunity Commission's ("EEOC") new regulations with regard to the Age Discrimination in Employment Act ("ADEA") concerning disparate-impact claims and the "reasonable factors other than age" ("RFOA") defense should be taken seriously by employers.

In part, the EEOC initially published proposed regulations to address issues raised by the U.S. Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005), an appeal out of the Fifth Circuit, in which the Court held that disparate-impact claims are cognizable under the ADEA but that liability is precluded when the impact is attributable to a reasonable factor other than age. Moreover, the Court established that the appropriate test for determining whether an employer's practice disproportionately affects older workers is the RFOA defense, instead of the previously employed "business-necessity" test.

Subsequently, the EEOC later published a second notice of proposed regulations to address the meaning of "reasonable factors other than age" from a later decision by the U.S. Supreme Court in *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008), in which the Court expounded upon its prior holding in *Smith* and determined that an employer bears both the burden of production and the burden of persuasion on the RFOA defense. In other words, after a plaintiff identifies a specific employment practice or policy that causes statistical disparities with regard to age, the burden then shifts to the employer to prove the RFOA defense.

Thus, the EEOC's new regulations provide that "[a] reasonable factor other than age 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" and offer a non-exclusive list of different factors that a Court may use to determine whether an employment practice is "reasonable," such as the extent to which the:

- Factor is related to the employer's stated business purpose;
- 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;
- Employer limited supervisors' discretion to assess employees subjectively, particularly when the criteria supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- Employer assessed the adverse impact of its employment practice on older workers;
- Individuals within the protected age group are harmed, in terms of both the extent of injury and the numbers of persons adversely affected; and
- Employer took steps to reduce the harm, in light of the burden of undertaking such measures.

It is also important for employers to note that the presence or absence of the above factors does not automatically establish or preclude the defense.

The Bottom Line. It is believed that these new regulations will most likely make it easier for older workers to bring disparate impact claims, and subsequently make it harder for employers to

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defend such claims. As we have mentioned in prior articles, the EEOC has become more aggressive in the enforcement of employment statutes. We recommend that, in light of these developments, employers should consider looking at the policies and practices used in hiring, advancement, and termination to determine whether such decisions are based upon subjective criteria. If so, employers should consider changing their policies and consult with counsel to determine whether additional precautions against age-based claims should be implemented. ■

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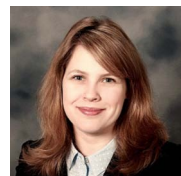
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