



The GSH 60-Second Memo

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EEOC Proposes New Age Discrimination Regulations and Promises Clarification of "Reasonable Factors Other than Age" Defense

By Laurie E. Meyer, Esq.

The Equal Employment Opportunity Commission has issued a Notice of Proposed Rulemaking ("NPRM") to address the meaning of the "reasonable factors other than age" test under the Age Discrimination in Employment Act ("ADEA"). This proposed rulemaking is in response to two recent United States Supreme Court decisions, *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Lab.*

In 2005, in *Smith v. City of Jackson*, the U.S. Supreme Court held that plaintiffs may pursue "disparate impact" age discrimination claims under the ADEA. Such claims have long been recognized under Title VII. Unlike a "disparate treatment" case, where an employee claims that an employer treated him or her differently than other employees in a similar situation for discriminatory reasons, a "disparate impact" claim is one that challenges a facially-neutral employment practice or policy because of its statistically-significant negative impact on a protected class. For instance, if an employer requires a high school diploma for its maintenance workers or laborers, this policy may result in proportionally fewer racial minorities being hired for these positions and be challenged on that basis.

In *Smith*, the Supreme Court further held that an employment practice that has a disparate impact on older workers is discriminatory unless the practice is justified by a "reasonable factor other than age" ("RFOA"). Later, in *Meacham*, the Court held that the RFOA provision in the text of the ADEA is an affirmative defense available to employers sued for violations of the ADEA. Thus, an employer defending against a claim of

disparate impact age discrimination bears both the burden of production and the burden of persuasion as to the existence of reasonable factors other than age that caused the disparate impact. In so doing, the Court overruled a previous Second Circuit decision that held that the *plaintiff* in an ADEA disparate impact case had the burden of showing that the adverse employment practice was *not* based on "reasonable factors other than age."

In light of these decisions, the EEOC has proposed revisions to its regulations to "clarify the scope of the RFOA defense" and is accepting public comment on the proposed rules through April 19, 2010.

So what is "reasonable?"

The EEOC noted that because neither the *Smith* case nor the *Meacham* case elaborated on the meaning of the term "reasonable," it referred to tort law's interpretation of that term when drafting its proposed rule. Consequently, the proposed rule defines a "reasonable factor other than age" as "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.") The proposed rule further makes clear that the employment practice must be "reasonable" both in its design and its administration.

What kind of evidence does an employer need to establish the RFOA defense?

According to the EEOC, the RFOA defense "requires evidence that the challenged practice was reasonably designed to further or achieve a legitimate business purpose and was reasonably administered to achieve that purpose."

Further, the proposed rule lists the following factors that may be relevant to the reasonableness determination:

- Whether the employment practice and the manner of its implementation are common business practices;
- The extent to which the factor is related to the employer's stated business goal;
- The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the

burden of undertaking such steps; and

- Whether other options were available and the reasons the employer selected the option it did.

Not all of these factors must be present in every case, nor is this list exhaustive. Rather, the EEOC emphasizes that the relative importance of these and other factors will vary according to the facts and circumstances of the specific situation.

As a practical matter, disparate impact ADEA claims generally occur when an employer either provides more favorable compensation or benefits to younger workers, makes other favorable decisions (such as promotions) in favor of younger workers, or when employers use factors in layoff situations that disproportionately impact older workers. In these situations, employers must be prepared to demonstrate that its practices and policies are based on legitimate business criteria. For example, if using performance- or competence-related criteria to determine what employees will be included in a reduction-in-force, the employer should be able to illustrate that these criteria are actually job-related and not simply "preferred."

What does the proposed rule say about "other than age"?

When an employment practice has a significant adverse impact on older workers, the RFOA defense applies only if the practice is not based on age. The proposed rule addresses the question of what is meant by "other than age." For example, what happens when the disparate impact on older workers results not from enforcement of a particular facially-neutral policy, but from "giving supervisors unchecked discretion to engage in subjective decision making?" In the EEOC's view, the adverse impact may, in fact, be "based on age" because the decision-making supervisors "may have acted on the bases of conscious or unconscious age-based stereotypes." Accordingly, the EEOC's proposed rule outlines factors relevant to determining whether a factor is "other than age," including:

- The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

In order to establish an RFOA defense, the employer need not prove *all* of the "reasonableness" factors or *all* of the "non-age" factors.

Again, the EEOC is accepting public comment on the proposed rules through April 19, 2010.

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