

What Do the EEOC's New ADEA Rules Mean for New York and New Jersey Employers?

by Ramon Rivera on April 25, 2012

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued a Final Rule amending the Age Discrimination in Employment Act of 1967 (ADEA). The law applies to New York and New Jersey private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations.

The ADEA prohibits practices that, although facially neutral with regard to age, have the effect of harming older workers more than younger workers (known as “disparate impact”), unless the employer can show that the practice is based on reasonable factors other than age (RFOA). The “Final Regulation on Disparate Impact and Reasonable Factors Other than Age” clarifies the parameters of the RFOA defense and amends the law to conform to two recent Supreme Court decisions. Those decisions held that while the plaintiff must identify the specific employment practice that caused the alleged disparate impact, the employer has the burden of proving an RFOA defense.

As detailed by the EEOC, an employment practice is based on an RFOA when it was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers. The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation.

It includes the following list of considerations relevant to assessing reasonableness:

- The extent to which the factor is related to the employer's stated business purpose;
- 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;
- 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;
- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- The degree of the 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.

The EEOC's Final Rule likely means more work for employers when it comes to evaluating the potential impacts of their employment decisions. If your business is concerned about the new requirements and would like to minimize its risk for disparate impact litigation under the ADEA, please contact Ramon Rivera, the Chair of Scarinci Hollenbeck's Labor and Employment Law Group.