EEOC Issues Proposed Regulations Defining Employers' Affirmative Defense Under ADEA

February 26, 2010 by Kelley Kaufman

On February 18, 2010, the Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking (NPRM) addressing the meaning of the "reasonable factors other than age" defense under the Age Discrimination in Employment Act (ADEA). The ADEA prohibits employers from discriminating against employees or job applicants based upon their age, but protects only those employees or applicants who are 40 years or older. In addition, the ADEA provides employers with statutory defenses, which include provisions for a "bona fide occupational qualification" defense and a "reasonable factors other than age" defense.

The "reasonable factors other than age" (RFOA) defense precludes liability for actions otherwise prohibited under the ADEA so long as the employment decision is based upon reasonable factors other than age. The EEOC's NPRM takes into consideration two relatively recent United States Supreme Court cases, *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratories*, which each evaluated disparate impact claims under the ADEA. Disparate impact claims involve the allegation that an employer's practice, although neutral on its face, has a discriminatory impact on a protected class – under the ADEA, workers aged 40 years or more.

Specifically, and with the Supreme Court's *Smith* and *Meacham* holdings in mind, the EEOC proposes to revise the federal regulations to illustrate that under the RFOA defense, the evaluation of an employer's practice "turns on the facts and circumstances of each particular situation and whether the employer acted prudently in light of those facts." Thus, the EEOC's proposed approach attempts to balance employers' rights to make reasonable business decisions with the ADEA's goal of protecting older workers from facially neutral employment practices that disparately impact their employment. In addition, the proposed amendments provide guidance as to the factors that will be considered in evaluating an employer's facially neutral practice under the ADEA.

What is a "Reasonable Factor"?

The NPRM first addresses the key "reasonableness" requirement of the RFOA defense. Under the proposed amendments, 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." As this language suggests, both the structure of the employment practice and the way in which it is implemented affect its reasonableness. Further, this "reasonableness" analysis requires consideration of what the employer knew – or should have known – about the impact the practice would have when it took the action. Thus, an

employer cannot hide behind a lack of knowledge – and a reasonable employer will evaluate its process to determine whether it will have a disparate age-based impact.

The EEOC included in its proposed amendments a non-exhaustive list of factors relevant to a determination of the "reasonableness" of an employer's practice. The proposed factors will serve to provide some guidance to employers in evaluating the susceptibility of an employment practice to attack under the ADEA. The factors include whether, and to what extent, the employer took steps to accurately define and apply decision-making factors – for example, through the training, guidance, or instruction of its managers. Other considerations include the extent and severity of the resulting harm to the protected class, and whether the employer had other options available.

Importantly, the EEOC is careful to note in the NPRM that these factors do not require an employer to adopt the employment practice with the *least severe impact* on members of the protected class. This is in contrast to the more stringent "business necessity" test available for Title VII discrimination claims. Under the RFOA defense, the availability of a less discriminatory practice will not – standing alone – make the employment practice unreasonable; however, employers should be aware that it will be considered a relevant factor in determining "reasonableness" under the RFOA defense.

Factors "Other than Age"

Under the NPRM, the RFOA defense would require that employers base an employment practice on a non-age factor – i.e., seniority or salary. As the EEOC notes in the NPRM, although these factors may often correlate with age, they are "analytically and factually distinct from age." On the other hand, an employer's "unchecked" use of subjective criteria related to age-based stereotypes may not be distinct from age.

The proposed amendments to the federal regulations include another non-exhaustive list of factors, which may be relevant to an assessment of whether an employer's facially neutral practice is based on a non-age factor. The factors include the extent to which the employer gave supervisor's unchecked discretion to assess employees subjectively, and whether supervisors were given guidance or training in the non-discriminatory application of the evaluation factors.

The NPRM cautions that employers who give supervisors unchecked discretion to engage in subjective decision-making should be well aware that an age-based disparate impact might result. In response, employers should make the effort to objectify evaluation criteria wherever possible in such situations and take steps to train supervisors for awareness (and avoidance) of age-based stereotyping. Employers should be aware that giving supervisors such unfettered discretion to make employment decisions may also subject them to liability not only for disparate impact claims, but also for disparate treatment claims under the ADEA and other employment discrimination laws.

Employers: Prepare to Review and Update Your Practices Now

The EEOC will consider any comments received on or before April 19, 2010, prior to adopting final regulations regarding the ADEA's statutory RFOA defense. Although the proposed regulations outlined above are not yet final, employers can take steps now to shore up their practices and to prepare for these anticipated changes to the RFOA defense, particularly in a reduction-in-force (RIF) context.

Pennsylvania employers should be poised to update their applicable policies and procedures, using the proposed regulations and the factors included therein, to provide some guidance. In addition, employers can be prepared to provide training to their managers and other decision-making personnel once the rules become final.