

Employment Law Commentary

Employment Practices After the EEOC's Final Rule on Age Discrimination and Disparate-Impact Claims

By **Jessica N. Childress**



On March 30, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued its Final Rule on Disparate Impact and Reasonable Factors Other than Age (RFOA). This rule became effective on April 30, 2012. The Final Rule explained the affirmative defense that employers have to disparate-impact claims under the Age Discrimination in Employment Act (ADEA), and amended the Commission's prior RFOA regulation, 29 C.F.R. § 1625.7.

The EEOC's Final Rule sought to clarify the Supreme Court's seminal rulings in *Smith v. Jackson*, 544 U.S. 228, (2005) and *Meacham v. Knolls Atomic Power Lab*, 554 U.S. 84 (2008). These cases broadly interpreted the ADEA, affirming the ability of employees to bring disparate-impact claims under the ADEA and placing the burden on employers to prove that a policy or practice that adversely impacts older workers is based on an RFOA. The Final Rule updates the EEOC's regulations on these issues. While the full effect of the rule has yet to be seen, it will impose new obligations on employers seeking to avoid ADEA claims.

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The Impact of *Smith* and *Meacham*

The ADEA covers private employers with 20 or more employees. The ADEA covers all employers within the public sector, regardless of the number of employees within the public entity. Individuals who are 40 years old or older fall within the ADEA's protected class. Section 623(f)(1) of the ADEA states that "it shall not be unlawful for an employer, employment agency, or labor organization [] to take any action otherwise prohibited under [the Act] . . . where the differentiation is based on reasonable factors other than age." It is this language that the new rule interprets.

In 2005, the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228, (2005) ruled that under the ADEA, it was unlawful for any employer to engage in practices that have the effect of harming older workers, despite the fact that these practices are facially neutral and not directed towards any individual worker. This was the first time that the *Supreme Court* had recognized disparate-impact liability for employers under the ADEA. Three years after issuing its seminal decision in *Smith*, the Supreme Court ruled that an employer provides a valid affirmative defense to a disparate-impact claim under the ADEA when it can demonstrate that its decision is based on an RFOA. See *Meacham v. Knolls Atomic Power Lab*, 554 U.S. 84 (2008). Furthermore, *Meacham* explained that the business necessity defense "has no place in ADEA disparate-impact cases." *Id.* at 85. Accordingly, after *Meacham*, employers' only affirmative defense to an ADEA disparate-impact case is that an employer's policy or practice constituted an RFOA, a defense that employers have the burden of proving.

The EEOC issued proposed rules in response to the Court's decisions in *Smith* and *Meacham* in 2008 and in 2010 respectively, but the rule was not finalized until March 2012. Despite the EEOC's attempts to clarify the effect of *Smith* and

Meacham, the following questions remain for many employers: What constitutes an RFOA? How will the Final Rule affect an employer's daily business practices?

What Is a Reasonable Factor Other Than Age?

The existing case law on disparate impact in ADEA cases provides little guidance regarding what actually constitutes an RFOA. Indeed, a precise definition of an RFOA may be impossible to obtain, because ADEA claims are fact specific, with the outcome varying according to the facts in each case. Nevertheless, the Final Rule notes that an RFOA is defined as a reason that is "is objectively reasonable when viewed from the position of a prudent employer *mindful of its responsibilities under the ADEA* under like circumstances." The EEOC further offers that "an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer." The definition of an RFOA provided by the EEOC is fraught with ambiguity, requiring employers to tread carefully when drafting and enforcing policies that may adversely affect older workers.

Most instructive to employers deciding whether certain of its employment practices will be deemed an RFOA are the following considerations from the Final Rule:

- 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 has noted that these considerations provide a non-exhaustive list of factors that will be considered when determining whether a practice is reasonable. Employers are cautioned that when evaluating an employment practice for reasonableness, the determination will be fact specific, and dependent upon the facts presented for each case. In practice, these considerations may be helpful to employers drafting new policies and evaluating existing ones, but no one consideration will determine reasonableness. As such, employers are advised to take great care in assessing how their current practices are affecting older workers, and engage in proactive measures to avoid creating or perpetuating policies that adversely impact employees who are 40 years old or older.

What Does the Final Rule Mean for Employers' Daily Business Practices?

Developing a Stated Business Purpose

The Final Rule provides that one consideration that will be used to assess whether an employer's policy constitutes

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an RFOA is the extent to which the factor is related to the employer's stated business purpose. Additionally, employee handbooks outlining employers' hiring, promotion, evaluation, and termination criteria should address how this criteria relates to the employer's business purpose, in the event that the employer's criteria is ever legally challenged.

Uniformity in Applying Factors

When making hiring, termination, promotion, or evaluation decisions, employers are advised to provide written criteria for managers and supervisors assessing employees that contain non-subjective factors for evaluation, to the extent that this is possible. Furthermore, the policies should underscore the importance of the employer's zero-tolerance for discrimination. Section 1625.7(e)(2)(iii) makes clear that the extent to which the employer attempts to minimize subjectivity and avoid age-based stereotyping is relevant to whether or not it acted reasonably, particularly where the criteria are known to be subject to age-based stereotypes. The EEOC offers the following examples to explain these considerations:

Example A:

If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department's actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.

Example B:

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

Accordingly, the more that employers can limit a supervisor's discretion when making decisions that may adversely impact older workers, the stronger an employer's defense to a disparate impact claim will likely be. Demonstrating the existence and enforcement of written policies can show that a challenged practice was not created for a discriminatory reason, nor applied in a subjective manner.

Clearly Defining the Factors on Which Employment Policies Are Based and Providing Training on Policies

The importance of clear, written policies cannot be understated. The Final Rule's consideration that the extent to which the employer accurately defined and applied the factors on which its policies are based will be instructive when considering whether an employment practice is based on an RFOA. Therefore, employers should try to draft policies that are understandable to

managers and supervisors applying these policies. Clearly written policies can help a company promote a culture of non-discrimination. Employers' policies should state that discrimination against any individual is not tolerated by the company for any reason. The policy should also clearly state how employees can report any suspected discrimination.

As the Final Rule states, the extent of training that managers and supervisors receive regarding the factors on which an employer's policies are based will be used to decide whether an employer has a viable defense to an ADEA disparate impact claim. The Final Rule notes that "[a]n employer's training measures do not constitute a defense to disparate treatment or disparate impact, but they should go a long way toward preventing conscious or unconscious bias from infecting decision making in the first place."

Assessing the Impact of Current Policies and Practices

The Final Rule recognizes that "[b]ecause employers bear the burden of proving that their actions were based on reasonable factors other than age, they will benefit from a greater ability to assess their own liability as a result of the rule, and therefore avoid litigation." The Commission's comments suggest that an expectation exists that employers will routinely monitor their policies to be sure that these policies are non-discriminatory towards older workers. Employers are advised to undertake routine reviews of existing policies to determine how these policies affect older workers.

In the event that employers notice that their existing policies adversely affect older workers, the EEOC has stated that employers are not required to seek out alternative employment options for these employees, but "[w]hether an employer knew or reasonably should have known of measures that would reduce harm informs the reasonableness of the employer's choices."

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Conclusion

While the EEOC's Final Rule offers much-needed guidance for employers who are defending ADEA disparate impact claims or trying to avoid them, the fact-specific nature of ADEA cases leaves the determination of whether an employment practice is based on an RFOA somewhat problematic. Engaging in proactive measures to avoid ADEA claims by using the EEOC's considerations involving RFOAs (as cited above) as guiding principles may reduce employers' risk of any ADEA claims. Moreover, applying these considerations to assess existing practices and policies will assist in providing a valid affirmative defense in the event that employers are subject to ADEA disparate impact litigation.

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