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NEW EEOC AGE DISCRIMINATION RULE ON “REASONABLE FACTORS OTHER THAN AGE” - EFFECTIVE APRIL 30

On March 30, 2012, the EEOC published its final rule providing guidance on the applicability of an important employer defense to claims of disparate impact under the Age Discrimination in Employment Act ("ADEA"). The ADEA prohibits employment discrimination against people who are 40 years of age or older. The rule applies to private employers with 20 or more employees, state and local government employers, employment agencies and labor organizations.

BACKGROUND

The final rule clarifies that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on a "reasonable factor other than age" ("RFOA"). The rule explains the meaning of the RFOA defense and is intended to make the EEOC's regulations consistent with recent Supreme Court case law. It is important to note that disparate impact cases are different from disparate treatment cases. In disparate treatment cases, the employer's intent to discriminate based on age is essential to a finding of liability. In a disparate impact case, the employer's lack of intent to discriminate is not relevant; only the overall impact on older workers is relevant, regardless of an employer's intention.

The number of age discrimination charges filed with the EEOC has increased by 50% since 2000. The EEOC held public meetings in 2009 and 2010 focusing on unfair layoffs during downsizing that were unrelated to job performance. The EEOC published proposed rules on the subject in 2008 and 2010, and after consideration of the many public comments, the EEOC revised portions of the proposed rules and issued its final rule that will become effective April 30, 2012.

The final rule revises Section 1625.7 of the EEOC's ADEA regulations. The new rule only addresses the RFOA defense and does not change other regulatory sections that apply to the ADEA's other affirmative defenses. However, the rule does not preclude an employer from asserting another statutory provision in response to a particular claim. For example, if an employee alleged that a practice required by a seniority system had a disparate impact, the employer could defend the claim by relying on section 4(f)(2) of the ADEA, which precludes using disparate impact analysis to challenge the provisions of a seniority system.

WHAT IS A REASONABLE FACTOR OTHER THAN AGE?

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. Whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. 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.

SOME EXAMPLES

- *Physical Fitness Tests.* 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.
- *Reductions in Force - Highest Paid and Least Productive - Objective Factors.* 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.

- *Reductions in Force - Lack of Guidance to Managers in Making Selections.* The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer's stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in the previous example.

KEY CONSIDERATIONS IN DETERMINING IF A PRACTICE IS BASED ON A REASONABLE FACTOR OTHER THAN AGE

The EEOC's new rule suggests strongly that employers consider each of the following when evaluating actions that could have an adverse impact on older workers:

- 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.

WHAT EMPLOYERS NEED TO DO

It is clear that the EEOC will be imposing a heavy burden on employers to justify their actions when it appears that older workers are affected more adversely than younger workers. This will most often happen in situations involving a relatively large number of employees (statistical significance) and can be expected to arise in a reduction in force. Employers should carefully plan ahead to make sure all of the considerations listed above have been addressed and documented. In other words, employers should:

- Articulate the business purpose;
- Define and justify the selection criteria;
- Guide and train the decision makers;
- Limit decision maker discretion;
- Review the potential adverse impact before making the final decisions;
- Consider alternative less adverse actions; and
- Document each step along the way.

Resources

Reference: 29 C.F.R. §16257

[Federal Register](#)

[EEOC Questions and Answers](#)

Should you have questions or require further information, please contact Stephen W. Lyman at 317.977.1422 or slyman@hallrender.com or your regular Hall Render attorney.