Insights, News & Events

IF YOU GIVE A MOUSE A COOKIE: DISPARATE-IMPACT CLAIMS UNDER THE ADEA AND THE RFOA DEFENSE

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On April 30, 2012, an EEOC Final Rule took effect regarding disparate-impact claims under the Age Discrimination in Employment Act (ADEA), and the defense of "reasonable factors other than age" (RFOA).[1] Ostensibly proposed to address issues related to the Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Laboratory*, the Final Rule incorporates the EEOC's interpretation of the RFOA defense, despite the concerns of several commenters.

Unsatisfied with the cookie it received from the Supreme Court, the EEOC's Final Rule provides the agency with its glass of milk. Proactive employers should consider the Final Rule when implementing policies that may have an adverse impact based on age.

WHAT'S IN PLAY

In *City of Jackson*, the Supreme Court decided that potential plaintiffs may bring disparate-impact claims under the ADEA. Disparate-impact claims are based on a facially-neutral policy (such as a reduction-in-force) that has an adverse impact on employees over 40. The employer's motivation is not relevant, unlike the traditional disparate-*treatment* framework where an employee must prove that the employer intended to discriminate. This means that an employer with the best intentions could face liability under the ADEA.

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In *Meacham*, the Supreme Court held that an employer has the burden of proving the RFOA defense. To successfully defend a disparate impact age discrimination suit, an employer must demonstrate that it relied upon a "reasonable factor other than age" to guide its policy or practice. The Supreme Court did not provide a list of potential considerations that employers must follow in order to prove the defense; instead, employers were permitted to present their own RFOA defense. The Final Rule contains a list of considerations that you should bear in mind when implementing a policy that may have an adverse impact based on age.

In its comments on the Final Rule, the EEOC included a list of "considerations that are *manifestly relevant* to determining whether an employer demonstrates the RFOA defense." It's not difficult to read between the lines and realize that the EEOC will likely attempt to hold employers accountable if they fail to follow the enumerated considerations.

To best protect your company against disparate impact claims under the ADEA and to preserve the RFOA defense, you should keep the following actions in mind before implementing any policy or practice that may have an impact on workers over 40.

ARTICULATE A "STATED BUSINESS PURPOSE"

When determining whether a policy may have an adverse impact based on age, determine whether the factor upon which you rely supports your stated business purpose. For instance, an employer may decide to raise salaries for less experienced workers at a slightly higher percentage than more experienced workers to attract and retain talent in a competitive market. Such policy may have an adverse impact on older workers (who fall into the more experienced category), but the level of experience is directly related to the employer's stated business purpose, and may therefore support the RFOA defense.

PROVIDE SUPERVISORS AND MANAGERS ADEQUATE TRAINING

Before implementing a policy, you should consider offering some level of training to your supervisors and managers who may be using the policy. The level of training will necessarily depend on the policy or practice. For instance, if you are planning to use certain hiring criteria, such as

technology skills, you could provide a list of specific skills or programs that your employees should be familiar with and which your supervisors and managers are trained to inquire about. Other policies may require more extensive training or guidance.

TRY TO QUANTIFY SUBJECTIVE CRITERIA

The EEOC has made it very clear that it believes subjective assessment may allow age bias, either deliberate or unconscious, to taint the process. An employee or potential employee's flexibility, willingness to learn, and technological skills were identified as areas of particular concern.

Your company likely values such qualities in its employees, and you need not abandon evaluations based on these traits. Instead, you should limit the subjectivity of the assessment by requiring your supervisors and managers to provide specific, objective examples when completing their evaluations. For example, rather than stating that an employee is "flexible," supervisors and managers should be trained to provide specific examples of the employee's flexibility, such as instances where the employee stayed late to complete a project.

ASSESS AND AMELIORATE THE ADVERSE IMPACT ON OLDER WORKERS

Many employers are already familiar with adverse-impact assessments, and currently monitor their policies' potential impact based on race, ethnicity, and gender. If you are not already looking at impact based on age, you should begin incorporating this into your regular assessment. There are basic disparate-impact calculators available online and more sophisticated analyses are also available. Conducting such analyses with the assistance of legal counsel may provide some level of confidentiality for the analytical process.

Once you have determined whether your policy has an adverse impact on older workers, consider the extent of the harm. If the effects of your policy are especially harsh (e.g., resulting in termination) or affect a large number of employees, you should consider whether the policy is in your company's best interest. In other words, conduct a cost-benefit analysis to determine whether the policy as drafted provides sufficient benefits to justify the risk of legal exposure.

If you find that your policy has an adverse impact, you should evaluate whether there are any steps you could take to reduce the harm caused to older workers. Under the RFOA standard, you need not find the least discriminatory option, but you can reduce your potential exposure by demonstrating that you considered and adopted a less discriminatory alternative.

LOOK AT *ALL* THE FACTORS

The EEOC included a provision in its Rule that "[n]o specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense." But based on the EEOC's recent plan to greatly increase the number of disparate impact cases it enforces over the next five years, coupled with its current systemic discrimination focus on class-type cases, you should attempt to incorporate as many of the above considerations into your decisions as possible.

The EEOC certainly got a cookie from the Supreme Court and decided to pour itself a tall glass of milk to wash it down. Except this isn't a children's story, and real employers can face serious liability if they are unable to prove the RFOA defense during a disparate impact suit.

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[1] Recent legislative activity has been undertaken to stop the EEOC from enforcing the Final Rule, but it will likely be several weeks before the outcome of this effort is determined.