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One Minute Memo®

New EEOC Age Rule Would Further Limit U.S. Employers

By a 3-2 vote, the EEOC this week proposed final regulations defining "reasonable factors other than age" (RFOA") under the Age Discrimination in Employment Act ("ADEA"). Whether by design or effect, the regulations – if they become law – would raise multiple hurdles to U.S. employers needing to downsize in order to remain profitable or competitive. Many facially neutral practices can disproportionately affect older employees; for example, a decision to separate mid-level managers who are more highly paid than their direct reports. Under Title VII, the standard for defending disparate impact based on race or sex is a strict one: "job related and consistent with business necessity." Congress and the Supreme Court have both made clear that the standard for justifying age-based disparate impact is much lower – the employer's action need only be "reasonable." In announcing the new regulations, EEOC noted its RFOA definition is not the same as "business necessity." But by erecting a series of checkpoints an employer must clear in order to establish RFOA, the EEOC's approach may in effect be even more onerous than traditional business necessity analysis.

Under the proposed rule, EEOC says a "reasonable" factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances, both in the factor's design and in the way it is administered. To assess whether an employment practice is based on RFOA, the EEOC has provided a non-exhaustive list of factors to be considered:

- whether the employment practice and the manner of its implementation are common business practices;
- the extent to which the factor is related to the employer's states business goal;
- the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected;
- the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- whether other options were available and the reasons the employer selected the option it did.

A 2010 supplement accompanying the draft rule says an employer need not satisfy each factor every time in order to meet its burden. *75 Fed. Reg. 7212 (Feb. 18, 2010)*. But that leaves employers without guidance as to which factor(s) must be followed when.

The proposed final rule now goes to the Office of Management and Budget for interagency review. That process typically takes about 3 months. Depending on whether OMB makes changes, the EEOC may be required to vote again on the proposal before it becomes final.

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