

Amended Regulations on Age Discrimination in Employment Suits Move Closer to Implementation

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By a 3-2 vote, the Equal Employment Opportunity Commission at its November 16, 2011, meeting approved amended “Final Regulation on Disparate Impact and Reasonable Factors Other than Age” under the Age Discrimination in Employment Act (“RFOA Regulations”). First proposed on February 18, 2010, these proposed amendments now move to the Office of Management and Budget (“OMB”) for review and interagency coordination.

Concerning employers are new criteria to establish a “reasonable factors other than age” defense in age discrimination cases. (More details on these proposed regulations are found in Jackson Lewis’ article, [EEOC Proposes New Factors to Evaluate Defense in Age Discrimination Lawsuits](#).) The use of the RFOA defense is crucial to employers seeking to avoid liability for ADEA disparate impact claims, which involve facially neutral employment practices that allegedly affect protected groups disproportionately. Such claims often are triggered by reduction-in-force programs or the introduction of new compensation systems.

In May 2010, EEOC Chair Jacqueline A. Berrien testified before a U.S. Senate Committee that the proposed amendments were needed to counteract “a recent spate of case law restricting the rights of age discrimination plaintiffs.”

The proposed RFOA Regulations create a six-pronged test (not all of which necessarily need be satisfied) to determine whether an age neutral practice or factor is reasonable:

1. Whether the employment practice and the manner of its implementation are common business practices.
2. The extent to which the factor is related to the employer’s stated business goal.
3. 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).
4. The extent to which the employer took steps to assess the adverse impact of its employment practices on older workers.
5. The severity of the harm to the individuals within the protected age group, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm.
6. Whether other options were available and the reasons the employer selected the option it did.

Last year, Jackson Lewis filed comments to the proposed regulations. The Firm pointed out that most portions of this six-pronged test contradict existing U.S. Supreme Court ADEA disparate impact rulings.

The proposed regulations also set forth a three-pronged test (not all of which necessarily need be satisfied) to evaluate whether an employment practice or factor is age neutral:

1. The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively.
2. The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes.
3. The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

In the Firm's comments to the EEOC, Jackson Lewis observed that many aspects of this neutrality test are inconsistent with the Supreme Court's ruling in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2352 (2009) ("The burden of persuasion does not shift to the employer to show it would have taken the action regardless of age. . ."). Moreover, since the EEOC proposed its regulations last year, the Supreme Court has stated that relying on subjective discretion by lower level managers is "a presumptively reasonable way of doing business" that does not raise the inference of discriminatory conduct. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (Title VII context).

The EEOC did not release the text of the amended RFOA regulations that it is forwarding to OMB. However, there is no indication that the EEOC has significantly modified the proposed regulations. Indeed, this seems unlikely since the EEOC defended the RFOA amendments as proposed in its July 29, 2011, "Plan for Retrospective Analysis of Existing Rules." It explained that "the proposed changes will have qualitative, dignitary, and related intrinsic benefits," including promoting "human dignity and self respect," "increasing diversity," "understanding and fairness in the workplace."

OMB will have at least 90 days to review the EEOC's proposed regulations. After OMB approval, the RFOA Regulations will be published in the Federal Register.

The EEOC's proposed RFOA amendments demonstrate that the agency expects employers to assess carefully their policies, the impact those policies would have on older employees, and alternatives that would avoid or materially reduce age-related adverse impact.

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