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New Proposed EEOC Regulations Impose Significant Burden on Employers

On February 18, 2010, the Equal Employment Opportunity Commission published Proposed Regulations interpreting the use of the Reasonable Factors Other than Age (RFOA) defense in response to two U.S. Supreme Court decisions. In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Court determined that claims of disparate impact (where an employer's facially neutral practice or policy falls more harshly on persons in a protected class than it does those outside that class) applied to cases brought under the Age Discrimination in Employment Act (ADEA). In *Meacham v. Knolls Atomic Power Laboratories*, 554 U.S. ___, 128 S. Ct. 239 (2008), the Court held that the employer had the burdens of production and persuasion to prove that the statistical disparity against older workers was the result of reasonable factors other than age.

The proposed regulations define a RFOA as "one that is objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances." Moreover, the employer must prove that the employment practice at issue was both (1) "reasonably designed to further or achieve a legitimate business purpose" and (2) "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 EEOC provides a "non-exhaustive" list of six factors that should be considered in determining whether an employment practice is "reasonable" under the facts and circumstances that existed at the time:

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 practice on older workers;
5. 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, and 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
6. Whether other options were available and the reasons the employer selected the option it did.

These proposed regulations make clear that the RFOA defense to disparate impact age claims applies only when the practice at issue is not based on age. The EEOC also set forth three non-exclusive factors in determining whether the policy or practice at issue is based on something "other than age":

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; and
3. The extent to which supervisors were given guidance or training about how to apply the factors to avoid discrimination.

What This Means to You

If these regulations are finalized without change, employers will need to undertake significant preplanning before implementing new policies or procedures in such areas as reduction-in-force decisions and the modification of pay or benefit policies. The following steps should be considered:

1. Test whether the contemplated policy or practice has an adverse effect on persons in protected classes (age, race, gender, etc.), and if so, the nature and effect of that impact. As a practical matter, the greater the degree of impact, the greater the risk to the employer, and the employer should determine whether the desired objective can be obtained in a different manner that has less impact on the protected workers.
2. Evaluate whether the planned action is a common business practice. If it is not, it will be much more difficult to prove that it was "reasonable."

3. Consider the extent to which a planned action is closely related to the business purpose for which it being undertaken. For example, in the *Smith* case, the Supreme Court determined that a policy of granting larger pay raises to lower ranked (and statistically younger) positions than to higher ranked (and statistically older) positions for the purpose of bringing salaries in line with area labor market was an appropriate response to the legitimate goal of retaining employees in the lower ranks, even though older workers were treated less favorably by the policy.
4. Make sure that your supervisors and decision makers have been properly trained to avoid stereotyping older workers and know how to properly and objectively implement the contemplated action. Unfettered discretion may result in subjective decisions based on conscious or unconscious stereotypes and therefore be determined not to have been reasonable factors other than age.

Contact Info

If you have any questions about these regulations, please contact your Husch Blackwell Sanders attorney.

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