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## What Constitutes “Reasonable Factors Other Than Age”? The EEOC’s Final Regulation Raises the Bar for Employers to Establish Defense to ADEA Claims

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Under the Age Discrimination in Employment Act, an employer may avoid liability for employment practices that have a disparate impact on individuals in the protected age group (40 and over) by showing that it acted based on “reasonable factors other than age” (commonly known as the “RFOA” defense). Last week, the Equal Employment Opportunity Commission published a **final rule** concerning the RFOA defense. The rule, which will take effect on April 30, is expected to make it more difficult for employers to prevail on age-based disparate impact claims.

### What Is “Disparate Impact”?

The federal anti-discrimination laws generally recognize two types of discrimination claims. A “disparate treatment” claim is more common and requires proof that the employer treated the employee differently from the way it treated “similarly situated” employees. For example, an employer may issue written warnings for a certain type of misconduct, but when a 60-year-old commits that same misconduct, he or she is fired. If the employer does not have a good explanation for treating the older employee more harshly, then the employee may have a valid “disparate treatment” claim. To prevail on a disparate treatment claim, the employee must have evidence of the employer’s discriminatory intent.

“Disparate impact” is different. In disparate impact cases, the employer has a facially neutral policy (in other words, a policy that seems to treat everyone the same) and applies it neutrally, but it affects members of a protected group more than it does others. For example, an employer may want to require that everyone in a certain job classification have a college degree. This is not discriminatory on its face because anyone, of any race, sex, national origin, or age, is capable of obtaining or not obtaining a college degree. But if, as a practical matter, this means that more of the older employees will be affected because they started work in an era in which fewer people went to college, they might have a valid disparate impact claim against the employer. This could be so even if the employer had no intention of discriminating against older employees.

### The New Regulation

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The EEOC's new regulation was issued to address two decisions from the U.S. Supreme Court: *Gross v. FBL Financial Services, Inc.*, and *Meacham v. Knolls Atomic Power Laboratory*. In *Gross*, the Court held that a plaintiff in an age-based disparate impact case must prove that "but for" age, he or she would not have been subjected to the adverse action. In *Meacham*, the Court said that the RFOA defense was an affirmative defense, on which the employer bears the burden of production and proof. Once an ADEA plaintiff identifies a specific employment practice that causes age-based statistical disparities, the employer bears the burden of proving the RFOA defense.

The EEOC regulation defines "reasonable factor other than age" as a non-age factor that is *objectively reasonable* when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA.

It is this "objectively reasonable" part that may cause difficulty for employers.

Under the new regulation, to establish the RFOA defense, an employer must show (1) that the employment practice was both reasonably designed to further or achieve a legitimate business purpose, and (2) that it was 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 regulation provides a non-exclusive list of considerations that the EEOC considers relevant in determining whether an employment practice is based on a reasonable factor other than age:

- The extent to which the factor is related to the employer's stated purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers 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 practices on older workers; and
- The degree of 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.

Although the regulation states that all of these considerations are relevant, it cautions that the presence or absence of any listed consideration does not necessarily determine whether the defense applies. Instead, whether an employment practice is based on reasonable factors other than age must be decided based on all of the particular facts and circumstances of any given situation.

### Practical Implications for Employers

The EEOC regulation provides that the availability of the RFOA defense depends not only on whether an employer based its employment practices on reasonable non-age-related factors, **but also whether the employer acted reasonably in all respects when designing and administering the challenged employment practices.** This paves the way for a rise in the number of ADEA disparate impact claims, and invites plaintiff's attorneys, the EEOC and the courts to engage in extremely broad "reasonableness" inquiries when employers' business decisions result in age-based statistical disparities.

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The reasonableness considerations contained in the regulation illustrate the breadth of the inquiry contemplated by the EEOC. Although none of the listed considerations is dispositive, the regulation creates a new expectation that a reasonable employer will, in most circumstances, train its managers on how to apply selection or termination factors and avoid age-based stereotypes, conduct an adverse impact analysis when implementing employment practices, consider what steps might reduce the impact on individuals in the protected age group and, when those measures are not onerous, implement them.

The regulation also raises the bar for employers who use *subjective* criteria when making employment decisions, particularly where those factors might relate to known age-based stereotypes (such as an individual's flexibility, willingness to learn, or technology skills). In the preamble to its final rule, the EEOC acknowledges that employers might sometimes find it necessary to use subjective criteria when making employment decisions, but states that giving supervisors "unchecked" discretion to engage in subjective decision-making might result in disparate impact and, consequently, employers should take reasonable steps to ensure supervisors exercise their discretion in a manner that does not violate the ADEA.

## Conclusion

The new EEOC regulation invites increased scrutiny of an employer's actions when implementing practices that might adversely affect older individuals, such as workforce reductions, hiring programs, or promotion guidelines, and makes it more difficult for employers to prove the RFOA defense.

Employers should prepare themselves for this heightened scrutiny by ensuring that they are able to demonstrate that they acted reasonably in all respects when implementing employment practices that might result in age-related statistical disparities. This might involve (1) taking particular care to clearly (and, where possible, objectively) define applicable selection or termination factors; (2) training managers on how to implement the employment practices and comply with EEO obligations under the ADEA and other laws; (3) providing guidance or oversight to ensure managers do not apply subjective criteria in a manner that reflects age-based stereotypes; (4) where appropriate, conducting an analysis to assess any adverse impact on individuals within the protected class; and, (5) if a significant age-based disparity exists, considering what reasonable steps might be taken to reduce the impact.

Ideally, employers should be doing these things anyway, but the EEOC's rule means that they may be *required* to do them from now on, in order to prevail on disparate impact ADEA claims.

If you have any questions about the EEOC's final rule or age discrimination in general, please contact any member of Constangy's **Litigation Practice Group** or the Constangy attorney of your choice.

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