

APRIL 2012

NEW EEOC REGULATIONS SEEK TO RAMP UP BURDEN OF PROOF ON EMPLOYER DEFENSES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Equal Employment Opportunity Commission (EEOC) published a new interpretive rule¹ under the Age Discrimination in Employment Act (ADEA) on March 30. The regulation defines the “reasonable factor other than age” (RFOA) defense that employers must prove when defending age discrimination claims based on adverse impact under the ADEA. The new rule takes effect on April 30, 2012, and employers should be aware of its impact when considering any employment policy or reduction in force that may adversely affect older workers.

The rule includes a non-exhaustive list of facts and circumstances that the EEOC believes should be considered in determining whether an employment practice with an adverse impact on older workers is justified by a “reasonable factor other than age.” These considerations are based on a fact-intensive inquiry that looks to the reasonableness of the employer’s actions and the particular circumstances of a given situation. The EEOC stakes out exactly what it believes employers must prove:

To establish the RFOA defense, an employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and 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.

While it is too early to predict how courts will apply this regulation, the new rule prompts

employers to ask the following questions when implementing a reduction in force or any other employment practice that may have an adverse impact on older workers:

- Is the employment practice based on a factor that is related to the employer’s stated business purpose?
- Did the employer define the factor accurately and apply it fairly and accurately?
- Did the employer give guidance or training to managers and supervisors about how to apply the factor and avoid discrimination?
- Did the employer limit 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?
- Did the employer assess the adverse impact of its employment practices on older workers?
- What was the degree of harm to individuals within the protected age group in terms of both the extent of the injury and the numbers of persons adversely affected?
- To what extent did the employer take steps to reduce the harm, in light of the burden of undertaking such steps?

Since, at the very least, the EEOC will be examining these questions in any charge that alleges age discrimination based on adverse impact, employers should be aware of the scope of these questions. Employers also should remember that the burden of proof for the RFOA defense is on the employer if

the reduction in force or other practice results in a disproportionately negative impact on older workers.

For assistance with these new regulations or any other employment issues, please contact Fred Alvarez, Ulrico Rosales, Marina Tsatalis, Charles Tait Graves, Laura Merritt, or another member of the firm’s employment and trade secrets litigation practice. Wilson Sonsini Goodrich & Rosati is actively following developments with respect to federal regulations affecting employers, and the firm is available to assist companies, newly formed businesses, and investors with issues arising under state and federal employment laws, including employment discrimination, employee mobility, and trade secrets litigation.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on April 4, 2012. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2012 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.

¹ To learn more about the rule, please visit <https://www.federalregister.gov/articles/2012/03/30/2012-5896/disparate-impact-and-reasonable-factors-other-than-age-under-the-age-discrimination-in-employment>.