PUBLICATION

EEOC Plays New Tricks on an Old Dog - New RFOA Regulations Released

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The U.S. Equal Employment Opportunity Commission (EEOC) recently published new regulations setting forth its interpretation on the scope of the "reasonable factors other than age" (RFOA) defense to disparate impact claims under the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against employees age 40 and over. While the EEOC insists that the regulations are "not intended to impose unwarranted burdens on employers," they are likely to prevent employers from successfully asserting the RFOA defense if courts accept the EEOC's analysis. The regulations are also likely to increase the frequency with which disparate impact claims are made.

The EEOC's regulations had become outdated in light of the United States Supreme Court's decisions in *Smith v. City of Jackson* and *Meacham v. Knolls Atomic Power Lab*. In those cases, the Court ruled that, while the ADEA authorizes recovery for disparate impact claims, the RFOA test, not the more stringent "business necessity test," is the more appropriate method for determining the lawfulness of an employment practice that disproportionately affects older workers. Unlike the business necessity test, which asks whether there is any other way for an employer to achieve its goals that would not result in a disparate impact on a protected class, the RFOA defense requires only that the employer's actions be "reasonable." While the employee(s) is/are responsible for identifying the specific employment practice that allegedly causes the disparate impact, the employer bears both the burden of production and the burden of persuasion on the RFOA defense.

Under the EEOC's regulations, whether a particular employment practice is based on a reasonable factor other than age will turn on the particulars of each case. To establish a RFOA defense, an employer must show that the challenged employment practice was both reasonably designed to further or achieve a legitimate business purpose and that it was administered in a way that reasonably achieves that purpose in light of the facts and circumstances that were known, or should have been known, to the employer.

These new regulations set forth a non-exhaustive list of "considerations" that the EEOC believes should be examined to determine whether a practice is based on a reasonable factor other than age. These considerations include:

1. The extent to which the factor is related to the employer's stated business purpose;
2. The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
3. 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;
4. The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
5. The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of people adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

Because the EEOC contends that these considerations should be examined whenever an employment decision that has an adverse impact on older employees is challenged, employers will be expected to examine these and related factors when making broad-based employment decisions that could disparately harm employees age 40 and over.

Baker Donelson encourages employers to take the following steps when introducing, modifying or reviewing broad-based employment policies:

- Document objective goals;
- Document performance concerns and avoid yielding to "grade inflation;"
- Conduct disparate impact analyses before implementing new hiring/promotional/termination standards; and
  Train supervisors on the ADEA.

To learn more about how your company is affected by the new RFOA regulations, please reach out to any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.