

## **New EEOC Rule Details Considerations for ADEA “Reasonable Factors Other than Age” (RFOA) Defense**



By: **Stephanie S. Hathaway**

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals who are 40 years of age or older. In 2005, the United States Supreme Court held, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that disparate impact claims are cognizable under the ADEA and that an employer could use reasonable factors other than age (RFOA) as a defense against such a claim. In 2008, the United States Supreme Court held that the employer bears the burden of production and persuasion when using a RFOA defense in an ADEA case in *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008).

In those two cases, the Supreme Court criticized the EEOC’s interpretation that if an employee proved that an employment practice disproportionately harmed older workers, the employer had to justify it as a “business necessity.” The Supreme Court stated that in ADEA disparate impact cases, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA, which is easier to prove than the business necessity defense. Since that time, the RFOA has become the standard defense to ADEA disparate impact claims. This defense requires that the employment policy or practice at issue is reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers.

In an attempt to make the existing regulation consistent with the Supreme Court’s holding and strike a balance between protecting older workers from discrimination and preserving an employer’s ability to make reasonable business decisions, the EEOC published “*Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act*” in the federal registrar on March 30, 2012.

The EEOC’s final rule clarifies that the ADEA prohibits policies and practices that have the effect of harming older employees more than younger employees, unless the employer can show that the policy or practice is based on a RFOA. A “reasonable factor other than age” is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances. The EEOC held that to successfully assert 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.

The EEOC rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. Of particular interest to employers, the rule includes the following list of considerations relevant to assessing reasonableness:

- The extent to which the factor is related to the employer’s stated business purpose;
- 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;
- 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 practice on older workers; and
- The degree of the 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.

The EEOC explained that these are considerations; not factors. Therefore, the RFOA defense may be established absent one or more of the considerations. Moreover, the defense is not automatically established merely because one or more of the considerations are present. In presenting an RFOA defense, the employer bears the burdens of production and persuasion. Moreover, the rule clarifies that this defense is unavailable in disparate treatment cases.

This rule applies to private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations. The provisions of this rule take effect 30 days after it was published, or on April 29, 2012.

If you have any other questions related to the ADEA RFOA defense or any other employment matters, please feel free to contact one of our Employment Practices Group Attorneys.

**Cleveland**  
**Stephanie S. Hathaway**  
[shathaway@reminger.com](mailto:shathaway@reminger.com)  
101 W. Prospect Ave.,  
1400 Midland Bldg.  
Cleveland, OH 44115  
Phone: 216-430-2192  
Fax: 216-687-1841

**Columbus**  
**D. Patrick Kasson**  
[pkasson@reminger.com](mailto:pkasson@reminger.com)  
65 East State St., 4th Floor  
Capitol Square  
Columbus, OH 43215  
Phone: 614-232-2418  
Fax: 614-232-2410

**Cincinnati**  
**Joseph W. Borchelt**  
[jborchelt@reminger.com](mailto:jborchelt@reminger.com)  
525 Vine Street,  
Suite 1700  
Cincinnati, OH 45202  
Phone: 513-455-4014  
Fax: 513-721-2553

**Toledo**  
**Laurie J. Avery**  
[lavery@reminger.com](mailto:lavery@reminger.com)  
One SeaGate,  
Suite 1600  
Toledo, OH 43604  
Phone: 419-245-3751  
Fax: 419-243-7830

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