

OBSERVATIONS

EEOC and OFCCP Updates

Provided by ERS Group

EEOC Soliciting Comments on the Definition of “Reasonable Factors Other Than Age” Under ADEA

The EEOC issued a notice of proposed rulemaking (NPRM) and is soliciting comments through April 19, 2010 regarding the meaning of “reasonable factors other than age” (RFOA) under the Age Discrimination in Employment Act (ADEA). The NPRM issued on February 18, 2010 seeks to clarify the definitions of “reasonable” and “factors other than age.” (See February 18, 2010 [Notice of Proposed Rulemaking](#)) The NPRM is in response to comments requesting clarification of the EEOC proposed revision of 29 CFR 1625.7 (d) published on March 31, 2008 which states “that an employment practice that has an adverse impact on individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a ‘reasonable factor other than age.’” In 2008, the EEOC proposed that the burden of identifying the employment practice that is the source of the adverse impact lies with the plaintiff and the burden is with the employer to demonstrate the existence and defense of a RFOA.

To further define “reasonable” and what constitutes “factors other than age” the EEOC is proposing that the regulations at 29 CFR 1625.7 include the following text:

Sec. 1625.7 Differentiations based on reasonable factors other than age.

* * * * *

(b) Whether a differentiation is based on reasonable factors other than age (“RFOA”) must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(1) Reasonable. A reasonable factor is 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. 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. Factors relevant to determining whether an employment practice is reasonable include but are not limited to, the following:

- (i) Whether the employment practice and the manner of its implementation are common business practices;
- (ii) The extent to which the factor is related to the employer’s stated business goal;
- (iii) 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);
- (iv) The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;

In the Spring 2010 Issue:

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(v) 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

(vi) Whether other options were available and the reasons the employer selected the option it did.¹

(2) Factors Other Than Age. When an employment practice has a significant disparate impact on older individuals, the RFOA defense applies only if the practice is not based on age. In the typical disparate impact case, the practice is based on an objective non-age factor and the only question is whether the practice is reasonable. When disparate impact results from giving supervisors unchecked discretion to engage in subjective decision making, however, the impact may, in fact, be based on age because the supervisors to whom decision making was delegated may have acted on the bases of conscious or unconscious age-based stereotypes. Factors relevant to determining whether a factor is “other than age” include, but are not limited to, the following:

(i) The extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;

(ii) The extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and

(iii) The extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

Any interested party can submit comments on the proposed regulations to the EEOC on or before April 19, 2010 by following the instructions at the Federal eRulemaking Portal: <http://www.regulations.gov>.

¹This does not mean that an employer must adopt an employment practice that has the least severe impact on members of the protected age group. “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.” *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005). Instead, this simply means that the availability of other options is one of the factors relevant to whether the practice was a reasonable one. “If the actor can advance or protect his interest as adequately by other conduct which involves less risk of harm to others, the risk contained in his conduct is clearly unreasonable.” Restatement (Second) of Torts 292, cmt. c (1965).

NEWS

Department of Labor Budget in Brief

The Department of Labor (DOL) has released the Fiscal Year 2011 budget request and justification. The budget request includes an increase in funding for the OFCCP from \$105 million in FY 2010 to \$113 million in FY 2011 to maintain the current staffing level of 788 full-time equivalent employees (FTEs). The request additionally states that the increased funding will allow the agency to:

- strengthen enforcement of affirmative action regulations,
- enforce anti-discrimination regulations regarding veterans and individuals with disabilities,
- pursue additional systemic discrimination actions, and
- pursue individual discrimination cases involving allegations of harassment, retaliation, termination, and failure to promote.

Planned Increase in Wage and Hour Compliance Investigations

The budget request also includes an increase of \$12 million for the Wage and Hour Division in FY 2011 with an increase of 90 FTEs to support field investigator training activities and 4,700 additional investigations. According to the DOL, the additional investigations will focus on the misclassification of employees as independent contractors rather than employees as part of the new multi-agency Misclassification Initiative. Targeted industries include construction, child care, home health care, grocery stores, janitorial, business services, poultry and meat processing, and landscaping. In the process of pursuing additional enforcement activities due to misclassification, the DOL budget also "...proposes legislation to ensure the proper classification of employees by: (1) shifting the burden of proof to employers to demonstrate that their employees are classified correctly, (2) closing the loophole created by Section 530 of the Revenue Act of 1978, and (3) making

misclassification a violation of the Fair Labor Standards Act, with appropriate penalties." (See [FY 2011 Detailed Budget Documentation](#)).

Other OFCCP News

The OFCCP recently entered into a conciliation agreement with DAL Global Services LLC to resolve allegations related to hiring of Asian, black, white and female applicants in 2007. According to the OFCCP news release, the conciliation agreement includes back pay and interest payments for 110 applicants, 18 ramp agent positions for the class members, and self-monitoring of their hiring practices to ensure compliance.

The OFCCP also announced the ruling by ALJ Linda Chapman regarding an investigation of hiring practices of African-Americans into entry-level positions by Bank of America. According to the ALJ's Recommended Decision and Order, Judge Chapman will retain jurisdiction for the remedy phase of the case.

Meet ERS Group Professionals

April 14-16, 2010, Hamilton Crowne Plaza, Washington, DC

Preparing for OFCCP Compliance Audits and Crafting Effective Affirmative Action Plans

ERS Group Presenters: Paul F. White, Ph.D., Carole M. Amidon, Ph.D., and George T. Desloge

Guest Presenters: Jon A. Geier (Paul Hastings), Lance Anderson, Ph.D. (ICF International)

To register call Frances Michels at (850) 562-1211 ext. 170 or visit our website by clicking [here](#).

April 21 - 22, 2010, Houston, TX

Southwest & Rocky Mountain Regional Industry Liaison Group Annual Conference

Meet ERS Group AAP professionals and economic experts at our booth.

May 11 - 12, 2010, St. Regis Washington, Washington, DC

Employment Discrimination: Economic and Statistical Evidence

ERS Group Presenters: Mary D. Baker, Ph.D., Sharon Kelly, Ph.D., Janet R. Thornton, Ph.D., and Paul F. White, Ph.D.

Guest Presenters: Kenneth Willner (Paul Hastings), Michael Lieder (Sprenger + Lang)

To register call Frances Michels at (850) 562-1211 ext. 170 or visit our website by clicking [here](#).

August 3 - 6, 2010, Las Vegas, NV

Industry Liaison Group National Conference

Meet ERS Group AAP professionals and economic experts at our booth.

ERS Group labor economists and AAP professionals are available to discuss issues related to compliance with the OFCCP, EEOC, as well as to discuss topics such as compensation, hiring, promotion, and termination analyses for internal monitoring and litigation.

Please contact us if you would like to discuss any of the issues raised here in more depth.

www.ersgroup.com

(850) 562-1211

info@ersgroup.com