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Altering The ADEA Disparate Impact Defense

Law360, New York (March 23, 2010) -- On Feb. 18, 2010, the Equal Employment Opportunity Commission issued a notice of proposed rulemaking with regard to the definition of "Reasonable Factors Other Than Age" (RFOA) under the Age Discrimination in Employment Act (ADEA). 72 Fed. Reg. 7,212. The comment period closes 60 days thereafter.

Code of Federal Regulations title 29, subsections 1625.7(b)(1)(iv)-(vi) of the proposed regulations would significantly change the burden employers must satisfy to defend against disparate impact claims. These proposed subsections read, in pertinent part, as follows:

Factors relevant to determining whether a factor is reasonable include but are not limited to, the following:

(iv) The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;

(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.

The EEOC's proposed rule ostensibly is inspired by tort law. The EEOC cites the venerable hornbook, Prosser and Keeton on Torts, as a guide, but leaps from the black letter principle that "torts 'consist of the breach of duties fixed ... by law,'" to the conclusion that:

"In light of Smith [v. City of Jackson] and Meacham [v. Knolls Atomic Power Laboratory], a prudent employer knows or should know that the ADEA was designed in part to avoid the

application of neutral employment standards that disproportionately affect the employment opportunities of older individuals. Accordingly, a reasonable factor is one that an employer exercising reasonable care to avoid limiting the employment opportunities of older persons would use." Id.

Thus, the EEOC has created the duty to reasonably avoid discrimination, and shifts the focus from the reasonableness of the factor adopted by the employer to the reasonableness of the employer's decision-making in adopting that factor.

Accordingly, the proposed rule would confer liability under the ADEA for negligently (i.e., unreasonably) failing to mitigate the disparate impact associated with an employer's facially neutral practices — a duty found neither in the statute nor any prior court decision.

The EEOC, just as any other government agency, is bound in its rulemaking by Supreme Court precedents. Thus, the commission may not promulgate regulations that contradict the Supreme Court's interpretation of the same statutory language. Maislin Indus., U.S. v. Primary Steel Inc., 497 U.S. 116, 130-31 (1990); see also California v. Federal Energy Regulatory Commission, 495 U.S. 490, 499 (1990) (recognizing the respect "this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes").

In this instance, a few principles established by the Supreme Court regarding the RFOA bear directly on the proposed regulation:

- As the EEOC acknowledges in the preamble to the proposed rule, in Smith v. City of Jackson, the Court held that the RFOA test, rather than the business necessity test, is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older workers. 544 U.S. 228 (2005). In Meacham v. Knolls Atomic Power Laboratory, the Court stated: "[W]e are now satisfied that the business necessity defense should have no place in ADEA disparate-impact cases." 128 S. Ct. 2395 (2008).

- "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." Id. at 2504 n.14.

- "[T]he scope of disparate-impact liability under ADEA is narrower than under Title VII." Smith, 544 U.S. at 240.

The proposed regulation violates these principles and tips the scale decidedly against an employer's ability to make reasonable business decisions — imposing a far greater burden on employers than the Supreme Court approves.

The example provided by the EEOC Notice is telling. It describes a reduction-in-force (RIF) among sales people. The neutral criterion by which the employer intends to make its selection is the employee's salary level — presumably, the employer recognizes that by eliminating these positions it would reduce its payroll while laying off the fewest number of employees.

This selection criterion ordinarily would be deemed "reasonable" because minimizing the number of affected employees is a reasonable business — as well as social — objective.

However, the EEOC notes that this practice "might severely affect older workers." Under these circumstances, "the employer could mitigate the harm by also considering the sales revenues that the affected individuals generated."

This principle purports to be in keeping with Comment c, Restatement (Second) of Torts, § 292, which states that "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."

This tort principle is predicated on the existence of a legal duty that has been breached. However, the Supreme Court in Smith expressly found that the ADEA imposes no duty on employers to consider less discriminatory alternatives, and reaffirmed this principle in Meacham, stating that "the reasonableness inquiry includes no such requirement."

Thus, employers are not obligated to search for and consider less discriminatory alternatives because whether or how they perform this search has "no place" in the RFOA defense.

While the EEOC appears to acknowledge these principles, it, in effect, violates the principles it purports to recognize. It initially notes that the ADEA does not require the employer to use a less discriminatory alternative, however, it then asserts that "an employer's knowledge of and failure to use equally effective, but less discriminatory alternatives is relevant to whether the employer's chosen practice is reasonable." 75 Fed. Reg. at 7,216.

Moreover, the EEOC makes clear that "[a]n employer ... cannot hide behind lack of knowledge ... [T]he employer's failure to have measured the impact will not protect it from a

finding that it should have known of the impact." Id. at 7,215.

The Proposed Rule Turns Employment Policies Into a Numbers Game

Modern businesses develop and require adherence to policies that touch upon virtually all aspects of the employment relationship. Hiring, leaves of absence, promotions, compensation, discipline and layoffs typically follow guidelines or rules set by the employer.

Each of these potentially impacts some segment of its work force differently. For example, a policy that does not provide for paid sick leave in excess of a limited number of days annually may adversely impact older employees, who may be subject to more frequent illnesses.

Employers have a legitimate interest in having its employees at work and limiting payments for non-work time. In most instances, this common–sense observation would end the inquiry regarding the RFOA.

However, the proposed regulation would require the employer first to assess whether this policy disproportionately affects older employees and, if so, to consider whether there are alternative rules that would have less impact. Employers would have to engage in the process with virtually every workplace rule.

Moreover, the goal of a less discriminatory alternative is itself problematic with respect to age discrimination. Unlike gender or race, age is defined not categorically but continuously. That is, a policy that adversely impacts those over 40, may or may not adversely affect those over 50.

Correspondingly, an alternative that ameliorates the impact on those over 40 may exacerbate the impact on those over 50. Is this alternative nevertheless to be preferred?

Age is not the only demographic that would be affected as employers examine the impact of alternative policies. For example, suppose an alternative that reduces the adverse impact on those over 40 enhances or creates an adverse impact with respect to women.

Is an employer justified nevertheless in selecting this alternative? Indeed, it is virtually certain that the likelihood that an alternative practice that reduces the adverse impact with respect to one age group will exacerbate the impact on another age, race, sex, or ethnic group.

Thus, the proposed rule would involve employers in an endless game of statistical "whack a mole" — reducing the adverse impact on one protected group only to find that this effectively creates an adverse impact on another group. By what criterion must an employer decide among these alternatives?

The employer in the EEOC's example described above first considers making its RIF decisions according to pay levels, then sales volume, and then presumably an array of additional criteria, such as performance evaluations, tenure, etc. However, the identity of the employees selected for layoff will differ under each scenario.

Accordingly, the rule proposed by the EEOC does not merely require the employer to expend considerable resources on reverse engineering its decision rules, it allows statistical happenstance to determine the fate of individual employees.

Lost in all of this is the need for the employer to run its business efficiently. As the ADEA presently is interpreted, an employer who ensures that its employment policies are tied to its business concerns, and that the tests it administers are validated, can ignore this "numbers game" and focus instead on its operations.

However, the proposed regulation, by placing this burden on the employer, involves the employer in both finding and validating an unspecified range of alternatives, and strips it of its RFOA defense if it fails to find the impact-minimizing alternative.

Given the number of practices that can be subjected to this type of analysis, the number of age demarcations and protected groups that must be assessed in this way, and the concomitant requirement to validate each alternative, the proposed rule will vastly increase the cost of compliance to every employer and improperly narrow the scope of the RFOA defense.

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