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EEOC Issues Age Discrimination Regulations

April 2, 2012

On March 30, 2012, the EEOC published its final rule, issuing new regulations – effective on April 29, 2012 – governing the Age Discrimination in Employment Act (ADEA). The new regulations set forth the EEOC's understanding of employers' "reasonable factor other than age" defense to disparate-impact age discrimination claims. 29 CFR § 1625.7. The regulations could impose significant burdens on employers and could render the ADEA as strict in practice as Title VII.

The ADEA protects employees over the age of 40 from employment policies that adversely impact them because of their age. Under the prior § 1625.7, if a policy disproportionately affected older workers and the employer based the policy on a reasonable factor other than age, the EEOC required the employer to justify the policy as a "business necessity." In 2005 and 2008, two Supreme Court opinions undermined the EEOC's position and stated that an employer does not have to prove "business necessity." The employer could simply prove the reasonableness of the factor, among other things. The Court did not define how to determine if a factor is reasonable.

The EEOC now offers its regulatory view on how to define a "reasonable" factor. Under the new regulations, practices that disparately impact older workers will be deemed discriminatory *unless* they are justified by a "reasonable factor other than age." In other words, the reasonable-factor test appears to be the only test the EEOC recognizes for justifying such a practice. The regulation further imposes a significant, fact-intensive test for employers' reasonableness. The EEOC says that a "prudent employer" knows that the ADEA prohibits adverse impact, absent some other reasonable factor, and that the employer will take reasonable care to avoid limiting the opportunities of older workers.

The EEOC now requires employers to prove that the particular factor (e.g., a cost-cutting measure or a business plan) was not only a legitimate business consideration, but also that the particular practice – in hindsight – was reasonable in its design and in its implementation. In other words, the issue is not merely whether the employer was sensible in considering the factor at all, but rather whether a court or a jury later thinks the employer was also reasonable in how it went about the entire process. The EEOC also offers a series of non-exclusive considerations to determine the overall reasonableness of the action. The EEOC acknowledges that this is a fact-intensive inquiry and that it only preserves an employer's ability to make "reasonable" decisions.

With this final rule in place, two things seem probable. Courts will be second-guessing ordinary business judgments, and summary judgment will be more difficult. The EEOC is requiring a great deal of caution from employers who enact policies that adversely affect older workers. Employers should beware.

The final regulations are available to the public online. For more information, contact Miller Canfield's Employment and Labor Group.