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## LEGISLATIVE & LEGAL UPDATE

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### EEOC Issues Proposed Regulations on Employer Defenses to Disparate Impact Age Discrimination

On February 18, 2010, the Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking on the issue of employer defenses to disparate impact age discrimination under the federal Age Discrimination in Employment Act (ADEA). The EEOC issued the revised rules in response to two recent U.S. Supreme Court decisions – Smith v. City of Jackson (2005) and Meacham v. Knolls Atomic Power Lab. (2008). Both cases involved the question when an employer is liable for age discrimination when a facially neutral policy or practice has a disparate impact on age-protected employees.

In the Smith case, the Supreme Court held that an employer can defend a policy that disproportionately affects older workers by showing that the policy is supported by “reasonable factors other than age” (RFOA). According to the EEOC, this standard is lower than Title VII’s business necessity test.

The Meacham case involved a reduction in force (RIF) in which supervisors ranked employees based on performance, flexibility and criticality of skill sets. More senior employees received additional points for years of service. The lowest ranked employees were laid off. Of the 31 employees selected for layoff, 30 were over the age of 40, even though only 58% of the employer’s workforce was over 40. The older employees claimed that the facially neutral selection process had a disparate impact on them.

The Court held that the employer bears the burden of demonstrating that its selection system was based on reasonable factors other than age.

In light of these decisions, the EEOC decided to amend the ADEA regulations to address the RFOA defense. The proposed regulations define the phrase “reasonable factor” as one that is “objectively reasonable when viewed from the position of a reasonable employer.” The factor must be reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in

#### YOUR VOICE IN THE REGULATORY PROCESS!

The EEOC will consider public comments on the proposed ADEA rules for a 60-day period. Thereafter, the EEOC will issue a final rule.

If you have views that you wish to be heard by the EEOC, you can submit your comments in writing to the EEOC within the 60-day comment period, which expires on **April 19, 2010**.

Comments may be submitted by mail to Stephen Llewellyn, Executive Officer, Executive Secretariat, EEOC, 131 M Street, Northeast, Washington DC 20507; or by fax to 202.663.4114 (6 pages or fewer only); or through the Federal eRulemaking portal at <http://www.regulations.gov>.

light of the facts and circumstances. Reasonableness, according to the EEOC, will be judged from the perspective of a “prudent employer mindful of its responsibilities under the ADEA.” A prudent employer knows or should know that the ADEA prohibits facially neutral employment policies or practices that disproportionately impact older workers.

Under the proposed rule, the EEOC will examine the following non-exhaustive list of factors to determine if a policy or practice is reasonable: (i) whether it is a common business practice; (ii) the extent to which the factor is related to the employer’s stated business goals; (iii) the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately; (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 harm to the individuals in the protected age group and whether the employer took preventive or corrective steps; and (vi) whether other options were available to the employer.

One of the considerations in evaluating whether the employer defined and applied the policy or practice accurately is whether any training, guidance, and instructions to managers was undertaken. This consideration also is relevant to whether the decisions in question, in fact, were not based on age.

The proposed regulations specifically state that giving supervisors “unchecked discretion to engage in subjective decision-making” may indicate that decisions are based on age because

supervisors may act on conscious or unconscious age stereotypes. According to the proposed regulations, an employer should be particularly cautious about giving supervisors discretion to rate workers on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills. The EEOC expects that a prudent employer would train managers to avoid age-based stereotypes and provide guidance on how to apply policies and practices in ways that further the employer’s legitimate business purposes.

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