



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1625

RIN 3046-AA76

Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Equal Employment Opportunity Commission (“EEOC” or “Commission”) is issuing this final rule to amend its Age Discrimination in Employment Act (“ADEA” or “Act”) regulations concerning disparate-impact claims and the reasonable factors other than age defense (“RFOA”). The Commission published proposed rules in the Federal Register on March 31, 2008, and February 18, 2010, for sixty-day notice-and-comment periods. After consideration of the public comments, the Commission has revised portions of the proposed rules and is now issuing a final rule covering both proposals.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dianna B. Johnston, Senior Attorney-Advisor, Aaron Konopasky, Attorney-Advisor, or Davis L. Kim, Attorney-Advisor, at (202) 663-4640 (voice) or (202) 663-7026 (TTY). (These are not toll free numbers). This final rule also is available in the following formats: large print, Braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Publications Information Center at 1-800-669-3362 (voice) or 1-800-800-3302 (TTY).

SUPPLEMENTARY INFORMATION:

Background

On March 31, 2008, EEOC published in the Federal Register a Notice of Proposed Rulemaking (“NPRM”) to address issues related to the United States Supreme Court’s decision in Smith v. City of Jackson.¹ 73 FR 16807, Mar. 31, 2008. The Court ruled that disparate-impact claims are cognizable under the Age Discrimination in Employment Act (“ADEA”)² but that liability is precluded when the impact is attributable to a reasonable factor other than age. The NPRM proposed to revise 29 CFR 1625.7(d) to state 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” and that the individual challenging the allegedly unlawful employment practice bears the burden of isolating and identifying the specific employment practice responsible for the adverse impact. The Commission also proposed to revise 29 CFR 1625.7(e) to state that, when the RFOA exception is

¹ 544 U.S. 228 (2005).

² 29 U.S.C. 621-34.

raised, the employer has the burden of showing that a reasonable factor other than age exists factually.

The NPRM sought public comments on the proposed rule and also invited comments on whether the Commission should provide more information on the meaning of “reasonable factors other than age.” Seven of the ten commenters clearly supported efforts to provide more information. One of the seven suggested that reasonable factors should be related to job requirements or job performance. One commenter who preferred that the EEOC not address the matter argued that, if the RFOA definition is subject to regulation, then EEOC should consult case law for a definition and should draft factors relevant to the RFOA determination. One commenter opposed efforts to provide more information on the meaning of RFOA.

As noted below, all commenters who addressed the proposed revision to 29 CFR 1625(d) supported it. Four commenters endorsed the proposal as written and two generally supported the section but suggested changes to the first sentence. For the reasons explained below, the final rule, which has been redesignated 1625.7(c), retains the proposal’s substantive language.

Five commenters supported the proposed revision to 29 CFR 1625(e) and four opposed it. The commenters who opposed it argued that plaintiffs, not employers, should bear the RFOA burden of persuasion. As noted below, the final rule, which has been redesignated 1625.7(d), continues to place the burden of persuasion on the employer because the Supreme Court agreed that the employer has the RFOA burden of persuasion.³

Subsequently, on February 18, 2010, EEOC published in the Federal Register a second NPRM to address the meaning of “reasonable factors other than age.” 75 FR 7212, Feb. 18, 2010.

³ Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 91-92 (2008).

The Commission noted that, given public comments and the Supreme Court decisions in Smith and Meacham, it was issuing the NPRM “before finalizing its regulations concerning disparate impact under the ADEA.” The NPRM proposed to revise 29 CFR 1625.7(b) to state that the RFOA determination depends on the facts and circumstances of each specific situation. It defined a reasonable factor as one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances. It provided that the RFOA defense applies only if the challenged practice is not based on age. In addition, the NPRM provided non-exhaustive lists of factors relevant to whether an employment practice is reasonable and whether a factor is “other than age.”

In response to the February 2010 NPRM, EEOC received 27 comments from groups and individuals and more than 2,300 facsimiles that were similar in form and content. Two commenters on the February 2010 NPRM suggested that the Commission issue a new NPRM if it made any changes to the material contained in the March 2008 NPRM. One of the two also suggested the publication of a new NPRM if the EEOC offered new justifications for the material contained in the February 2010 NPRM. The other commenter suggested that a new NPRM clarify whether the 2008 and 2010 documents should be read in conjunction.

The Commission does not believe that publication of a new NPRM is necessary. The Commission has considered all comments received in response to both notices of proposed rulemaking and has made appropriate changes to the proposed rules in response to those comments. This document sets out the revised paragraphs of §§ 1625.7(b) through (e). Because §§ 1625.7(a) and (f) remain unchanged, they are not reprinted herein.

Some commenters on the February 2010 NPRM, including those who submitted form facsimiles, expressed concern that the EEOC’s approach to RFOA would place significant

burdens on employers. They argued that the rule would lead to unwarranted scrutiny of business decisions, permit second-guessing of routine decisions, and make it harder for employers to defend against frivolous litigation. Other commenters thought that the rule presented a fair, workable approach to RFOA.

The ADEA and disparate-impact analysis by definition require some scrutiny of employer practices that disproportionately harm older workers. As the Supreme Court held, employers must prove that such practices are based on reasonable factors other than age once plaintiffs have identified a specific employment practice that has a significant disparate impact.⁴ In holding that the RFOA is an affirmative defense, the Supreme Court recognized that scrutiny of employer decisions that cause an adverse impact is warranted, as employers must persuade “factfinders that their choices are reasonable” and that “this will sometimes affect the way employers do business with their employees.”⁵

The EEOC’s proposed rule was designed to conform existing regulations to recent Supreme Court decisions and to provide guidance about the application of the RFOA affirmative defense. It was not intended to impose unwarranted burdens on employers. Nonetheless, the Commission recognizes that some commenters interpreted the proposed rule as imposing significant burdens by requiring employers to meet all of the factors relevant to the RFOA determination. As explained below, the Commission has revised the rule to clarify that the factors are not required elements or duties, but considerations that are manifestly relevant to determining whether an employer demonstrates the RFOA defense.

⁴ Id. at 96.

⁵ Id. at 101.

Some commenters argued that the proposed rule improperly imported Title VII standards into ADEA disparate-impact analysis and conflicted with the Supreme Court decisions in Smith, Meacham, and Hazen Paper Co. v. Biggins.⁶ Other commenters believed that the proposed rule was consistent with the statute and relevant case law. The Commission, which disagrees with some commenters' interpretations of the statute and Supreme Court decisions, has addressed their comments in the context of specific sections of the rule. For the reasons explained below, the Commission believes that the rule is consistent with the ADEA and case law interpreting the statute. Where appropriate, the Commission has revised the rule to make this clearer.

Section-by-Section Analysis

Section 1625.7(b)

Former section 1625.7(c) has been redesignated 1625.7(b). The text of the paragraph remains unchanged.

Section 1625.7(c)

Section 1625.7(c) revises current section 1625.7(d). The 2008 proposed rule stated that any employment practice that has an age-based adverse impact on individuals within the protected age group is discriminatory unless the practice is justified by a reasonable factor other than age. It also stated that the individual challenging the practice is responsible for isolating and identifying the specific employment practice responsible for the adverse impact.

All of the commenters who addressed this section supported it. Four of them endorsed the section as written. Two of them generally supported the section but suggested changes to the first sentence. One commenter argued that the first sentence of the proposed rule inappropriately

⁶ 507 U.S. 604 (1993).

implied that the RFOA defense is the only defense applicable to disparate-impact claims under the ADEA. The commenter asserted that, although the Smith decision held that RFOA is an appropriate test for determining the lawfulness of an employment practice that has an age-based disparate impact, it did not hold that it was the only test. According to the commenter, section 4(f)⁷ of the ADEA permits other practices that might have a disparate impact on members of the protected age group. The commenter did not offer examples of such practices or otherwise explain how other defenses might apply in the disparate-impact context.

The final rule, which has been redesignated 1625.7(c), retains the proposed language. The Supreme Court relied on the RFOA provision to conclude that the ADEA prohibits disparate-impact discrimination.⁸ The Court’s determination that ADEA disparate-impact claims are cognizable because of the RFOA provision logically leads to the conclusion that RFOA is the defense to such claims. As the Court explained in Meacham, the RFOA defense fits⁹ as the

⁷ 29 U.S.C. 623(f).

⁸ Smith, 544 U.S. at 239.

⁹ The applicability of a statutory defense to a claim depends on whether the defense appropriately responds to the facts raised. For example, the “bona fide occupational qualification” (“BFOQ”) defense in section 4(f)(1) applies to facially discriminatory policies, not to neutral practices. See Meacham, 544 U.S. at 92. The NPRMs proposed to revise section 1625.7 only, which is confined to the applicability of the RFOA defense and did not propose changes to other regulatory sections that apply to the ADEA’s other affirmative defenses. See, e.g., 29 CFR 1625.6 (BFOQ), 1625.8 (seniority systems), 1625.10 (employee benefit plans). The regulations do not preclude an employer from asserting any statutory defense that responds to a particular claim. It should be noted that the ADEA’s affirmative defenses in section 4(f)(1) (BFOQ and foreign workplace) and section 4(f)(2) (seniority system and bona fide employee benefit plan) structurally and historically apply to intent-based claims. See, e.g., 29 U.S.C. 623(f)(1), (2). See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (BFOQ and seniority system defenses raised to age-based denial of transfers); Mahoney v. Radio Free Europe/Radio Liberty, Inc., 47 F.3d 447 (D.C. Cir. 1995) (holding that foreign workplace defense applied to age-based mandatory retirement provision).

appropriate defense to a disparate-impact claim because the age-neutral employment practice causing the unlawful impact is “other than age” and “otherwise prohibited.”¹⁰

Another commenter objected to the use of the term “justified.” The commenter asserted that the term is closely associated with Title VII’s business-necessity test and that its use could cause confusion between the concepts of business necessity and RFOA. The final rule retains the term “justified.” Use of this term is consistent with the Meacham decision, which noted that the language of section 4(f)(1) “refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition.”¹¹ It is also consistent with 29 CFR 1625.7(b), the text of which has not been changed. The term “justified” designates the party who bears the burden of proof, not the content of the defense. There is no question that the RFOA standard is lower than the business-necessity standard, as the rule makes clear.

The Commission has simplified the language in the second sentence of paragraph 1625.7(c). The sentence now refers to the employment practice “that allegedly causes” statistical disparities rather than the employment practice “that is allegedly responsible for” the disparities.

Paragraph 1625.7(c) reflects the Supreme Court’s conclusions that disparate-impact claims are cognizable under the ADEA, that the individual alleging disparate impact bears the burden of identifying the specific employment practice causing the alleged impact, and that the RFOA defense is the appropriate standard for determining the lawfulness of a practice that disproportionately affects older workers.¹²

¹⁰ Meacham, 554 U.S. at 93.

¹¹ Id. at 95.

¹² See Smith v. City of Jackson, 544 U.S. 228 (2005).

Section 1625.7(d)

Section 1625.7(d) revises current section 1625.7(e). The proposed rule stated that, when the RFOA exception is raised, the employer has the burden of showing that a reasonable factor other than age exists factually. Five commenters supported the proposal, and four objected to placing the burden of proof on the employer. One commenter noted that the term “exists factually” was ambiguous and likely to lead to confusion.

Subsequently, in Meacham v. Knolls Atomic Power Laboratory, the Supreme Court confirmed that the employer defending an ADEA claim of disparate impact has the RFOA burden of proof, i.e., the burden of persuasion as well as production.¹³ The Commission has revised the paragraph, which has been redesignated 1625.7(d), to reflect the Supreme Court’s holding that the RFOA provision is an affirmative defense in disparate-impact cases for which the employer bears the burdens of production and persuasion. To avoid confusion, the Commission has deleted the phrase “exists factually.”

The Commission also has revised the rule to clarify that the RFOA affirmative defense is unavailable in disparate-treatment cases. In Smith, the Court rejected the argument that the RFOA exemption acted simply as a “safe harbor” in disparate-treatment cases.¹⁴ As the Supreme Court

¹³ 554 U.S. 84, 97 (2008).

¹⁴ 544 U.S. at 238-39. Although the majority opinion specifically rejected Justice O’Connor’s view of the RFOA as a “safe harbor analogous to the legitimate nondiscriminatory reason (LNR) justification,” it did not respond to her contention that the “RFOA provision also plays a distinct (and clearly nonredundant) role in ‘mixed-motive’ cases.” 544 U.S. at 253. Thus, the majority’s phrasing that the RFOA provision “plays its principal role” in disparate-impact cases seems to refer to the notion that it might have a role in mixed-motives cases. Any such role has been obviated, however, by the Court’s subsequent holding that the ADEA does not permit “mixed-motives” claims. Gross v. FBL Financial Servs. Inc., 557 U.S. 167 (2009).

explained in Smith,¹⁵ the “other than age” element of the RFOA provision makes the defense inapplicable to a claim conditioned on an age-based intent to discriminate.

Section 1625.7(e)

Section 1625.7(e) revises current section 1625.7(b). The proposed rule noted that whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. The final rule retains this language, which emphasizes that the RFOA determination involves a fact-intensive inquiry.¹⁶ For organizational purposes, the Commission has changed the order of the sentences in the paragraph.

The proposed rule divided the discussion of “reasonable factors other than age” into two paragraphs, “reasonable” and “factors other than age,” and listed factors relevant to each paragraph. The “reasonable” paragraph noted that 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. It stated that an employer must show that an employment practice was reasonably designed to achieve a legitimate business purpose and was administered in a way that reasonably achieves that purpose in light of the facts that were known or should have been known to the employer. It included a non-exhaustive list of factors relevant to whether an employment practice is reasonable.

The “factors other than age” paragraph noted that the RFOA defense applies only if the practice was not based on age. It stated that, in the typical disparate-impact case, the practice is

¹⁵ 544 U.S. at 238.

¹⁶ The determination of whether an employer establishes a “reasonable factors other than age” defense is a jury question. See EEOC v. Allstate Ins. Co., 458 F. Supp.2d 980, aff’d, 528 F.3d 1042 (8th Cir.), reh’g en banc granted and opinion vacated on other grounds (Sept. 8, 2008).

based on an objective non-age factor and the only question is whether the practice is reasonable. The paragraph noted, however, that a disparate impact may be based on age when decision makers are given unchecked discretion to engage in subjective decision making and, as a result, act on the basis of conscious or unconscious age-based stereotypes. It included a non-exhaustive list of factors relevant to whether a factor is other than age.

Factors Other Than Age

Some commenters argued that the “other than age” paragraph conflated disparate treatment and disparate impact and improperly shifted the burden of proof by requiring the employer to prove that the challenged employment action was not based on age. They also argued that the paragraph conflicted with Meacham’s statement that the RFOA defense assumes that a non-age factor is at work.

In response to comments, and to ensure that the rule is not misconstrued as placing a disparate-treatment burden of proof on employers, the Commission has revised the discussion into a subsection, which has been redesignated 1625.7(e)(1)-(3), addressing the term “reasonable factors other than age.” The Commission also has revised the lists into a single, non-exhaustive description of considerations relevant to the RFOA defense.

The final rule states that 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 reference to “non-age factor” recognizes that “other than age” is an express part of the statutory RFOA defense.¹⁷

¹⁷ 29 U.S.C. 623(f)(1); see also Smith, 544 U.S. at 239 (noting that the RFOA defense “preclud[es] liability if the adverse impact was attributable to a nonage factor that was ‘reasonable’”). When an employer asserts purportedly neutral criteria, the RFOA defense is not available if age is a component of the employer’s practice or policy. See, e.g., City of Los

Prudent Employer

The preamble to the proposed rule stated that, in light of Smith and Meacham, a prudent employer would know that the ADEA was designed in part to avoid the application of neutral standards that disproportionately affect older workers. One commenter, noting that more than thirty years had passed between the enactment of the ADEA and the Supreme Court's determination that the law covered disparate-impact claims, questioned the Commission's statement. Another commenter agreed with the Commission and pointed out that the Court had decided Smith nearly five years, and Meacham nearly two years, before publication of the NPRM.

The Supreme Court's decisions in Smith and Meacham confirmed EEOC's longstanding position¹⁸ that disparate-impact claims are cognizable under the ADEA and that employers have the burden of establishing the RFOA defense. The decisions also validated the 1965 Wirtz Report's concern about "institutional arrangements" that unintentionally limit the opportunities of older workers.¹⁹ Courts had applied disparate-impact analysis to ADEA claims for many years,²⁰ and it was only after the Court's 1993 Hazen Paper decision²¹ that some courts held that disparate-

Angeles, Dept. of Water & Manpower v. Manhart, 435 U.S. 702 (1978) (rejecting employer's assertion of neutral criterion of "longevity" where sex determined longevity).

¹⁸ See 29 CFR 1625.7.

¹⁹ Report of the Sec'y of Labor, *The Older American Worker: Age Discrimination in Employment* 15-17 (1965), reprinted in U.S. EEOC, *Leg. History of the ADEA* 32-34 (1981) (discussing "[a] broad range of personnel programs and practices [that] affect the employment of the older worker, although they were not developed for this purpose") (hereinafter "Wirtz Report").

²⁰ See, e.g., Maresco v. Evans Chemetics, 964 F.2d 106, 115 (2d Cir. 1992); Abbott v. Fed. Forge, Inc., 912 F.2d 867, 872-77 (6th Cir. 1990); Leftwich v. Harris-Stowe State Coll., 702 F.2d 686 (8th Cir.1983); Geller v. Markham, 635 F.2d 1027 (2d Cir.1980).

²¹ 507 U.S. 604 (1993).

impact claims were not cognizable under the ADEA.²² Therefore, the Commission continues to believe that a prudent employer mindful of its ADEA responsibilities should know that the law prohibits the use of neutral practices that disproportionately affect older workers and are not based on reasonable factors other than age. A reasonable factor other than age is one that an employer exercising reasonable care would use to avoid limiting the opportunities of older workers, in light of all the surrounding facts and circumstances.²³

Reference to Tort Law

The proposed rule relied on tort principles when discussing what constitutes a “reasonable” factor other than age. Some commenters thought that the reference to tort law was practical and sensible. Others, however, objected to the use of tort law. They argued that employment discrimination law provides sufficient guidance for determining whether a practice is based on reasonable, nondiscriminatory factors and that the rule inappropriately imports the concept of “reasonable employer” into the RFOA analysis. One commenter asserted that, whereas tort law and sexual-harassment theory assess reasonableness in terms of an individual’s efforts to avoid harm, the RFOA analysis assumes and permits disparate impact. Another commenter

²² See, e.g., Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999); Ellis v. United Airlines, Inc., 73 F.3d 999, 1006-10 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077-78 (7th Cir. 1994). But see Frank v. United Airlines, Inc., 216 F.3d 845, 856 (9th Cir. 2000) (disparate-impact claims cognizable under ADEA); Criley v. Delta Air Lines Inc., 119 F.3d 102, 105 (2d Cir. 1997) (same); Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996) (same).

²³ See Smith, 544 U.S. at 235 n.5 (quoting Wirtz Report's discussion of employment standards that unfairly disadvantage older workers); cf. Faragher v. City of Boca Raton, 524 U.S. 775, 808-09 (1998) (rejecting employer's argument that it should not be held liable for negligently failing to promulgate anti-harassment policy where EEOC regulations advised employers to take all steps necessary to prevent harassment and holding as a matter of law that employer did not exercise reasonable care to prevent sexual harassment).

asserted that it is unfair to rely on some tort principles without including the concepts of contributory negligence and assumption of the risk.

The final rule continues to refer to tort principles. Employment discrimination law includes little discussion of reasonableness whereas tort law extensively analyzes the concept. Indeed, the Supreme Court recently made clear that federal nondiscrimination laws are torts and that “when Congress creates a federal tort [we presume that] it adopts the background of general tort law.”²⁴ Prior to Staub, the Supreme Court noted in Faragher v. City of Boca Raton²⁵ that lower courts have unanimously applied tort negligence standards to determine employer liability for co-worker harassment. Similarly, the Court turned to tort principles to determine what mental state warrants punitive damages.²⁶ Lower courts also have turned to tort law for guidance in resolving employment discrimination cases.²⁷

The fundamental objective of employment discrimination statutes, “like that of any statute meant to influence primary conduct, is . . . to avoid harm.”²⁸ Tort law, too, focuses on the duty to avoid harm and provides guiding principles to help understand reasonableness in this context.

²⁴ Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (citing, among other decisions, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998)).

²⁵ 524 U.S. 775, 799 (1998). In Faragher and Ellerth, the Court crafted a duty-of-care defense in hostile-environment cases without any statutory language directing it to do so.

²⁶ Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 538 (1999).

²⁷ E.g., Baskerville v. Culligan Int’l Co., 50 F.3d 428, 432 (7th Cir. 1995) (reasonableness of employer’s steps to discover and correct sexual harassment “depends on the gravity of the harassment”); see also Erickson v. Wis. Dep’t of Corr., 469 F.3d 600, 604 (7th Cir. 2006) (“The greater the potential injury to the employee, the greater care the employer must take.”) (citing Baskerville); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (noting, in an age case, that discrimination constitutes a tort).

²⁸ Faragher, 524 U.S. at 806 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

Under the ADEA, employers are required to avoid the harm of using facially neutral practices that impair employment opportunities for older workers and are not reasonable.²⁹ Whether a factor is reasonable can be determined only in light of all of the surrounding facts and circumstances, including the employer's duty to be cognizant of the consequences of its choices.

The assertion that the rule should not refer to tort law without importing the concepts of contributory negligence and assumption of the risk into the RFOA analysis misapprehends the rule's reference to tort law. The rule does not import tort principles wholesale; rather, it merely refers to tort law for guidance. Like the defense to harassment, the RFOA defense considers what the employer knew about the harm and what it did to correct it. Negligence principles as applied to co-worker harassment do not address the concepts of contributory negligence and assumption of the risk, and there is no need to address those concepts in the RFOA context. Moreover, employees do not "contribute" (negligently or otherwise) to an employer's use of an employment practice that has an age-based disparate impact. In addition, it would be contrary to the purposes of the anti-discrimination laws to assert that any employee voluntarily assumes the risk of being subject to discrimination.³⁰

²⁹ See Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 101 (2008); Smith v. City of Jackson, 544 U.S. 228, 234-5 & n.5 (2005).

³⁰ McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995) (the ADEA is part of a wider statutory scheme to protect employees in the workplace nationwide). Allowing an assumption-of-risk defense would defeat the ADEA's deterrent purpose; it would allow employers to avoid liability simply by advertising the fact that they will discriminate. See Smith v. Sheahan, 189 F.3d 529, 534 (7th Cir. 1999) (dismissing the idea that discriminatory actions can be excused by a prevailing workplace culture that has included exclusionary practices and bigotry and stating, "There is no assumption-of-risk defense to charges of workplace discrimination."); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1292 (8th Cir. 1997) (holding that an employer's liability for sex discrimination is not mitigated by the fact that the work environment was known to have an egregiously discriminatory culture); Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th

Design and Administration of Employment Practice

The proposed rule looked at “reasonable” from the position of a prudent employer and considered how the challenged employment practice is designed and administered. Some commenters agreed that the rule should look at how the practice is applied as well as at how it is designed. Other commenters, however, argued that this approach inappropriately focuses on the employer’s decision-making process rather than on the factor upon which the decision was based. In their view, the RFOA inquiry should focus on the factor underlying the employment practice, not on whether the employer acted reasonably in selecting the factor.

The final rule continues to focus on how the employment practice is designed and administered. The RFOA defense arises after an employment practice has been shown to have an age-based disparate impact. In that context, the concept of “reasonable factor” necessarily includes consideration of the reasonableness of the factor’s application. Thus, the Smith Court considered not just the City of Jackson’s goal of retaining police officers, but also the design and administration of the pay plan used to achieve that goal.³¹

The way in which an employer applies the factor is probative of whether it is reasonable; a practice that seems reasonable in the abstract might not be reasonable in its application. For example, an employer might require candidates for jobs in its meat-processing plant to pass a physical strength test. It would be reasonable for the employer to design a test that accurately

Cir. 1999) (“women working in the [male-dominated] trades do not deserve less protection from the law than women working in a courthouse”).”

³¹ See Smith, 544 U.S. at 242. (“Reliance on seniority and rank is unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in surrounding communities. . . . [T]he City’s decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a ‘reasonable facto[r] other than age’ that responded to the City’s legitimate goal of retaining police officers.”).

measures the ability to perform the job successfully. It would be manifestly unreasonable, however, for the employer to administer the test inconsistently, evaluate results unevenly, or judge test takers unreliably. Similarly, although it might well be reasonable for an employer to conduct a reduction-in-force (RIF) to save money, if an identified employment practice caused older workers to be disparately impacted, the cost-cutting goal alone would not be sufficient to establish the RFOA defense. The employer would have to show that the 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.

“Reasonable” and “Rational Basis”

The preamble to the proposed rule noted that the RFOA defense requires that a practice be reasonable, which is different from requiring only that it be rational. Some commenters argued that the RFOA standard should be a rational-basis standard and that “reasonable” means not irrational or not arbitrary. Other commenters commended the EEOC for clarifying that the reasonableness test is not a rational-basis test.

The Commission continues to believe that the RFOA defense is more stringent than a rational-basis or non-arbitrary standard for several reasons. First, the Supreme Court has held that the RFOA provision “confirms that Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny.”³² In other words, the Supreme

³² Kimel v. Florida Bd. of Regents, 528 U.S. 62, 88 (2000). The Kimel Court held that the ADEA did not validly abrogate states’ Eleventh Amendment immunity from suit by private individuals because it “prohibits substantially more . . . than would likely be held unconstitutional under the . . . rational basis standard.” Id. at 86. The Court concluded that “[the RFOA] exception confirms, . . . rather than disproves, the conclusion that the ADEA’s protection extends beyond the requirements of the Equal Protection Clause.” Id. at 88.

Court has previously recognized that the RFOA reflects a standard of proof higher than a rational-basis standard.

Second, proof that an action was rational or non-arbitrary focuses on whether an articulated reason is a pretext for intentional discrimination.³³ Thus, equating the RFOA defense with a rational-basis standard would improperly conflate ADEA disparate-treatment and disparate-impact standards of proof. If an employer attempting to establish the RFOA defense were only required to show that it had acted rationally, then the employer would merely be required to show that it had not engaged in intentional age discrimination. In Smith, the Supreme Court bluntly held that the RFOA provision is not a statutory safe harbor from liability for disparate treatment when the employer merely had a rational justification for its actions.³⁴

Thus, the Supreme Court concluded that the ADEA prohibits more than intentional discrimination; it also prohibits employers from adopting facially neutral practices that disproportionately exclude older workers unless the employer can prove that its actions were based on reasonable factors other than age. In holding that the RFOA provision is the defense to disparate-impact claims, the Supreme Court recognized that the RFOA defense is distinguishable in form and substance from the “legitimate, nondiscriminatory reason” evidence that the employer must produce in individual disparate-treatment cases.³⁵ The RFOA defense necessarily requires

³³ Smith, 544 U.S. at 253.

³⁴ Id. at 238-39 (rejecting Justice O’Connor’s argument that “the RFOA provision’s reference to ‘reasonable’ factors serves only to prevent the employer from gaining the benefit of the statutory safe harbor by offering an irrational justification.” Id. at 253).

³⁵ Id. at 238-39 (rejecting Justice O’Connor’s contention that RFOA is safe harbor from liability, because employer can defeat liability in disparate-treatment case by showing that employee was rejected for legitimate, nondiscriminatory reason) (citing Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)); see also Meacham, 554 U.S. at 96, n.12.

more than merely a showing that the employer's action was not irrational or not arbitrary.³⁶ To adopt commenters' assertions would be to nullify the Smith and Meacham holdings and undermine the intent of Congress to address "the consequences of employment practices, not simply the motivation."³⁷

Third, a rational basis standard would also undercut the Court's recognition of the RFOA as an affirmative defense. Under a rational-basis standard, an action "may be based on rational speculation unsupported by evidence or empirical data."³⁸ The decision maker is not required "to articulate at any time the purpose or rationale supporting its classification,"³⁹ and an action will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."⁴⁰ By that measure, the "reasonable" requirement would afford no protection against practices that have an age-based disparate impact.⁴¹

³⁶ Smith, 544 U.S. at 238-39.

³⁷ Id. at 234-35 and n.5 ("just as Griggs recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans . . . the Wirtz Report identified the identical obstacle to the employment of older workers").

³⁸ FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (Cable Communications Policy Act's distinction between cable television facilities that serve separately owned buildings and those that serve buildings under common ownership, 47 U.S.C. 522(7)(B), is rationally related to a legitimate government purpose under the Fifth Amendment's Due Process Clause).

³⁹ Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (taxation system focusing on acquisition value of real property rationally furthers legitimate state interests for purposes of the Equal Protection Clause of the Fourteenth Amendment).

⁴⁰ FCC v. Beach Commc'ns, Inc., 508 U.S. at 313.

⁴¹ See id. at 323 n.3 ("Judicial review under the 'conceivable set of facts' test is tantamount to no review at all.") (Stevens, J., concurring); see also W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 n.36 (1985) (rejecting rational-basis standard for "bona fide occupational qualification" defense where, "under a 'rational basis' standard a jury might well consider that its 'inquiry is at

Finally, equating the RFOA reasonableness requirement with a rational-basis standard would contradict the Smith Court's holding that the "reasonable" requirement shows that the RFOA provision is more stringent than the Equal Pay Act's ("EPA") "any other factor" defense.⁴² Indeed, applying the rational-basis test to the RFOA defense would actually make it less stringent than the EPA's "any other factor" defense as the latter has been construed by the EEOC and some courts, which have taken the position that, even under the Equal Pay Act, an employer asserting an "any other factor other than sex" defense must show that the factor is related to job requirements or otherwise is beneficial to the employer's business.⁴³

an end' with an expert witness' articulation of any 'plausible reaso[n]' for the employer's decision") (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

⁴² See Smith, 544 U.S. at 239 n.11 (2005) (finding it "instructive" that, in contrast to providing an "any other factor" defense under the Equal Pay Act, 29 U.S.C. 206(d)(1), "Congress provided that employers could use only reasonable factors in defending a suit under the ADEA") (emphasis in the original).

⁴³ EEOC Compliance Manual, Compensation Discrimination 10-IV.F.2 (2000) ("An employer asserting a 'factor other than sex' defense also must show that the factor is related to job requirements or otherwise is beneficial to the employer's business."); see also Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525-26 (2d Cir. 1992) (factor other than sex must be grounded in legitimate business-related concerns); EEOC v. J.C. Penny Co., 843 F.2d 249, 253 (6th Cir. 1988) (factor-other-than-sex defense requires a legitimate business reason); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988) (defense "applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business"); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876-77 (9th Cir. 1982) (employer must have an acceptable business reason and "must use the factor reasonably in light of the employer's stated purpose as well as its other practices"). But see Behm v. United States, 68 Fed. Cl. 395, 400-01 (Fed. Cir. 2005) (text of EPA does not suggest that factor other than sex must be business related; applying "deferential" rational-basis standard to any-other-factor defense of federal government employer "whose business is not business, but government"); Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003) (any-other-factor defense does not involve a reasonableness inquiry); Fallon v. State of Ill., 882 F.2d 1206, 1211 (7th Cir. 1989) (business-related reason need not be shown).

“Reasonable” and “Business Necessity”

The February 2010 Notice of Proposed Rulemaking emphasized that the proposed RFOA standard was lower than the business-necessity test of Title VII of the Civil Rights Act of 1964,⁴⁴ but higher than the Equal Pay Act’s “any other factor” test.⁴⁵ It also stated that the factors relevant to the reasonableness inquiry recognize that the RFOA standard is less stringent than the business-necessity standard and that disparate-impact liability is narrower under the ADEA than under Title VII.

Several commenters expressed the view that the proposed rule impermissibly imposed Title VII’s business-necessity test on ADEA defendants. One of the commenters suggested that EEOC revise the language to state that the factors “may” be relevant to the RFOA determination. The commenters’ arguments generally centered on the mistaken view that the factors were requirements, and that the factors concerning employers’ efforts to assess impact, minimize harm, and weigh options amounted to a business-necessity requirement.

In response, the Commission has made several changes. To address the commenters’ view that the factors were required elements or duties, the rule now refers to “considerations” relevant to demonstrating the defense. The rule sets forth a non-exhaustive description of relevant considerations, rather than a list of duties to be met. Because the RFOA determination involves a fact-intensive inquiry, the importance of a consideration depends on the facts of the particular

⁴⁴ 42 U.S.C. 2000e-2(k)(1)(A)(i) (a particular employment practice that has a disparate impact based on race, color, religion, sex, or national origin is unlawful unless the employer “demonstrate[s] that the challenged practice is job related for the position in question and consistent with business necessity”).

⁴⁵ 29 U.S.C. 206(d)(1)(iv) (permitting sex discrimination in wages pursuant to a “differential based on any factor other than sex.”)

situation. Based on the specific facts raised, one or two considerations may be sufficient to establish the RFOA defense.

In addition, the rule expressly states that no specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age and that the presence of one consideration does not automatically establish the defense. Just as the absence of a consideration does not automatically defeat the RFOA defense, so too the presence of one consideration does not necessarily prove that a differentiation is based on reasonable factors other than age. Rather, as the rule makes clear, the RFOA determination depends on all of the facts and circumstances in each particular situation.

The Commission disagrees that consideration of efforts to assess impact, reduce harm, and weigh options suggests a Title VII business-necessity analysis. However, the Commission has deleted the factor concerning the availability of options because some commenters misconstrued the factor as imposing the Title VII standard that the employer must search for and select the least discriminatory alternative.⁴⁶ Removal of the factor does not mean that the availability of measures to reduce harm is irrelevant to reasonableness. There may be circumstances in which

⁴⁶ Three commenters disagreed with the Commission's statement, in the preamble to the proposed rule, that Title VII requires an employer to adopt the least discriminatory alternative. Under Title VII, once the employer establishes that the challenged practice is job related and consistent with business necessity, the burden shifts to the plaintiff to demonstrate that there is an alternative employment practice that the employer refuses to adopt. 42 U.S.C. 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C) (adopting pre-Wards Cove approach to "alternative employment practice"). The alternative must be less discriminatory and must serve the employer's legitimate business needs. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); see also Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009). As a practical matter, an employer that does not adopt the least discriminatory effective alternative proposed by the plaintiff will not prevail in a Title VII disparate-impact case because the plaintiff will be able to establish the existence of a less discriminatory alternative. That is not the case under the ADEA, whose RFOA standard is less stringent than Title VII's business-necessity standard. Smith, 544 U. S. at 243.

the availability of a measure that would noticeably reduce harm was or should have been so readily apparent that it would be manifestly unreasonable for the employer to fail to use it. The removal of the factor does, however, make clear that an employer need not search for alternatives and use the one that is least discriminatory. These changes, along with the clarification that none of the considerations is a required element of the RFOA defense, make clear the distinction between the ADEA RFOA standard and Title VII's business-necessity standard.

Under Title VII, if a particular employment practice has a disparate impact based on race, color, religion, sex, or national origin, then the employer must “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”⁴⁷ An employer could meet the Title VII standard by proving, for example, that a test has been validated to show that it is “predictive of ... important elements of work behavior which comprise ... the job.”⁴⁸ In contrast, the RFOA defense involves the less demanding standard of reasonableness.

Application of the rule's considerations to a physical fitness test⁴⁹ illustrates the difference between the RFOA and business-necessity standards. For example, suppose a security company

⁴⁷ 42 U.S.C. 2000e-2(k)(1)(A)(i).

⁴⁸ Albemarle Paper Co. v. Moody, 422 U.S. 405, 431, 434 (1975). The business-necessity standard has been articulated in other ways. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (“necessary to safe and efficient job performance”); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (employment practice must bear a “manifest relationship to the employment in question”); El v. Se. Pa. Trans. Auth., 479 F.3d 232, 242, 245 (3d Cir. 2007) (practice at issue must “accurately--but not perfectly--ascertain[] an applicant's ability to perform successfully the job in question”).

⁴⁹ It is important to emphasize that physical-fitness requirements must be relevant to successful performance of the particular job, so as to avoid the use of such tests to restrict the hiring of older workers when there is no basis for such requirements, as the 1965 Wirtz Report documented. See Wirtz Report at 4. Subjecting only older workers to a particular test would be facially discriminatory and the RFOA defense would not apply. See, e.g., EEOC v. Massachusetts, 987 F.2d 64, 73 (1st Cir. 1993) (rejecting RFOA defense to practice requiring employees to pass physical fitness exam at age 70).

mandated that all applicants for security guard positions must be able to run a half mile in three minutes and do 35 push ups in a row. The company's stated purpose is to ensure that guards are physically able to pursue and apprehend suspects (consideration (i)). The test defines and measures the factors of speed and strength and provides clear guidance on how the test is to be applied accurately and fairly (consideration (ii)). The employer performs a disparate-impact analysis and finds that large percentages of older workers and women cannot pass the test. (consideration (iv)). The employer changes the test so that performance standards vary based on age and gender, when it learns that a successful competitor firm uses such standards and is attracting a large pool of qualified candidates. Although the test continues to disproportionately exclude older and female applicants, it excludes fewer of them and still produces qualified hires (consideration (v)).

The security company would not need to perform a validation study to establish the RFOA defense. In contrast, to establish a Title VII business-necessity defense, the employer would need to validate the test to show that it accurately measured safe and efficient performance. In addition, even if the employer could show that the test was validated, proof by female applicants that there were less discriminatory alternatives that the employer refused to adopt would impose liability under Title VII. This is just one example of how the RFOA standard is less stringent than Title VII's business-necessity standard.

Relevant Considerations

The proposed rule set forth non-exhaustive lists of factors relevant to whether an employment practice is reasonable and is based on factors other than age. Although, as discussed above, some commenters objected to some of the factors, other commenters found the lists useful and generally supported them. One commenter suggested that EEOC provide guidance on the

types of evidence relevant to the factors and argued that the evidence should be objective, in existence before litigation, and more than mere self-serving statements. Another commenter stated that no single factor should be dispositive of whether an employment practice is reasonable.

Given the context-specific nature of the RFOA inquiry, it is not possible to specify every type of relevant evidence. All relevant evidence should be considered, and such evidence necessarily will vary according to the facts of each particular situation. Depending on the circumstances, relevant evidence might include documents describing the business purpose underlying the challenged practice, copies of any written guidance that the employer provided to decision makers, explanations of how the employer implemented the practice, and impact-related studies that the employer may have conducted. Objective evidence that was in existence prior to litigation will carry more weight than mere self-serving statements or after-the-fact rationales.

The first “reasonable” factor listed in the proposed rule concerned whether the employment practice and its implementation were common business practices. One commenter supported this factor because, as a factor rather than a required element, it would allow employers to defend their actions while ensuring that discriminatory practices that may be common in an industry are not given weight. Other commenters opposed the factor. Some commenters argued, for example, that the factor could stifle employer creativity and was not relevant to whether a particular employer’s practice was reasonable under particular circumstances. Others argued that the commonality of a practice has no bearing on whether it is discriminatory and expressed concern that the factor could allow an employer to defend a practice when there is industry-wide discrimination. One commenter suggested that the factor should refer to common practices in comparable settings rather than to common business practices.

In light of the variety of concerns about this factor, the Commission has deleted it from the relevant considerations.

Section 1625.7(e)(2)(i)

The second item in the proposed rule's list of factors relevant to "reasonableness" concerned the extent to which the factor is related to the employer's stated business goal. One commenter thought that the factor encompassed the essence of the RFOA defense but suggested that the term "stated" be deleted. Another commenter thought that the term "stated" was vague and wondered whether it meant that an employer must state its goal in advance.

The Commission has revised the provision, which has been redesignated 1625.7(e)(2)(i), to refer to an employer's "stated business purpose," which is the legitimate business purpose that the employer had at the time of the challenged employment practice. This approach is consistent with Smith, which expressly noted that the City's "stated purpose . . . was to 'attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability.'"⁵⁰ The City reasonably achieved this purpose by raising the salaries of junior officers to make them competitive with those of comparable positions in the region.⁵¹ Similarly, an employer whose stated purpose is to hire qualified candidates could reasonably achieve this purpose by ensuring that its hiring criteria accurately reflect job requirements.

⁵⁰ Smith, 544 U.S. at 231.

⁵¹ Id. at 242.

Section 1625.7(e)(2)(ii)

The proposed rule said that the extent to which the employer took steps to define and apply the factor accurately and provided training, guidance, and instruction to managers was relevant to reasonableness. Three commenters supported this factor. One of them noted that training and guidance are sound business practices that are not burdensome. Two commenters objected to this factor. One argued that this factor is not necessary because it is subsumed under the factor concerning the employment practice's relation to the employer's stated business goals. The other commenter argued that, although providing guidance and training to managers may be good business practice and may enhance an employer's RFOA defense, the ADEA does not require employers to take such steps.

The proposed rule also included consideration of the extent to which supervisors were given guidance or training in the "other than age" section. Two commenters supported this factor as written, one commenter asked for guidance on the type of training that will help supervisors to make decisions based on objective rather than subjective criteria, and one commenter argued that an employer should lose its affirmative defense if the employer does not train its managers on subjective decision making. One commenter opposed this factor and suggested that EEOC work with stakeholders to determine whether an employer's preventive training measures should be a Faragher-type defense⁵² to ADEA disparate-treatment claims. Another commenter asked how often training should be conducted and suggested that training should be required for all protected bases if it is required for age discrimination.

⁵² Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (employer not liable for supervisor harassment that did not result in tangible employment action if employer exercised reasonable care to prevent and promptly correct any harassment and employee unreasonably failed to complain to management or to avoid harm otherwise).

As discussed, the Commission has eliminated the “other than age” section and has combined the factors relating to guidance and instruction of managers into a single consideration, which has been designated 1625.7(e)(2)(ii). The Commission has deleted the reference to “took steps” to make clear that the consideration focuses on how the employer actually defined and applied its criteria. Through this consideration, the final rule recognizes the importance of defining an employment criterion carefully and educating managers and supervisors on how to apply it fairly.

As commenters noted, it is in the employer’s interest to define and apply accurately the criteria on which it relies. Ensuring that decision makers understand and know how to apply the employer’s standard will help to ensure that the employer has the work force it wants. For example, research demonstrates that older workers are commonly perceived to be less productive than younger workers but that such stereotypes are inaccurate.⁵³ In fact, studies show a nonexistent or slightly positive relationship between job performance and older age.⁵⁴ The output

⁵³ Robert McCann & Howard Giles, Ageism in the Workplace: A Communication Perspective, in Ageism: Stereotyping and Prejudice Against Older Persons 163, 172 (Todd D. Nelson ed. 2002) (citing J. O. Britton & K. R. Thomas, Age and Sex as Employment Variables: Views of Employment Service Interviewers, 10 J. Emp. Counseling 180 (1973); S. Cole, Age and Scientific Performance, 84 Am. J. Sociology 958 (1979); A. Roe, Changes in Scientific Activities with Age, 150 Sci. 313 (1965); P. E. Panek et al., Age Differences in Perceptual Style, Selective Attention, and Perceptual-Motor Reaction Time, 4 Experimental Aging Res. 377 (1978); N. Munk, Finished at 40, 139 Fortune 50 (1999)).

⁵⁴ See generally McCann & Giles, supra note 53, at 172 (citing J. A. Forteza & J. M. Prieto, Aging and Work Behavior, in Handbook of Industrial and Organizational Psychology 447 (H. C. Triandis et al. eds., 2d ed. vol. 4, 1994); D. C. Park, Aging, Cognition, and Work, 7 Hum. Performance 181 (1994); P. Warr, Age and Employment, in Handbook of Industrial and Organizational Psychology, supra, at 485).

of older workers is equal to that of younger workers;⁵⁵ older workers are better in terms of accuracy and steadiness of work output and output level,⁵⁶ and they outperform younger workers in the area of sales.⁵⁷ Thus, educating decision makers to be aware of, and avoid, age-based stereotypes can help to ensure that they apply the employer's standard accurately and do not unfairly limit the opportunities of older workers.

For example, an employer seeking to hire individuals with technological skills could instruct decision makers on the particular skills (e.g., experience using specific software or developing certain types of programs) that it needs. Similarly, rather than simply asking managers to assess an employee's training potential, an employer could instruct managers to identify the times the employee has received or sought training. Using objective criteria as much as possible and providing decision makers with specific job-related information can help to overcome age-based stereotypes.⁵⁸

The rule does not require employers to train their managers. First, by referring not just to training but to "guidance or training," it recognizes that employers use a wide range of measures to convey their expectations to managers, depending on the circumstances. For example, a small

⁵⁵ McCann & Giles, supra note 53, at 173 (citing Commonwealth Fund, *The Untapped Resource: Americans Over 55 at Work* (1993)).

⁵⁶ McCann & Giles, supra note 53, at 173 (citing J. Eisenberg, Relationship Between Age and Effects Upon Work: A Study of Older Workers in the Garment Industry, *Dissertation Abstracts Int'l* 41 (4A) (1980)).

⁵⁷ McCann & Giles, supra note 53, at 173 (citing W. H. Holley et al., Age and Reactions to Jobs: An Empirical study of Paraprofessional Workers, 1 *Aging & Work* 33 (1978)).

⁵⁸ See Richard A. Posthuma & Michael A. Campion, Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions, 35 *J. Mgmt.* 158, 172 (2009) (availability and use of job-related information reduces the effects of age-based stereotypes).

employer might reasonably rely entirely on brief, informal, verbal instruction. Second, as with all of the considerations in section 1625.7(e), this consideration is not a required duty. Instead, its importance depends on the particular facts raised. Thus, an employer's RFOA defense will not necessarily fail because, for example, the employer did not train managers on how to apply its standard. On the other hand, steps such as carefully defining a standard and instructing managers on how to apply it are evidence that the employer's actions were based on reasonable factors other than age and will support the employer's defense.

The Commission does not agree with the commenter's suggestion that preventive training measures should be a Faragher-type defense. Employers have a Faragher-type defense to harassment based on age.⁵⁹ An employer's training measures do not constitute a defense to disparate treatment or disparate impact, but they should go a long way toward preventing conscious or unconscious bias from infecting decision making in the first place. Although training is not a required element of the RFOA defense, it is a key component of efforts to provide a workplace free from discrimination. The Commission urges employers to educate all employees on their rights and responsibilities under all anti-discrimination laws.

Section 1625.7(e)(2)(iii)

Paragraph 1625.7(b)(2) of the proposed rule noted that, in the typical disparate-impact case, an employer has used an objective, non-age factor and the inquiry focuses on

⁵⁹ See, e.g., Weyers v. Lear Operations Corp., 359 F.3d 1049, 1056 n.6 (8th Cir. 2004) (same analysis applies to hostile-environment claims under ADEA and Title VII); Terry v. Ashcroft, 336 F.3d 128, 148-50 (2d Cir. 2003) (same); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors II (June 18, 1999) (Faragher vicarious-liability rule applies to unlawful harassment on all covered bases, including age).

reasonableness. Relying on Watson v. Forth Worth Bank and Trust,⁶⁰ however, it also said that employers are subject to liability under disparate-impact analysis for granting supervisors unchecked discretion to engage in subjective decision making because the unchecked discretion allows conscious or unconscious age-based stereotypes to infect the decision-making process and, as such, is not “other than age.” It listed three factors relevant to whether an employment practice was “other than age”: the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively, the extent to which supervisors evaluated employees based on factors known to be subject to age-based stereotypes, and the extent to which supervisors were given guidance or training.

Three commenters supported the proposed rule’s approach to subjective decision making. They noted that subjective decision making frequently disadvantages older workers and raises the risk of age-based disparate impact. Other commenters who addressed this issue opposed the approach and argued that subjective decision making is not inherently based on age. They asserted that the proposed rule conflicted with Meacham’s statement that the RFOA defense assumes that a non-age factor is at work, misconstrued Watson, and conflated disparate impact and disparate treatment. Some commenters asked for more guidance on the meaning of “unchecked discretion.”

The preamble to the proposed rule noted that criteria such as flexibility, willingness to learn, and technological skills are particularly susceptible to age-based stereotyping. One commenter argued that it is appropriate for an employer to consider these qualities, which are relevant to today’s workplace. Another commenter asserted that the factor was too broad and

⁶⁰ 487 U.S. 977 (1988).

could encompass such criteria as “energy,’ ‘flexibility,’ ‘adaptability,’ ‘long-term commitment to company,’ ‘success driven,’ ‘tolerance,’ [and] ‘creativity.’” The commenter argued that the factor would cause parties to focus on whether a criterion was subject to stereotypes rather than on whether an employer evaluated employees negatively because of age.

The rule continues to recognize that giving supervisors unchecked discretion to engage in subjective decision making may result in disparate impact and that employers should take reasonable steps to ensure supervisors exercise their discretion in a manner that does not violate the ADEA. To prevent the misunderstanding reflected in the comments, however, the Commission has revised the rule. First, as noted above, the rule no longer addresses “reasonable” and “other than age” in separate paragraphs, but discusses “reasonable factor other than age” in a single paragraph. Second, the factors listed under “other than age” in the NPRM have been integrated into 1625.7(e)(2)(ii) and (e)(2)(iii). Section 1625.7(e)(2)(ii) addresses the extent to which the employer defined the employment criterion -- such as a subjective factor -- and provided supervisors with guidance on how to apply it. The Commission also has combined two “other than age” factors into a single consideration addressing subjective decision making and the use of criteria susceptible to age-based stereotypes. Section 1625.7(e)(2)(iii) makes clear that the extent to which the employer attempts to minimize subjectivity and avoid age-based stereotyping is relevant to whether or not it acted reasonably, particularly where the criteria are known to be subject to age-based stereotypes.

The Commission disagrees with commenters’ assertions that the proposed rule was inconsistent with the Supreme Court’s decisions in Meacham and Watson and believes that the rule is consistent with those decisions. First, Meacham did not say that a practice is “without respect to age” in every impact case, but only that such is the case in the typical disparate-impact

case.⁶¹ Second, although “[i]t is true . . . that an employer’s policy of leaving . . . decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct,”⁶² this does not mean “that the particular supervisors to whom this discretion is delegated always act without discriminatory intent.”⁶³ As the Supreme Court recognized in Watson, disparate-impact analysis may be the only way to combat “the problem of subconscious stereotypes and prejudices” that may affect subjective decision making.⁶⁴ Thus, although employers may sometimes deem it necessary to use subjective criteria to assess employees, it is not reasonable to leave the supervisors’ discretion unconstrained.

Contrary to some commenters’ assertions, the rule does not improperly conflate disparate-treatment and disparate-impact claims. It is not surprising, however, that disparate-treatment and disparate-impact claims may overlap in the context of subjective decision making. As the Supreme Court has noted, “the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”⁶⁵ As noted above, the final rule’s reference to a “non-age factor” reflects the language of the statutory RFOA defense and the Smith

⁶¹ 554 U.S. at 96.

⁶² Watson, 487 U.S. at 990.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id. at 987; see also id. at 998 (factors such as cost of alternative relevant to “whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment”); accord Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989); Albemarle Paper Co., 422 U.S. at 425.

decision.⁶⁶ It also reflects the Watson decision’s endorsement of disparate-impact analysis to address the problem of stereotypes and prejudices that impede the elimination of employment discrimination.

The proposed rule used the term “unchecked” discretion, which was also used by the Court in Watson. Nevertheless, to address commenters’ confusion about the term, we have eliminated it. The rule now refers to whether the employer “limited supervisors’ discretion.”

One commenter, noting that the identification of a specific employment practice is part of a plaintiff’s prima facie case, argued that the issue of subjective decision making is not relevant to the RFOA defense. As noted above, the final rule expressly states that the individual challenging the practice is responsible for isolating and identifying the specific employment practice causing the adverse impact. As courts have recognized, however, plaintiffs may challenge an overall decision-making process “if the employer utilizes an ‘undisciplined system of subjective decision making.’”⁶⁷ If an individual establishes that an employer’s use of subjective decision making had an age-based disparate impact, then the burden shifts to the employer to prove that the practice is a reasonable factor other than age. The extent to which the employer limited supervisors’ discretion in a manner that minimized the likelihood that age-based stereotypes would infect the process is one of a number of factors relevant to whether the employer’s practice is a reasonable, non-age factor.

⁶⁶ See 29 U.S.C. 623(f)(1); Smith, 544 U.S. at 239.

⁶⁷ Durante v. Qualcomm, Inc., 144 Fed. Appx. 603, 606 (9th Cir. 2005) (unpublished) (quoting Watson, 487 U.S. at 990); see also Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 139 (2d Cir. 2006) (unaudited reliance on supervisors’ subjective judgment of employees’ flexibility and criticality constituted a specific employment practice), vacated on other grounds, 554 U.S. 84 (2008).

Sections 1625.7(e)(2)(iv) and (v)

The proposed rule listed three factors that some commenters interpreted as imposing Title VII's business-necessity test on ADEA disparate-impact claims. One factor addressed the extent to which an employer assessed the impact of its practice on older workers, and another factor concerned the severity of harm to individuals in the protected age group and the extent to which the employer took steps to minimize the harm. The remaining factor looked at whether other options were available and the reasons the employer chose the option it did. Quoting the Smith statement that the RFOA inquiry does not require employers to adopt a less discriminatory alternative,⁶⁸ a footnote explained that the factor did not mean that an employer must adopt a practice that has the least severe age-based impact. The footnote also quoted a Restatement of Torts (Second) comment concerning unreasonable risk.

Some commenters argued that the factors conflate the concepts of impact and reasonableness, which are analytically distinct. They asserted that the factors improperly impose an affirmative duty to monitor selection procedures for adverse impact, that employers will not have data to conduct mandated impact analyses because they do not collect and report statistics on the ages of employees and applicants, that conducting impact analyses would be too costly for small employers, and that the factors penalize employers that do not conduct analyses. In addition, noting that plaintiffs have the burden of establishing that an employment practice has a disparate impact, some commenters argued that the factors inappropriately place the burden of disproving impact on employers. They also argued that the factor concerning consideration of other options conflicts with the Smith statement. Some commenters noted that, under Title VII, plaintiffs, not employers, have the burden of identifying less discriminatory alternatives. One

⁶⁸ Smith, 544 U.S. at 243.

commenter who opposed the factor argued that, if the Commission retains the factor, it should refer to “other known options” because employers should not be expected to know all potential employment practices. The commenter also argued that the Smith and Restatement quotes in the footnote were contradictory. Another commenter expressed concern that an alternative designed to minimize a practice’s age-based impact might have an adverse impact on another protected group.

Two commenters supported the factor concerning consideration of other options. They noted that, as the Supreme Court stated in Watson, evidence that the employer ignored equally effective less discriminatory alternatives suggests that the challenged practice was the “functional equivalent of a pretext for discriminatory treatment.”⁶⁹

In response to comments, and to emphasize that the rule reflects a standard that is less stringent than Title VII’s business-necessity test, the Commission has revised the rule to make clear that none of the considerations is a required element of the RFOA defense. As noted above, the rule now refers to a non-exhaustive description of “relevant considerations” and expressly states that no specific consideration need be present for a differentiation to be based on reasonable factors other than age. The importance of each consideration will necessarily vary according to the facts of each particular situation.

The final rule retains the impact-assessment and harm considerations, which have been redesignated 1625.7(e)(2)(iv) and 1625.7(e)(2)(v). The Commission has deleted the reference to “took steps” from 1625.7(e)(2)(iv) to make clear that the consideration focuses on the extent to which the employer actually assessed the impact rather than on the steps the employer took to do

⁶⁹ 487 U.S. at 998.

so. What an employer reasonably should do to assess impact depends on the facts of the particular situation. For example, an employer that assesses the race- and sex-based impact of an employment practice would appear to act unreasonably if it does not similarly assess the age-based impact. A small employer that does not generally conduct impact analyses on any basis, however, may well be able to show that its RIF decisions were reasonable even if it did not conduct a formal disparate-impact analysis during the RIF. Similarly, evidence that a policy was not the type normally subject to disparate-impact analysis would support an employer's argument that it should not reasonably be expected to conduct such analysis. Whether or not a formal disparate-impact analysis is done, if the impact is sufficiently large that the employer was or should have been aware of it, a failure to have taken reasonable steps to avoid or mitigate the impact is relevant to whether the employer's actions were based on reasonable factors other than age.

For purposes of clarity, section 1625.7(e)(2)(v) now refers to the "degree" rather than "severity" of the harm and the "extent" of injury. The final rule also changes the term "minimize" to "reduce" with respect to the assessment of the harm caused by different options to make clear that the rule does not require the adoption of the least discriminatory alternative.

Consideration of the degree of harm on individuals is measured both in terms of the scope of the injury to the individual and the scope of the impact, i.e., the number of persons affected. Smith exemplifies negligible harm in terms of injury and impact. In Smith, the injury was relatively minor as the raises affecting older workers were actually higher in dollar terms,

although lower in percentage terms.⁷⁰ The number of older workers affected was also relatively small.

In contrast, the more severe the harm, the greater the care that ought to be exercised.⁷¹ The Meacham case exemplifies significant injury and impact from the loss of jobs affecting a “startlingly skewed” group of older workers.⁷² In light of such significant injury and impact, it would be reasonable for an employer to investigate the reasons for such results and attempt to reduce the impact as appropriate.

The extent to which the employer took steps to reduce the harm to older workers in light of the burden of undertaking such steps is relevant to reasonableness. Whether an employer knew or reasonably should have known of measures that would reduce harm informs the reasonableness of the employer’s choices.⁷³ Thus, the RFOA includes consideration of the availability of measures to reduce harm, and the extent to which the employer weighed the harm to older workers against both the costs and efficiencies of using other measures that will achieve the employer’s stated business purpose.

Given the relevance of the availability of measures to reduce harm contemplated by this consideration, the Commission has deleted the last factor concerning the availability of options. In addition, commenters misconstrued the consideration of options as requiring employers to

⁷⁰ Smith, 544 U.S. at 241-42.

⁷¹ Cf. Restatement (Second) of Torts, 298 cmt. b (1965) (“The greater the danger, the greater the care which must be exercised.”).

⁷² Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 145 (2d Cir. 2006), vacated, 544 U.S. 84 (2008).

⁷³ Cf. Restatement (Second) of Torts 292 cmt. c (1965) (“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.”).

search out every possible alternative and use the least discriminatory alternative, comparable to the Title VII's requirement, which the Supreme Court in Smith reasoned is not mandated by the RFOA defense.⁷⁴

The Commission disagrees with commenters' views that Smith means that the consideration of alternative or equally effective practices is irrelevant. Smith stated that the RFOA does not impose Title VII's "requirement" that the employer must adopt a less discriminatory alternative.⁷⁵ This statement does not mean that options or alternatives are irrelevant to the determination of reasonableness. As previously explained, the availability of options is manifestly relevant to the issue of reasonableness.⁷⁶ A chosen practice might not be reasonable if an employer knew of and ignored an equally effective option that would have had a significantly less severe impact on older workers. Whereas Title VII requires an employer to adopt an equally effective, even marginally less discriminatory alternative, an employer's choice not to use an alternative that only marginally reduces the impact might be reasonable under the ADEA.

The changes to 1625.7(e) clarify that the RFOA standard is lower than Title VII's "business necessity" standard.⁷⁷ They also clarify that the considerations relevant to the RFOA

⁷⁴ 544 U.S. at 243.

⁷⁵ 42 U.S.C. 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C) (adopting pre-Wards Cove approach to "alternative employment practice"). The RFOA standard does not require the employer to select the least discriminatory option. Smith, 544 U. S. at 243.

⁷⁶ In addition, the failure to adopt a less discriminatory alternative may be evidence of pretext under certain circumstances. Watson, 487 U.S. at 998; see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989) (refusal to adopt less discriminatory alternative "would belie a claim [that challenged] practices are being employed for nondiscriminatory reasons").

⁷⁷ 42 U.S.C. 2000e-2(k)(1)(A)(i).

determination are not required elements of the RFOA defense. These changes ensure that employers may continue to make reasonable business decisions that do not arbitrarily limit the employment opportunities of older workers.

Regulatory Procedures

Executive Orders 13563 and 12866

This final rule has been drafted and reviewed in accordance with Executive Order (“E.O.”) 13563 and E.O. 12866. Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its cost (recognizing that some benefits and costs are difficult to quantify); tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives; and select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 directs agencies to submit a regulatory impact analysis for those regulatory actions that are “economically significant” within the meaning of section 3(f)(1).⁷⁸ A regulatory action is economically significant under section 3(f)(1) if it is anticipated (1) to “[h]ave an annual effect on the economy of \$100 million or more,” or (2) to “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the

⁷⁸ Executive Order 12866 refers to “those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1).” *Id.* The Office of Management & Budget states that “Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1).” Circular A-4 (Sept. 17, 2003), available at http://www.whitehouse.gov/omb/circulars_a004_a-4.

environment, public health or safety, or State, local, or tribal governments or communities.”⁷⁹

Executive Order 13563 reaffirms the principles established by E.O. 12866, and further emphasizes the need to reduce regulatory burden to the extent feasible and permitted by law.⁸⁰

As reported in the February 2010 NPRM, the Commission determined that the rule is not economically significant under this standard, and therefore that a full regulatory impact analysis was not required. However, some comments received during the notice and comment period suggested, without specifically mentioning the Commission’s determination under E.O. 12866, that the rule would impose greater costs on regulated entities than the Commission anticipated. To ensure that regulatory burdens are minimized, the Commission reexamined its basis for determining that the rule is not economically significant in light of the comments. It concluded that the determination did not need to be changed, and that the commenters’ stated concerns about costs reflected a misunderstanding of the rule. The final rule has been revised to obviate such misunderstanding. For the record, the Commission presents its analysis of the impact of the rule on regulated entities and responds to the public comments below.

Analysis

The purpose of the rule is to help explain the implications of the Supreme Court’s decisions in Smith⁸¹ and Meacham⁸² and the type of conduct that would support an RFOA defense

⁷⁹ Exec. Order No. 12866, 58 FR 51735 (Oct. 4, 1993), available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866.pdf>.

⁸⁰ Exec. Order No. 13563, 76 FR 3821 (Jan. 21, 2011).

⁸¹ 544 U.S. 228 (2005).

⁸² 554 U.S. 84 (2008).

in court. It therefore does not require any action on the part of covered entities.⁸³ Rather, it provides assistance to covered entities regarding what they can do to ensure that their practices are based on reasonable factors other than age. The rule does not expand the coverage of the ADEA to additional employers or employees. It also does not include reporting, recordkeeping, or other requirements for compliance. Accordingly, the Commission concluded that efforts to comply with the rule will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities.

However, the Commission recognizes that some covered entities may choose to modify their business practices in light of the recent Supreme Court decisions reflected in the rule, and the provisions in the rule itself, to avoid disparate-impact liability. Therefore, in addition to determining that the rule imposes no requirements that have an economic impact, the Commission investigated whether this type of voluntary, precautionary behavior would have a significant impact on the economy.

Cost of Disparate-Impact Analyses

Because paragraph 1625.7(e)(2)(iv) of the rule states that “[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers” is relevant to the RFOA defense, some covered entities may perform additional disparate-impact analyses in

⁸³ The ADEA applies to employers with 20 or more employees, labor organizations, employment agencies, and government entities. There are approximately 639,288 businesses with 20 or more employees. United States Small Bus. Ass’n, Employer Firms, Establishments, Employment, and Annual Payroll Small Firm Class Sizes, 2007, Table in Firm Data, http://archive.sba.gov/advo/research/us_07ss.pdf (last visited Feb. 15, 2012). There are approximately 17,000 employment agencies. Am. Staffing Ass’n., Staffing FAQs, <http://www.americanstaffing.net/statistics/faqs.cfm> (last visited Feb. 15, 2012).

response to the rule. The first step of the Commission's inquiry was therefore to determine the economic consequences of performing additional analyses.

The Commission does not anticipate that this final rule will motivate large numbers of employers to perform additional disparate-impact analyses for the following reasons. First, the current regulation assumed that employers would routinely analyze job actions susceptible to disparate-impact claims for potential adverse effects on older workers, and many employers, especially larger ones, already do so. Some do so to reduce potential liability for ADEA claims; others simply wish to avoid disproportionately negative treatment of older workers.

Second, few job actions would be subject to disparate-impact analysis.⁸⁴ For example, voluntary terminations and individual terminations for cause generally will not be subject to disparate-impact analysis. Third, even actions that involve practices amenable to disparate-impact analysis do not always require such analysis to ensure that a practice is reasonable. The rule states that, to demonstrate the RFOA defense, a covered entity needs to show only that it acted as would a prudent employer mindful of the requirements of the ADEA. In many cases, a prudent employer may reasonably decide that a formal disparate-impact analysis is unnecessary, for example because --

⁸⁴ While the Commission is not aware of data on the number of job actions performed per year that may give rise to a disparate-impact claim, there is research on the number of disparate-impact cases filed in federal court under all of the employment discrimination laws. An analysis of 1788 randomly selected employment discrimination cases filed in federal court, and reported between 1987-2003, showed that only 4% raised disparate-impact claims. Laura Beth Nielsen et al., Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003 11 (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf. ADEA disparate-impact claims are only a subset of this 4%, as ADEA cases only comprised 20% of the total number of cases studied. *Id.* at 9.

- the number of affected employees is relatively small, making impact readily ascertainable without formal analysis; or
- the employer has reason to believe that the practice will not negatively impact older workers, and no employees or applicants have alleged that it would have such impact.

Further, where the covered entity determines that a disparate-impact analysis is warranted, the associated costs will generally be minimal. Larger businesses already routinely employ sophisticated methods of detecting disparate impact on the basis of race, ethnicity, or gender, and therefore already possess the expertise and resources required to analyze age data for impact. Because performing an additional analysis using these pre-existing resources takes little time, the associated costs will be minimal.

Although smaller entities may be less familiar with disparate-impact analysis, such entities are even less likely to incur costs for performing formal analyses, for two reasons. First, the average small entity's involuntary termination or other selection decisions will most often involve such a small number of employees that impact will be readily ascertainable without formal analysis. Second, where the numbers are large enough to warrant a more formal analysis, the RFOA defense only requires an entity to take steps that are reasonable under the circumstances to uncover potential impact. A small entity without many resources will likely be able to show that it acted reasonably by using the same methods it uses to detect disparate impact on the basis of race, ethnicity, or gender, which can often be carried out using free, readily available Internet tools. By conducting a web search for the term "online disparate-impact analysis calculator," a small entity may find and use an online calculator that can be easily used by lay people. This tool would enable the entity to test for adverse impact in less than 10 minutes. Additional steps to

evaluate adverse impact would be reasonable only if, in light of the circumstances and available resources, a prudent employer mindful of ADEA requirements would take such steps.

Moreover, if a small entity determines that it requires assistance to perform these or other efforts to prevent age discrimination in employment, it may rely on free outreach materials from the Commission. The Commission expects to issue free small-business-oriented guidance materials discussing this rule, including technical assistance specifically designed to instruct small entities how to perform disparate-impact analyses and interpret the results.

Cost of Taking Steps to Reduce Harm

Paragraph 1625.7(e)(2)(v) states that “[t]he degree of the harm [to older workers], 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” is relevant to the RFOA determination.

Steps to reduce harm to older individuals only become relevant to the RFOA defense where the employer knew or reasonably should have known of measures to reduce such harm while effectively achieving its stated business purpose. Again, the Commission’s analysis is limited by the paucity of data that currently exist. However, because so few job actions involve neutral employment practices that disproportionately harm older workers,⁸⁵ only a small percentage of employer decisions will even present the opportunity for employers to consider steps to reduce harm to older individuals. Of these cases, only a subset will be ones in which the employer knew or reasonably should have known of measures to reduce such harm while

⁸⁵ As previously noted, the percentage of federal employment discrimination cases raising disparate-impact claims is approximately 4%. *Id.* at 11. A review of the ADEA disparate-impact cases available on Westlaw reveals that approximately 70% failed to reach the RFOA issue altogether, because the Plaintiff could not establish impact, leaving only 1.2% of cases.

effectively achieving its stated business purpose. Thus, such considerations will be relevant only in a very small percentage of cases. Further, as stated expressly in the consideration, the determination whether steps are relevant to the RFOA defense is made in light of the burdens associated with such steps. Therefore, a business would not be required to take steps that were overly burdensome.

Cost of Instruction and Guidance

Paragraph 1625.7(e)(2)(ii) states that “[t]he 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” is relevant to the RFOA determination. Paragraph 1625.7(e)(2)(iii) states that “[t]he 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” is relevant. Therefore, the rule may motivate some employers to provide additional instruction, guidance, and training to their supervisors.

In many cases, no instruction will be required to avoid age discrimination. As noted, voluntary resignations do not raise a question of disparate impact. Even where the employment action involves application of selection or termination criteria, instruction will not always be needed. For example, instruction to avoid age-based stereotyping will be unnecessary if the selection criteria are objective.

Where instruction is needed, the associated costs will generally be de minimis. Larger employers will not incur significant costs because they already provide regular training for supervisors, including regular EEO training. Any instructions necessary to avoid age-biased

applications of selection or termination criteria may easily be incorporated into this regular training.

Smaller businesses are even less likely to incur additional training costs. Because of the small number of people involved, many layoff decisions made by small entities are relatively straightforward, making instruction unnecessary to avoid age-biased applications of employment criteria. Further, even where some instruction is appropriate, entities small in size can typically provide such instruction informally, thereby avoiding costs associated with formal training. In addition, a small business wanting help with its training, or with other efforts to reduce adverse impact on older workers, may rely on the Commission's assistance. Each year, the Commission performs a very large number of free outreach presentations for employers, human resource managers, and their counsel, as well as fee-based training sessions offered at approximately \$350. In fiscal year 2009 alone, the Commission offered 1,889 no-cost outreach events that addressed ADEA compliance, reaching more than 127,000 people, many of whom were from small businesses, and offered approximately 300 fee-based private-sector trainings that reached more than 13,000 people. In addition, the Commission expects to issue small-business-oriented guidance materials discussing the rule, as it has done in other contexts.⁸⁶

Benefits of the Rule

Under E.O. 13563, the Commission must assess not only the rule's negative effects on the economy but also its positive effects. Here again, the Commission's assessment was necessarily limited by the data that currently exist. Indeed, doing this assessment highlights the need for more focused research on the economic costs and benefits of ensuring equal employment opportunity.

⁸⁶ See, e.g., Equal Employment Opportunity Comm'n, The ADA: A Primer for Small Business, <http://www.eeoc.gov/ada/adahandbook.html>.

Nevertheless, on the basis of the general considerations below, the Commission determined that the rule will have modest positive effects on the economy.

- Providing additional instruction about how to implement employment practices in a manner that is free from age bias carries the benefit of obtaining more accurate employee evaluations. As stated in the section-by-section analysis above, research demonstrates that negative age-based stereotypes are not only harmful to older individuals but also inaccurate – a large number of empirical studies and research reviews indicate that there is a nonexistent or slightly positive relationship between job performance and older age.⁸⁷ These data suggest that taking measures to eliminate age bias in selection and termination can actually improve the employer's bottom line.
- Data show that older individuals who become unemployed have more difficulty finding a new position and tend to stay unemployed longer than younger individuals.⁸⁸ To the extent that the difficulty in finding new work is attributable to neutral practices that act as barriers to the employment of older workers, the regulation should help to reduce the rate of their unemployment and, thus, help to reduce these unique burdens on society. This effort is likely to become

⁸⁷ See supra notes 53-57.

⁸⁸ See Impact of Economy on Older Workers: Meeting of the Equal Employment Opportunity Comm'n (2010) (written testimony of William E. Spriggs, Ph.D.), available at <http://www.eeoc.gov/eeoc/meetings/11-17-10/spriggs.cfm> (citing Bureau of Lab. Statistics, Unemployed Persons by Age, Sex, Race, Hispanic or Latino Ethnicity, Marital Status, and Duration of Unemployment, <http://www.bls.gov/web/empsit/cpseea36.pdf> (last visited Mar. 12, 2011); Bureau of Lab. Statistics, Displaced Workers Summary (Aug. 26, 2010, 10:00 AM), <http://www.bls.gov/news.release/disp.nr0.htm>).

increasingly important as the Baby Boom Generation grows older, raising the number of older individuals in the workforce.⁸⁹

- Encouraging employers to avoid practices that adversely affect older workers will reduce employers' litigation costs. In a disparate-impact case, the plaintiff has the initial burden of demonstrating that the challenged practice has a disproportionately negative effect on the protected group. If an employer less frequently uses practices that have a disproportionately negative effect on older workers, older individuals will less frequently have reason to allege discrimination.
- The rule will also reduce employers' litigation costs by eliminating the considerable uncertainty left after the Supreme Court's decisions in Smith⁹⁰ and Meacham.⁹¹ Although the Court clearly held that employers asserting the RFOA defense do not need to demonstrate that the practice is a business necessity, as required by the current regulations,⁹² it did not provide guidance on the application of the RFOA standard. Because employers bear the burden of proving that their actions were based on reasonable factors other than age, they will benefit from a

⁸⁹ Id. (citing Bureau of Lab. Statistics, Employment Projections (Dec. 10, 2009, 10:00 AM), <http://www.bls.gov/news.release/ecopro.nr0.htm> (reporting that the number of persons in the labor force age 55 years and older is expected to increase by 43 percent by 2018)).

⁹⁰ 544 U.S. 228 (2005).

⁹¹ 554 U.S. 84 (2008).

⁹² See 29 CFR 1625.7(d), 46 FR 47724 (Sept. 29, 1981) (amended herein) (“When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a ‘factor other than’ age, and such practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.”).

greater ability to assess their own liability as a result of the rule, and therefore to avoid litigation.

The Commission also concludes that a wide range of qualitative, dignitary, and related intrinsic benefits must be considered. These benefits include the values identified in E.O. 13563, such as equity, human dignity, and fairness. Specifically, the qualitative benefits attributable to the final rule include but are not limited to the following:

- Reducing discrimination against older individuals promotes human dignity and self-respect, and diminishes feelings of exclusion and humiliation.
- Reducing discrimination against older individuals also yields third-party benefits such as a reduction in the prevalence of age-based stereotypes and associated stigma.
- Increased participation in the workforce by older individuals benefits both employers and coworkers in ways that may not be subject to monetary quantification, including increasing diversity, understanding, and fairness in the workplace.
- Reducing discrimination against older individuals benefits workers in general and society at large by creating less discriminatory work environments.

Public Comments

The comments suggesting that the rule will impose economic burdens were as follows:

- Six commenters stated that the rule would require employers to monitor or analyze employment decisions for adverse impact on older workers. One of these commenters stated more specifically that the rule would require employers to compare the impact of each practice on employees of every age with its impact on

employees of every other age. Another commenter thought that disparate-impact analysis would require employers to collect age information about its applicants and employees.

- Four commenters asserted that the rule would require employers to search for and evaluate alternative means of achieving their business goals. One stated more specifically that the number of alternatives that employers must evaluate under the rule is “potentially infinite.”
- One commenter asserted that the rule imposed a duty on employers to provide training, instruction, or guidance to its supervisors. Other commenters asserted that the rule required employers to provide training to supervisors in order to limit the discretion that they exercise when assessing employees subjectively, particularly with respect to factors known to be susceptible to age-based stereotypes.⁹³
- One commenter stated that the rule would require employers to hire consultants to determine whether their practices are “common business practices.”
- One commenter asserted that the rule would make it much harder for employers to win even the most frivolous of age discrimination claims at the summary judgment stage. The same commenter asserted that the rule would require litigants to engage

⁹³ Some commenters interpreted the February 2010 NPRM as asserting that employers should not assess employee qualities such as flexibility, willingness to learn, and technological skills (qualities that are often assessed subjectively). These commenters objected that the rule would deprive employers of their ability to seek out employees with these qualities, which are valuable in the workplace. The Commission does not assert that employers should not seek out employees with these qualities, or that they are not valuable. It does maintain, however, that if employers assess qualities such as flexibility, willingness to learn, and technological skills, they should take reasonable steps to ensure that the assessments are accurate and not influenced by common age-based stereotypes. Such steps may include providing an objective means of assessing the desired quality and instructing managers how to be fair in their evaluations.

in extensive discovery to determine whether each of the listed factors had been met, including whether the employer considered alternatives and whether it took steps to minimize harm to older workers.

Commission Response

The comments do not alter the Commission's conclusion that the rule will not impose unacceptable or unreasonable costs on society. As previously noted, the comments were based on a misunderstanding of the proposed rule, and the final rule was revised to obviate such misapprehension. As shown above, any costs associated with the rule will be minimal.

Response to Comments Regarding the Cost of Disparate-Impact Analyses

The comments overstate the number of disparate-impact analyses that will be performed by employers as a result of the rule. As explained above, a disparate-impact analysis is appropriate in only a small proportion of job actions, is already done by many employers pursuant to existing regulations and case law, and, even where the practice is amenable to disparate-impact analysis, such analysis is not always required to ensure that a practice is reasonable. If an impact analyses is done, neither existing law nor this regulation would require it to compare the practice's impact on individuals of every age with its impact on individuals of every other age. The RFOA defense requires only such steps as would be taken by a prudent employer mindful of the requirements of the ADEA.

The Commission disagrees with the assertion of one commenter that obtaining the required age data would be burdensome. Generally, employees' birth dates are available to employers because they are recorded in personnel files.

Response to Comments Regarding the Cost of Evaluating Alternatives

As explained above, the Commission has deleted the factor discussing the availability of other ways for the employer to achieve its stated business purpose, because commenters misunderstood the factor to mean that employers must search out every possible alternative (or, in the words of one commenter, a “potentially infinite” number of alternatives) and use the one that is least discriminatory. Of course, as also explained above, the deletion of the factor does not mean that the availability of other measures to achieve the employer’s purposes is irrelevant to the defense. Whether an employer knew or reasonably should have known of measures that would reduce harm informs the reasonableness of the employer’s choices.

Because so few job actions involve neutral employment practices that disproportionately harm older workers, only a small percentage of employer decisions will even present the opportunity for employers to consider the relative harm of various options.⁹⁴ Only a subset of these actions will be ones in which the employer knew or reasonably should have known of measures that would reduce harm to older individuals. Further, when an employer does decide to evaluate whether another option would reduce harm to older individuals, it may do so using the same low-cost methods that were described above in the discussion of the cost of disparate-impact analyses. Overall costs are therefore likely to be extremely low.

Response to Comments Regarding the Cost of Instruction and Guidance

The comments assert generally that the additional training will be burdensome. As explained in the analysis above, training costs associated with the rule will be minimal.

⁹⁴ See supra note 87.

Response to Comments Regarding the Cost of Determining Whether a Business Practice Is Common

The Commission has deleted the factor concerning whether a business practice is common from the considerations. Therefore, the Commission need not discuss the commenter's assertion that this factor requires businesses to hire consultants to determine whether their practices are common.

Response to Comments Regarding the Cost of Frivolous Litigation

The Commission disagrees with one commenter's assertion that the rule would increase employers' vulnerability to frivolous litigation or make it more difficult for employers to win against frivolous claims at the summary judgment stage. Of course, individuals may file frivolous litigation regardless of the underlying law. Further, even without the rule, determining whether a practice is based on reasonable factors other than age is a fact-specific inquiry; the commenter provided no reason to conclude that the considerations in the final rule are any more complicated than other facts relevant to the RFOA analysis. Indeed, as noted, the Commission concludes the rule is likely to reduce employers' litigation costs.

Conclusion

For the foregoing reasons, the Commission has determined that the final rule will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities.

Regulatory Flexibility Act

The purpose of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, is to ensure that statutory goals are achieved without imposing unnecessary and unjustifiable regulatory burdens on small businesses and other small entities, which may have few resources to devote to regulatory compliance. To achieve this purpose, the RFA requires federal agencies to conduct a series of analyses on proposed rules. The analyses are designed to ensure that the agency considers ways of minimizing any significant regulatory burdens imposed on small entities by the rules.

The goal of the analysis is to determine whether the proposed rule will have a significant economic impact on a substantial number of small entities. If it will, the agency must consider alternative regulatory approaches that may minimize the impact. If the rule will not have a significant impact on a substantial number of small entities, it may so certify under 5 U.S.C. 605(b).

In the February 2010 NPRM, the Commission certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities, and therefore did not include an initial regulatory flexibility analysis. Although the final rule covers a substantial number of small entities,⁹⁵ the Commission's threshold analysis indicated that, for the reasons discussed in detail in the section on Executive Order 12866 above, the costs

⁹⁵ The rule covers all employers with at least 20 employees, labor organizations, employment agencies, and state and local governments. According to 2007-based statistics from the Small Business Administration, there were 620,977 businesses with 20 or more employees and fewer than 500 employees. United States Small Bus. Ass'n, [Employer Firms, Establishments, Employment, and Annual Payroll Small Firm Class Sizes, 2007](http://archive.sba.gov/advo/research/us_07ss.pdf), Table in [Firm Data](http://archive.sba.gov/advo/research/us_07ss.pdf), http://archive.sba.gov/advo/research/us_07ss.pdf (last visited Jan. 22, 2011).

imposed by the rule generally are de minimis and therefore would not significantly impact small business.

Public Comments

Two commenters disagreed with the Commission's decision to certify the rule, and therefore requested further analysis under the RFA. One of these commenters asserted that the rule would economically impact small entities by suggesting that they keep track of alternative employment practices and the reasons for their choices, and that they give supervisors additional guidance and training. In light of these comments and the comments discussed above regarding E.O. 12866, the Commission reexamined the factual basis for its certification.

Commission Response

The comments provide no reason to alter the Commission's initial conclusion that the rule will not impose unnecessary or unjustifiable regulatory burdens on small entities. The comments did not include any factual basis for their assertions and, for reasons specifically discussed in the E.O. 12866 analysis above, the Commission has determined that small entities are unlikely to incur costs as a result of this rule.

As explained above, the rule will seldom be implicated in actions by small employers because issues of age-based disparate impact are most likely to arise in the context of mass terminations, hiring based on tests, or other practices involving significant numbers of individuals. Although there are no data available that speak specifically to this issue, the Commission estimates that the average small entity is unlikely to be involved in even one such practice. If a small employer were to engage in such a practice, moreover, the number of individuals affected is likely to be so small that impact can be ascertained without resort to formal disparate-impact analysis. If the employer wants to do such analysis, free and easy to use tools are available on the

Internet. Therefore, the Commission disagrees with the commenter that small entities will be significantly burdened by additional impact analyses performed as a result of the rule.

The Commission also disagrees that small entities will be significantly burdened by the need to keep track of alternative employment practices and the reasons for their choices. As explained above, consideration of alternative employment practices would be relevant only in a very small percentage of cases.⁹⁶ Further, if a small employer undertook a neutral practice that disproportionately harmed older workers, the determination of the reasonableness of the factor it used would be made in light of its resources. The entity's resources also inform the determination of whether it would be reasonable for it to take, or not to take, further steps to reduce harm. Therefore, small employers will not be disproportionately burdened by this aspect of the rule.

For the reasons explained above, the Commission disagrees with the commenter's assertion that small entities will be significantly burdened by additional guidance and training performed as a result of the rule. Indeed, the rule is likely to have little impact on small employers.

Conclusion

For the foregoing reasons, the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities.

⁹⁶ See supra note 94, and the accompanying text.

Paperwork Reduction Act

This final rule contains no new or revised information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

To the extent that this rule is subject to the Congressional Review Act, the Commission has complied with its requirements by submitting this final rule to Congress prior to publication in the Federal Register.

List of Subjects in 29 CFR Part 1625

Advertising, Age, Employee benefit plans, Equal employment opportunity, Retirement.

Dated: March __7__, 2012.

FOR THE COMMISSION

Jacqueline A. Berrien

Chair

For the reasons set forth in the preamble, the Equal Employment Opportunity Commission 29 CFR chapter XIV part 1625 is amended as follows:

PART 1625 — AGE DISCRIMINATION IN EMPLOYMENT ACT

1. The authority citation for part 1625 continues to read as follows:

Authority: 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary’s Order No. 10-68; Secretary’s Order No. 11-68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99-592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

Subpart A--Interpretations

2. In § 1625.7, revise paragraphs (b) through (e) to read as follows:

§ 1625.7 Differentiations based on reasonable factors other than age (RFOA).

(b) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(c) Any employment practice that adversely affects 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.” An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that allegedly causes any observed statistical disparities.

(d) Whenever the "reasonable factors other than age" defense is raised, the employer bears the burdens of production and persuasion to demonstrate the defense. The “reasonable factors other than age” provision is not available as a defense to a claim of disparate treatment.

(e)(1) 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. Whether a differentiation is based on reasonable factors other than age must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. 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.

(2) Considerations that are relevant to whether a practice is based on a reasonable factor other than age include, but are not limited to:

- (i) The extent to which the factor is related to the employer's stated business purpose;
- (ii) 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;
- (iii) 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;
- (iv) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and
- (v) 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.

(3) No specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense.

[FR Doc. 2012-5896 Filed 03/29/2012 at 8:45 am; Publication Date: 03/30/2012]