



U.S. Equal Employment Opportunity Commission

Background Information for EEOC Notice of Proposed Rulemaking on the Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967

The EEOC has approved a [Notice of Proposed Rulemaking](#) ("NPRM") on the definition of "reasonable factors other than age" ("RFOA") under the Age Discrimination in Employment Act of 1967 ("ADEA"). The EEOC welcomes comments on the proposed rule, which was published in the Federal Register on February 18, 2010. There is a 60-day comment period.

The ADEA prohibits age-based employment discrimination against individuals who are 40 or older. The law's protections apply to job applicants as well as employees. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

Why did the EEOC publish this NPRM?

This NPRM follows up on a March 2008 NPRM that the EEOC issued in light of the Supreme Court decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The *Smith* decision held that an employment practice that has a disparate impact on older workers is discriminatory unless the practice is justified by a reasonable factor other than age. The 2008 NPRM set forth the *Smith* rule and, in addition to asking for public comments on that proposed rule, asked whether our regulations should provide more information on the meaning of "reasonable factors other than age." Most commenters said that the Commission should provide such information. Accordingly, before finalizing its regulations concerning disparate impact under the ADEA, the EEOC published this NPRM concerning "RFOA."

How does the proposed rule approach the "reasonable factors other than age" defense?

The proposed rule emphasizes the need for an individualized, case-by-case approach to determining whether an employment practice is based on reasonable factors other than age. It also emphasizes that the RFOA defense applies only when an employment practice is not based on age. In addition, it provides lists of factors relevant to determining whether an employment practice is "reasonable" and whether it is based on a factor "other than age."

What is the basis for the proposed rule's definition of "reasonable factors other than age"?

The proposed rule is based on our analysis of *Smith* and *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008) (holding that the employer bears the burden of proving the RFOA defense). In addition, because neither *Smith* nor *Meacham* elaborated on the meaning of "reasonable," the proposed rule refers to tort law's interpretation of that term.

Why did the EEOC rely on tort law?

Courts have previously turned to tort law for guidance when resolving employment discrimination cases. For example, courts use a negligence standard to assess employer liability for co-worker harassment.

In addition, reasonableness is a fundamental concept of tort law. As a result, tort law offers extensive, well-developed guidance on the meaning of "reasonable."

What does the proposed rule say about "reasonable"?

The proposed rule explains that a "reasonable" factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances, both in its design and in the way it is administered. To aid in assessing whether an employment practice is based on reasonable factors other than age, the proposed regulation provides a list of factors relevant to whether a factor is reasonable.

What factors does the proposed rule say are relevant to determining whether a factor is "reasonable"?

The proposed rule lists the following factors that may be relevant to the reasonableness determination:

- whether the employment practice and the manner of its implementation are common business practices;
- the extent to which the factor is related to the employer's stated business goal;
- the extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- the severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- whether other options were available and the reasons the employer selected the option it did.

To establish the RFOA defense, must an employer prove that all of the listed factors are present?

No. It is not necessary that all factors be present in every case; the importance of various factors will vary according to the facts and circumstances of each situation. In addition, this is a non-exhaustive list, which means that an employer may present other factors relevant to whether an employment practice is reasonable.

What does the proposed rule say about "other than age"?

The proposed rule explains that the RFOA defense applies only when an employment practice is not based on age. Disparate-impact challenges typically involve practices that are based on objective, non-age factors. Sometimes, however, disparate impact results from giving supervisors unchecked authority to engage in subjective decision-making. In that case, the criteria at issue may not be distinct from age.

For example, a criterion such as "flexibility" can be subject to age-based stereotyping. Therefore, instead of asking supervisors in the abstract to rate employees based on their "flexibility," employers should provide guidance on how to measure the criterion objectively. They can do this through steps such as identifying the times that an employee was asked to perform new tasks, describing the employee's reaction to the assignments, and specifying which of the employee's skills can be used in various assignments.

What factors does the proposed rule say are relevant to determining whether a factor is "other than age"?

To aid in assessing whether an employment practice is based on a non-age factor, the proposed rule sets forth a list of factors relevant to the RFOA defense. The proposed rule lists the following factors:

- the extent to which the employer gave supervisors unchecked discretion to assess employees subjectively;
- the extent to which supervisors were asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- the extent to which supervisors were given guidance or training about how to apply the factors and avoid discrimination.

To establish the RFOA defense, must an employer prove that all of the "non-age" factors are present?

No. It is not necessary that all factors be present in every case; the importance of various factors will vary according to the facts and circumstances of each situation. In addition, this is a non-exhaustive list, which means that an employer may present other factors relevant to whether an employment practice is "other than age."

What will happen after the period for submitting public comments on the NPRM ends?

The EEOC will consider all of the public comments and make revisions in response to those comments. The Commission then will vote on a final rule covering this NPRM and the 2008 NPRM. After it is approved by the Commission, the final rule will be sent to the Office of Management and Budget pursuant to Executive Order 12866. As part of this process, the final rule will be coordinated with other federal agencies before it is published in the Federal Register.