

# Employment Practice Update

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## EEOC Issues Final Rule Amending ADEA Regulations

By Christopher B. Lunny and Angela D. Miles



On March 30, 2012, the EEOC published a [final rule](#) amending its regulation under the Age Discrimination in Employment Act (“ADEA”). The new rule, which took effect April 29, 2012, clarifies the “reasonable factor other than age” (“RFOA”) defense and its application to disparate impact claims under the ADEA.

The ADEA prohibits employment discrimination against people who are 40 years of age or older. The ADEA also prohibits facially neutral policies and practices that have the effect of harming older workers more than younger workers (i.e., policies which have a “disparate impact” on older workers such as mandatory physicals). An affirmative defense is available to employers, however, when those challenged policies are based on reasonable factors other than age.

**“... employers relying on the RFOA defense must do more than show the employment practice was not irrational or arbitrary ”**

The new rule confirms that that the plaintiff in an ADEA action bears the burden of identifying the specific employment practice responsible for the adverse impact on older workers. Once a disparate impact is demonstrated, the employer has the burden of proving the RFOA defense. The regulation defines a “reasonable factor other than age” as one that is “objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA.”

In other words, the EEOC believes employers relying on the RFOA defense must do more than show the employment practice was not irrational or arbitrary.

The rule also suggests relevant considerations to assist employers (and courts) in determining whether an employer’s policy is based on a “reasonable factor other than age.” These considerations include the extent to which:

- The factor relates to the employer’s stated business purpose;
- The factor was accurately defined and applied;
- Managers were trained on how to implement the factor and avoid discrimination;
- The employer limited decision makers’ ability to engage in purely subjective decision making;
- The employer conducted an adverse-impact analysis of its practices on older workers;
- Age-protected individuals were harmed; and
- The employer took steps to reduce the potential harm.

The failure to satisfy one or more of the factors is not dispositive and, according to the EEOC, resolution of the issue is largely dependent on the particular facts of each case. If an employee complains that an employer’s policy adversely impacts older workers, employers should consider these factors in evaluating the employee’s concerns to ensure that the challenged policy can be defended.

Employers should also take note of the EEOC’s rule reference to management training which repeats the agency’s ongoing emphasis that employers must train managers on the employer’s policies and management obligations. If you have any questions regarding the rule or the ADEA please contact our office at (850) 425-6654.



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*This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.*