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April 19, 2010

Stephen Llewellyn
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: RIN 3046-AA87

Dear Mr. Llewellyn:

We welcome the opportunity to submit written comments in response to the February 18, 2010 Federal Register notice of the Equal Employment Opportunity Commission ("EEOC") proposal to issue regulations defining the concept of a reasonable factor other than age ("RFOA") under the federal Age Discrimination in Employment Act ("ADEA").

While we commend the EEOC's stated intent to provide greater clarity to the concept of RFOA consistent with existing authorities of the United States Supreme Court, the proposed regulation appears to mark a fundamental departure from prior judicial interpretation and relevant statutory text. In light of our experience in representing employers both in litigation and in counseling contexts and speaking with several clients regarding the proposed regulations, our conclusion is that, rather than providing clarity and guidance to industry, the proposed regulation will likely engender greater confusion around the RFOA concept and thereby increase the likelihood of future litigation.

Statutory Text and Interpretation

The ADEA prohibits employers from discriminating against employees aged 40 and older on the basis of age. Like Title VII, the statute has been interpreted to prohibit both disparate treatment – *i.e.* intentional discrimination – and disparate impact – *i.e.* facially neutral employment practices that disproportionately affect older workers. In the seminal case of *Smith*

v. City of Jackson, 544 U.S. 228 (2005), the U.S. Supreme Court held that, while both statutes permit disparate impact liability, there exists a fundamental difference between the two insofar as the ADEA provides a defense to such liability where the employment practice in question is based on a RFOA, while Title VII provides a defense only where the practice is job-related and consistent with business necessity. *Compare* 29 U.S.C. § 623(f)(1) *with* 42 U.S.C. § 2000e-2(k)(1)(A).

The plaintiffs in *Smith* were senior police and public safety officers who alleged that the city's pay plan had a disparate impact on older workers because it gave proportionately larger pay increases to newer officers than to more senior officers. Older officers, who tended to hold senior positions, on average received raises that represented a smaller percentage of their salaries than did the raises given to younger officers. The city based their decision on a survey of salaries in comparable communities, which led them to raise junior officers' salaries to make them competitive with those for comparable positions in the region.

The Supreme Court rejected the plaintiffs' discrimination claims and held that the reliance on the survey of comparable communities "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers." Importantly, the Court noted that while "there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable" and that "unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement."

Approximately three years after *Smith*, the Supreme Court decided *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008), in which the Court confirmed its differentiation between the "business necessity" and RFOA standards. The Court also clarified that the burden of establishing a RFOA rests with the employer defendant.

The EEOC's Proposed Rulemaking

The Proposed Rule seeks to administratively define the concept of "reasonableness" in the context of the RFOA affirmative defense. As stated in the agency's Q&A released contemporaneously with the Notice, it is the EEOC's perspective 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."

In order to assess whether an employment practice is based on a RFOA, the Proposed Rule provides a checklist for reasonableness, including:

1. whether the employment practice and the manner of its implementation are common business practices;
2. the extent to which the factor is related to the employer's stated business goal;
3. 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);
4. the extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
5. 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
6. whether other options were available and the reasons the employer selected the option it did.

Many of the factors set forth above, in particular factors 4 through 6, which would require an employer to assess the impact of its neutral employment policy and to take "preventive or corrective steps" to minimize such impact including considering "other options," are in significant tension – if not outright conflict – with existing decisional law. In addition, these factors would impose significant burdens on employers that are not required by the ADEA.

The Proposed Regulation Is In Tension With Supreme Court Precedent

The EEOC seeks to support factors 4 through 6 through reliance on the concept of "reasonableness" as developed in common law tort theory, and the Notice is replete with citations to the Restatement of Torts. The agency also discusses the Supreme Court's analysis of reasonableness in the context of sexual harassment and the determination of whether an employer exercised "reasonable care" to prevent such conduct from occurring.

Despite these references, the conceptual tension between the EEOC's common law analysis and the statutory construct of RFOA is evident. In both common law tort theory and the sexual harassment context, reasonableness is assessed in terms of an individual's efforts ***to avoid*** a certain harm – i.e. injury to a third party or employee. Under the RFOA analysis, disparate impact as to older employees is both ***assumed*** and ***expressly permitted*** by the language of the statute. Indeed, this conceptual tension may explain why it appears that no federal court decision interpreting the RFOA provision has ever relied upon or even cited to the Restatement of Torts' analysis of the concept of reasonableness.

More importantly, the agency's bootstrapping of a common law obligation to take reasonable steps to avoid disparate impact into a statutory provision that ***expressly permits*** such phenomenon to occur is inconsistent with the Supreme Court's decisions in *Smith* and *Meacham*.

For example, in the Notice the EEOC states that, under the Proposed Rule, a reasonable employer would "investigate the reason for the result and attempt to reduce the impact to the extent appropriate to the given facts." Such an assessment – while consistent with the concept of "business necessity" – has been rejected by the Supreme Court in the context of RFOA.

The Court in *Smith* expressly stated that the RFOA affirmative defense "includes no such requirement" that an employer analyze whether there are other ways to achieve its goals that do not result in a disparate impact on older workers. Similarly, in *Meacham* the Supreme Court stated that "[r]easonableness is a justification ***categorically distinct*** from the factual condition 'because of age' and ***not necessarily correlated with it in any particular way***: a reasonable factor may lean more heavily on older workers, as against younger ones, and an unreasonable factor might do just the opposite." Clarifying the separate concepts of "impact" and "reasonableness", the Court continued stating that the RFOA enquiry "would be muddled if the value, 'reasonableness,' were to become a factor artificially boosting or discounting ... the extent of measured impact."

Despite the high court's clear admonitions, the sole footnote to the Proposed Rule quotes with approval the following from the Restatement of Torts: "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***." The Proposed Rule engages in the very "muddling" of concepts – i.e., "impact" and "reasonableness" – against which the Supreme Court warned in *Meacham*. In doing so, the Proposed Rule imposes significant burdens on employers and renders the difference between the affirmative defenses of "business necessity" in the Title VII context and RFOA in the context of the ADEA functionally indistinct.

Because the Proposed Rule is in obvious tension with both the statutory text of the ADEA and the Supreme Court's analysis of that statute, the rule will not serve the clarifying purpose the EEOC has established for this rulemaking. Accordingly, we believe the Proposed Rule should either be withdrawn or substantially revised to separate the concepts of impact and reasonableness consistent with *Smith* and *Meacham*. Failing to do so will result in additional confusion among employer- and employee-advocates as to the parameters of RFOA, thereby leading to unnecessary litigation and expense.

We appreciate the opportunity to comment on the proposal and hope that you will take our views into consideration. Should you have any questions regarding our comments we can be reached at the numbers set forth above.

Sincerely,

David R. Warner
Patrick L. Clancy