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TABLE OF CONTENTS

Unintentional Age Discrimination Claims Just Got a Bit More Complicated: The EEOC Weighs In on Reasonable Facto

By: David J. Freedman

On March 30, 2012, the United States Equal Employment Opportunity Commission ("EEOC") adopted new regulations clarifying the standard of proof in "disparate impact" claims arising under the Age Discrimination in Employment Act ("ADEA"). As you are likely aware, federal anti-discrimination laws prohibit both intentional discrimination, known as "disparate treatment," and "disparate impact," which results from facially-neutral employment practices.

In disparate impact cases, the plaintiff need not prove that the employer intentionally discriminated. Instead, the plaintiff must show that the challenged employment practice had a statistically significant impact on the protected class. Even if a plaintiff can establish such a statistical impact on older workers, the ADEA provides that the employer can still avoid liability if the challenged policy is justified by "reasonable factors other than age." This has become known as the "RFOA" defense.

The EEOC's final regulations are intended to clarify when the RFOA defense applies and feature some good news for employers. Specifically, the EEOC has affirmed that the RFOA defense is less onerous than the "business necessity" defense applicable in Title VII disparate treatment claims. And although the EEOC previously implied that an employer seeking to invoke the RFOA defense had to prove that it undertook affirmative steps to avoid age discrimination, the final regulations clarify that there are no specific guidelines that an employer must satisfy to demonstrate the RFOA defense. The final regulations, however, do endorse the following topics as "considerations relevant to whether a practice is based on a reasonable factor other than age:"- the extent to which the factor is related to the employer's stated business purpose;- the extent to which the employer accurately defined the factor and accurately applied it;- the extent to which the employer limited supervisors' discretion to assess employees subjectively;- the extent to which the employer assessed the adverse impact of its employment practice on older

workers; and
- the extent of harm, both to the individuals affected and the number of individuals affected, and any steps the employer took to lessen that harm.

But the regulations were not all positive for employers. As an initial matter, they make clear that the employer bears the burden of proving the applicability of the RFOA defense. Moreover, as the listed factors make clear, RFOA cases will involve a fairly probing examination into the employer's decision-making and administration process. And because the applicability of the RFOA defense must account for "all of the surrounding facts and circumstances," employers can expect that more disparate impact ADEA cases will proceed to a jury trial as opposed to being dismissed at the summary judgment stage.

Because of this, some commentators are predicting an uptick in ADEA disparate impact claims. Although the EEOC's regulations will make it more difficult for employers to prevail on a pretrial motion based on the defense, plaintiffs lodging disparate impact age discrimination claims still bear the burden of proving that a particular employment practice has a statistically disproportionate impact on older workers. The RFOA defense does not come into play unless the plaintiff can satisfy that burden. And because proving statistical impact is both challenging and expensive, most plaintiffs will continue shying away from disparate impact age cases. Nevertheless, there are some proactive steps that employers should undertake to ensure that they are in a position to utilize an RFOA defense should they find their employment practices challenged through an ADEA disparate impact claim. First, as always, ensure proper documentation. Employers should document the goals of their business decisions since the EEOC and courts will be delving into the rationale underlying employer decisions and the implementation of those decisions. If company or unit-wide decisions--such as a reduction-in-force--are going to be made based on performance, there should be supporting documentation for those decisions. If such decisions will be based on the possession of certain skills, there should be documentation that training regarding those skills was made available to all employees without regard to age, and if training was not made available to all employees, an explanation why this was the case. Second, consider conducting adverse impact analyses. The EEOC's regulations do not specifically require that employers undertake their own analysis, but the EEOC's regulations strongly imply that ignorance of disparate impact may undermine an RFOA defense, particularly for more sophisticated employers.

Moreover, conducting your own disparate impact analysis will go a long way towards establishing that the you took steps to avoid unintentional age discrimination, which is one of the EEOC's endorsed considerations. Third, employers should take efforts to train both executives and lower level supervisors regarding the ADEA and how to avoid disparate impact age discrimination. These final regulations became effective April 29, 2012. So the time is ripefor re-evaluating these issues.

Back To Top

All In A Day's Work -- Or Is It? Do Companies Need To Pay Employees For Their Commute Back From the Worksite A

By: Jill Sebest Welch

Clients often ask whether their employees need to be paid for the time that they spend travelling to and from various worksites at the beginning and end of the day, particularly in the construction industry. This issue was recently decided in a case we tried before a judge of the Lancaster County Court of Common Pleas in December 2011 on

behalf of a construction company.

The plaintiff in the case, a former employee, worked as a laborer for the Company, a general contractor in the construction industry. Plaintiff typically began his day by reporting to the office in the morning and punching in, when he would get the day's assignment, have a cup of coffee and a bite to eat, help load equipment onto the Company work truck, then ride with the crew to the worksite in the work truck. The travel time to these various worksites was generally no more than one hour, and was paid by the Company. At the end of the workday, Plaintiff would typically ride back to the office, punch out, and go home. This was not always the case, though -- on roughly one-third of his workdays, Plaintiff drove himself directly home from the worksite without stopping to punch out. Again, the Company paid Plaintiff for the commute time in the morning from the office to the worksite. However, the Company did not pay for the time Plaintiff spent riding from the worksite back to the office at the end of the day. In fact, important to the case, Plaintiff signed an agreement specifying that the travel time from the worksite back to the office at the end of the day is unpaid.

After Plaintiff left his employment with the Company, he filed a lawsuit seeking to recover overtime compensation for the time he spent at the end of the day riding from the worksite back to the office. He argued that he should have been paid for the trip home because (1) he was required to report to the office to punch in and out; (2) the Company work truck that he rode in carried tools and equipment necessary for the job; and (3) on the trip home, the crew occasionally stopped to empty the trash from the truck.

As we know, federal and state wage and hour laws do not require employers to pay employees for normal home to work and work to home travel: the Portal-to-Portal Act expressly excludes such time from compensation under the Fair Labor Standards Act (FLSA). **The Employment Commute Flexibility Act (ECFA) further amended the FLSA, and clarified that an employer may provide a company vehicle to an employee for travel and still take advantage of this rule that home to work and work to home travel is not compensable if (1) *the travel is within the normal commuting area for the employer's business; and (2) there is an agreement between the employer and the employee that the time is not compensable*.** Also, if the pre-shift and post-shift activities -- including the commute and those tasks employees perform prior to, during, and after the commute -- are not "integral and indispensible" to the primary duties of the employee's job, then they do not generally need to be paid. In other words, activities that are primarily undertaken for the employees' own convenience, that are not required by the employer, and that are not necessary for the performance of the employees' duties for the employer do not turn the commute into compensable work time.

All of these factors were present in this case, therefore, the Company argued that Plaintiff's travel time from the worksite at the end of the day did not need to be paid following reasons:

- The post-shift trips that Plaintiff argued should have been paid were all within the normal one-hour commuting area of the Company's office.
- Plaintiff signed an agreement that the trip from the worksite back to the office was unpaid.
- The Company did not require Plaintiff to report back to the office at the end of the day to punch out, and, in fact, Plaintiff elected not to return to the office to punch out roughly one-third of the time, without any discipline or adverse employment consequences.
- The carpool to and from the worksite was offered for Plaintiff's convenience, to save wear and tear on his vehicle,

and to save gas money, and Plaintiff could choose to drive his own vehicle to and from the worksite instead of riding as a passenger in the work truck.

• Occasionally emptying trash from the work truck on the trip home was not required by the Company and not necessary for the performance of Plaintiff's construction job, and even if it did occur (although the Company's witnesses testified that it did not), emptying trash did not make the whole return trip compensable because it took only a minute or two.

Important to this case were the lack of work-related duties that the employee performed during the "carpool" home. Following trial, the court ruled in favor of the company and found that, under these facts, Plaintiff was not entitled to be paid overtime compensation for his post-shift commute time.

Take heed that this is not a blanket exception and is not the rule in all cases. As this case demonstrates, each situation is unique and the answer to the question turns on several factors, including the nature of the written agreement with employees about paying for commute time, whether the trip is within the "normal commuting distance" of the employer, whether the employee is required to report to the office before and after work, whether the employee is driving or merely a passenger, and the extent to which any work is performed before, during, and after the commute. It also depends on the court and state that you are in. It is therefore important for companies that are considering entering into these types of commuting agreements to consult with counsel in advance.

Back To Top

Workers' Compensation: The Employers' Burden in Suspension Cases

By: Joshua L. Schwartz

When an injured worker is released to return to work in some capacity, demonstrating job availability is generally crucial to obtaining a suspension of workers compensation benefits. Intentionally or not, Claimants can and sometimes do misrepresent to judges whether and what type of work they have been offered, so a written job offer is often the key to proving an employer's case. However, there are certain circumstances under which an employer may obtain a suspension even if no jobs are available. Several recent cases elaborate on what an employer must prove to obtain a suspension.

In *Vaughn v. WCAB (Carrara Steel Erectors)*, the Court examined what an offer letter must include to sufficiently place an employee on notice of work availability. The claimant had suffered a back injury in 2005, and an independent medical examination in January 2008 resulted in specific physical restrictions. In May 2008, the employer sent a job offer letter stating that it would accommodate the doctor's restrictions. Though the offer letter did not list a job title, duties, or tasks, the Court noted that the claimant was familiar with his pre-injury job and would understand what portions of that job he could perform. Under these circumstances, an offer letter need only inform the claimant that there is work available within a physician's specific restrictions and include some accommodation language. We recommend being as specific as possible in job offer letters to eliminate a claimant's argument that he or she did not understand the work available, but the case demonstrates that it is easier to defeat this argument when the work being offered is a modified version of the pre-injury job.

An employer need not show job availability when an injured worker has "voluntarily withdrawn" from the workforce. It is the employer's burden to prove this voluntary withdrawal under the totality of the circumstances, but this can prove difficult. In *Keene v. WCAB (Ogden Corp.)*, an employer sought to suspend benefits without making work available, noting that the injured worker had not looked for work in over two years. The claimant testified that she had stopped looking for work because she became discouraged. Though the Workers' Compensation Appeal Board held that this failure to look for work indicated a voluntary withdrawal from the workforce, the Court reversed. The Court made it clear that a claimant's failure to look for work, alone, does not establish voluntary retirement; rather, unless the claimant is receiving a retirement pension or old-age benefits, it is the employer's burden to demonstrate either job availability or earning capacity, with some other affirmative evidence that the claimant has chosen not to work. The case is somewhat ironic because it appears unlikely that the claimant would have returned to work, had a job offer been made. Therefore, unless the employer truly has no available work within a claimant's restrictions, and even when an employer believes that an injured worker is unlikely to return or considers herself retired, it is generally a good idea to make a formal job offer when seeking a suspension.

On the other hand, an employer need not and typically should not make work available to undocumented workers who may be in Pennsylvania illegally. Such undocumented workers are entitled to receive workers' compensation benefits if they are injured in the course of their employment, but the employer is entitled to a suspension once the injured worker is released to modified duty without proving job availability. Moreover, if the employer knows that the injured worker is undocumented, the employer could face adverse consequences from an immigration standpoint if work is again made available. Nonetheless, the employer has to prove undocumented status to obtain a suspension: In *Kennett Square Specialties v. WCAB (Cruz)*, the employer had assumed it would be entitled to a suspension and did not present any actual evidence of the claimant's immigration status. The claimant, meanwhile, refused to testify on the subject, citing his Fifth Amendment right against self-incrimination. The Commonwealth Court held that this refusal to testify, alone, could not constitute evidence of undocumented status, so that the employer was not entitled to a suspension absent some affirmative indication that the claimant was in the state illegally.

The attorneys at Barley Snyder are available to assist in reviewing job offer letters or to discuss other matters relating to a potential suspension of benefits.

Back To Top

Storing Forms I-9 Electronically

By: Silas M. Ruiz-Steele

Employers are required to complete an I-9 form for every employee they have hired. Employers may use a paper system, an electronic system or a combination of paper and electronic systems to store Forms I-9.

For the past few years, employers have been eligible to file and store Forms I-9 electronically. As the national effort to reduce the amount of illegal immigration becomes more intense on employers, a number of software companies are now offering electronic I-9 products. Employers are starting to weigh the benefits of eliminating paper I-9s and going digital.

There are many reasons why employers favor electronic I-9s over paper-based systems. A few of the most common include:

• Most of the major vendors use web-based systems. That means employers do not have to install software and only need Internet access and a web browser.Plaintiff signed an agreement that the trip from the worksite back to the office was unpaid.

• Employees are not able to complete the Form I-9 unless the data is properly entered. Many vendors offer systems that guide workers and human resource officials through proper completion of the forms.

• Employers with employees at multiple sites can more easily monitor I-9 compliance at remote locations.

• Re-verification is automated and employers are less likely to incur liability due to an inadvertent failure to update an employee's I-9. Many systems send email reminders.

• Employers can integrate the system with E-Verify or other electronic employment verification systems in order to minimize the chances that unauthorized workers end up employed.

• An electronic I-9 system allows for the automation of the purging of Forms I-9 for employees no longer with the employer and for whom Forms I-9 must no longer be retained.

What standards must electronic I-9 systems meet

DHS regulations require I-9s generated electronically to meet set standards. A number of software products are available allowing for the electronic filing of I-9s and there are advantages to using such systems including improving accuracy in completing forms and setting up automated systems to prompt employers to re-verify I-9s for employees with temporary work authorization.

DHS regulations require I-9s that are generated electronically to meet the following standards:

• The forms must be legible when seen on a computer screen, microfiche, microfilm or when printed on paper.

• The name, content and order of data must not be altered from the paper version of the form.

• There are reasonable controls to ensure the accuracy and reliability of the electronic generation or storage system.

• There are reasonable controls designed to prevent and detect the unauthorized or accidental creation, deletion or deterioration of stored Forms I-9.

• The software must have an indexing system allowing for searches by any field.

• There must be the ability to reproduce legible hardcopies.

• The software must not be subject to any agreement that would limit or restrict access to and use of the electronic generation system by a government agency on the premises of the employer or recruiter.

Whether you wish to go green, save money or improve efficiency, employers that are considering transitioning from paper Forms I-9 to an electronic I-9 system need to be aware that the decision involves potential issues including legal liability, document security and cost. Our knowledge of the regulatory electronic I-9 requirements and our experience with the DHS I-9 regulations allow us to assist you in making the best decision how to complete and store Forms I-9 for your company and employees. To discuss your options and learn how Barley Snyder may be able to assist you with an electronic I-9 system, contact Attorney Silas Ruiz-Steele at 610-898-7153

Back To Top