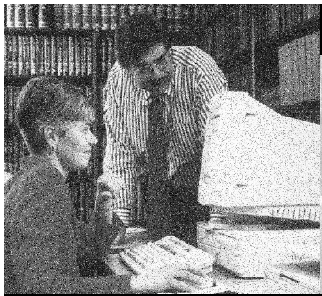
Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.



EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management   June 2025

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Age Discrimination Can Be Proven Statistically (Within Limits), Supreme Court Rules

In recent years, there has been a difference of opinion among federal courts about whether age discrimination can be proven solely by the use of statistical information. In other words, some courts have held that if an employment decision adversely effects a disproportionate number of older workers (in comparison to younger workers), the employment decision is automatically deemed to be unlawful age discrimination under the Age Discrimination in Employment Act (ADEA). This is known as the "disparate impact" theory of discrimination. Other courts have held that this theory only applies to claims under Title VII of the Civil Rights Act of 1964 (e.g., discrimination on the basis of race, gender, religion, national origin, etc.) but not to ADEA claims. The U.S. Supreme Court has now settled this disagreement by holding that while disparate impact analysis **does** apply to the ADEA, it is more limited in scope than it would be for race, sex or other types of discrimination under Title VII. *Smith v. City of Jackson, Mississippi,* __ U. S. __ (March 30, 2005). Specifically, the Court ruled that the disparate impact analysis for an age case is limited by the right of the employer to show that the statistically disproportionate impact on older workers was based on "reasonable factors other than age" (RFOA).

The bottom line is ...

In light of this case, employers should review their policies, practices and procedures that may negatively impact older workers, and be able to demonstrate (through documentation) that they are based upon "reasonable factors other than age."

Facts

In *Smith*, the City of Jackson, Mississippi negotiated salary increases for its police officers which gave larger percentage raises to officers with five or fewer years of service. The stated reason was to make starting salaries more competitive with other police forces in the region. Older officers sued, claiming this constituted "disparate impact" discrimination because most officers with fewer than five years service were under the age of 40.

ADEA Similar to Title VII

The Court first examined the history of the ADEA and found that many of its provisions are identical to those of Title VII, with the mere substitution of the word "age" for "race, color," etc. The Court noted that when Congress uses the same language in two statutes having similar purposes (particularly when one is enacted shortly after the other, as was the case here), it is appropriate to presume that Congress intended that the two statutes have the same meaning. The provisions of both laws specifically prohibit employment actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's ..." race or age. In the context of Title VII, it has long been settled that discrimination can be proven statistically, based on this language. Since the ADEA was derived from Title VII, the Court held that discrimination can be proven statistically for age, as well.

ADEA Different in One Key Way

However, even though both statutes authorize recovery on a disparate-impact theory, the

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Age Discrimination Can Be Proven Statistically (Within Limits), Supreme Court Rules (continued)

scope of disparate-impact liability under ADEA is narrower than under Title VII because Congress included another provision in the ADEA which does not appear in Title VII. Specifically, the ADEA includes a qualifier on an employer's liability for disparate impact where "...where the differentiation is based on reasonable factors other than age discrimination … ." The Court stated:

> It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable."

Turning to the case before it, the Court noted that older workers who brought the case (the Petitioners) did little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They did not identify any specific test, requirement, or practice within the pay plan that had an adverse impact on older workers. It was not enough to simply allege that there was a disparate impact on older workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.

After discussing in greater detail the provisions of the pay plan at issue, the Court found that the Petitioners' evidence established two principal facts: (1) almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did; and, (2) the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority. Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

Based on all of this, the Court concluded that reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. The court noted:

> In sum, we hold that the 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 factor other than age" that responded to the City's legitimate goal of retaining police officers.

In light of this case, employers should review their policies, practices and procedures that may negatively impact older workers, and be able to demonstrate (through documentation) that they are based upon "reasonable factors other than age."

IRS Permits "Late" Reimbursements under Flex Spending Arrangements

Last month, the Treasury Department and the Internal Revenue Service (IRS) amended their prior regulations to allow employers to modify Flexible Spending Arrangements (FSAs) to extend the deadline for reimbursement of health and dependent care expenses up to 2½ months after the end of the plan year. (See IRS Notice 2005-42.) Previously, employees were required to "use-or-lose" FSA funds by the end of the year. Under the old rules, any unspent funds at year's end would be forfeited.

Specifically, the rule that an FSA could not defer the receipt of compensation (as set out in Proposed Treasury Regulations §§ 1.125-1 and 1.125-2) was modified, in part, as follows:

> A cafeteria plan document may, at the employer's option, be amended to provide for a grace period immediately following the end of each plan year. The grace period must apply to all participants in the cafeteria plan. Expenses for qualified benefits incurred during the grace period may be paid or reimbursed from benefits or contributions remaining unused at the end of the immediately preceding plan year. The grace period must not extend beyond the fifteenth day of the third calendar month after the end of the immediately preceding plan year to which it relates (i.e., "the 2 and 1/2 month rule"). If a cafeteria plan document is amended to include a grace period, a participant who has unused benefits or contributions relating to a particular qualified benefit from the immediately preceding plan year, and who incurs expenses for that same qualified benefit during the grace period, may be paid or reimbursed for those expenses from the unused benefits or contributions as if

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IRS Permits "Late" Reimbursements under Flex Spending Arrangements

the expenses had been incurred in the immediately preceding plan year. The effect of the grace period is that the participant may have as long as 14 months and 15 days (the 12 months in the current cafeteria plan year plus the grace period) to use the benefits or contributions for a plan year before those amounts are "forfeited" under the "use-it-or-lose-it" rule.

An employer may adopt a grace period as authorized in the IRS notice for the current cafeteria plan year (and subsequent cafeteria plan years) by amending the cafeteria plan document before the end of the current plan year.

The new rule as set forth in the IRS notice can be illustrated by the following example: An employer with a cafeteria plan year ending on December 31, 2005, amended the plan document before the end of the plan year to permit a grace period which allows all participants to apply unused benefits or contributions remaining at the end of the plan year to qualified benefits incurred during the grace period immediately following that plan year. The grace period adopted by the employer ends on the fifteenth day of the third calendar month after the end of the plan year (March 15, 2006 for the plan year ending December 31, 2005). Employee X timely elected salary reduction of $1,000 for a health FSA for the plan year ending December 31, 2005. As of December 31, 2005, X has $200 remaining unused in his health FSA. X timely elected salary reduction for a health FSA of $1,500 for the plan year ending December 31, 2006. During the grace period from January 1 through March 15, 2006, X incurs $300 of unreimbursed medical expenses (as defined in § 213(d)). The unused $200 from the plan year ending December 31, 2005 is applied to pay or reimburse $200 of X's $300 of medical expenses incurred during the grace period. Therefore, as of March 16, 2006, X has no unused benefits or contributions remaining for the plan year ending December 31, 2005. The remaining $100 of medical expenses incurred between January 1 and March 15, 2006 is paid or reimbursed from X's health FSA for the plan year ending December 31, 2006. As of March 16, 2006, X has $1,400 remaining in the health FSA for the plan year ending December 31, 2006.

If you have any questions regarding this change in IRS regulations, please contact Michael Dodd of our office at 315-437-7600.

What To Do When the Government's At The Door

At our law firm's most recent "Breakfast Briefing", Attorneys Nick Fiorenza and Mike Dodd gave a presentation entitled "The Government is at the Door: What to do When You Are Audited or Inspected." The following are some of the tips given to Briefing participants about what to do when they become the subject of a government audit or inspection:

- **Be prepared.** Do your own audit. Find out where your company is not in compliance before the government does, and correct the problem.

- **Designate an "inspection supervisor."** This person should be trained in company policies/procedures and the company's legal rights. This individual will be expected to guide the inspector through the company.

- **Examine the inspector's credentials.** Be sure to get his/her name, job title, agency, badge number or driver's license. Generally speaking, if the individual suggests products or selling anything, he/she is probably not a government inspector.

- **Comply with any valid warrant or subpoena.** Ask for an opportunity to fax it to an attorney for review. If you are not allowed to, note it (take lots of notes) but do not prevent the inspector from proceeding. If the inspector has no warrant or subpoena, you may deny him/her access, but the inspector will likely be back with a warrant to do an even broader inspection than before. Generally, only deny access after consultation with an attorney.

- **Stay with the inspector.** The inspection supervisor and/or attorney should always accompany the inspector. Take notes about what the inspector views, questions asked, employees talked to, etc. Take photos and/or video of what the inspector photographs or videotapes.

If you would like to know more about what your company should do in the event of an audit/inspection, call us at 315-437-7600.

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 8 AM to 9 AM (with check-in at 7:45 AM) at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
June 9, 2005	Responding to Employee Harassment Complaints
September 8, 2005	You Can't Ask That! Employer's Guide Pre-Employment Inquiries
October 13, 2005	Drugs and Alcohol in the Workplace: The Employer's Dilemma
November 10, 2005	Employment Offer Letters and Contracts: Read Between the Lines
December 8, 2005	Employment Law: The Year in Review

HR Administration and Training Services

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- A comprehensive audit of your HR policies, practices and procedures.
- Advice for complying with employment laws.
- More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/supervisors, including:

- Minimizing the Risk of Employment Litigation
- Preventing Workplace Harassment
- Leadership and Influence
- Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

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