

ON THE DEFENSIVE

Employers face added burdens due to recent U. S. Supreme Court ruling that closes age-discrimination loophole

As you may have read, the U.S. Supreme Court just increased the cost and burden on employers to defend age discrimination cases. Today's question: What does this mean in practical terms for local companies?

On June 19, the Court's Knolls Atomic Power decision held that when older workers are disproportionately impacted by an adverse employment decision, the employer now bears the burden to prove a reasonable factor other than age for the company's actions. The reasoning and result come as no real surprise — but the decision closes an evidentiary loophole in the employer defense arsenal.

Like it or not, companies now need to take even greater pains to document termination decisions to protect against the threat of future litigation.

The Age Discrimination in Employment Act of 1967, or ADEA, was enacted out of concern that older workers were being deprived of employment opportunities as a result of inaccurate stereotypes. At a high level, the ADEA — which applies to companies with 20 or more employees, and protects employees and job-seekers 40 and older — prohibits age-based discrimination in any hiring, firing, promotion, layoff, compensation, benefits, job assignments and training. It also prohibits retaliation against employees for opposing discriminatory practices or for filing or participating in an ADEA proceeding.

The ADEA prohibits intentional discrimination based upon age, which is known as "disparate treatment." In 2005, the U.S. Supreme Court expanded the scope of the ADEA to also apply to "disparate impact" cases. Under these cases, a worker only needs to show that employment policies or practices that appear to be neutral at face value had a disproportionately adverse impact on older employees. These are troublesome cases for employers because of the myriad of innocent causes that may lead to statistical imbalances.



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Age discrimination prohibitions are, however, subject to certain exceptions. These exceptions include cases where age is a bona fide occupational qualification, known as a BFOQ, reasonably necessary to the normal operation of the particular business, and where the decision is based on reasonable factors other than age.

Under prior law, it was the employee's burden to prove that the employer's reasonable factors other than age justification was unreasonable. Under BFOQ cases, however, it was the employer's burden to prove the defense. The net effect of this discrepancy was to place a high burden on the plaintiff in RFOA cases to prove the unreasonable nature of the employer's position.

Shifting the standard

Last week, the Knolls Court, in a 7-1 ruling, said that when older workers are disproportionately impacted by an employment decision, the employer now bears the burden of proving that there was a reasonable explanation other than age for the company's action. The basis for this decision was a matter of legislative construction and consistency. The Court reviewed the text and structure of the ADEA and found it impossible to imagine that the RFOA clause worked differently from the BFOQ clause next to it.

Whether this decision will encourage preemptive suits or will provide incentive to plaintiffs with marginal cases to file in court remains to be seen. There is no denying, however, that requiring employers to persuade juries that their choices are reasonable will make it harder and costlier to defend these types of cases.

PRACTICE POINTS

- **Ask first, then shoot:** Review adverse employment decisions before acting upon them.
- **Examine the demographic impact of the decision:**
 - What's the impact on the employee or on all employees over 40?
 - If the impact is disproportionate, ask why.
 - What is the business reason? Is it accurate, reasonable and supportable?
- **Record the business basis for the decision, and maintain the records for an appropriate amount of time:**
 - Keep all personnel records for one year
 - Retain payroll records for three years
- **In termination cases,** consider making severance payments in exchange for ADEA release agreements — and have counsel review these agreements.

Without question, forward-looking employers should review and modify as necessary their framework for analyzing employment decisions and their record-keeping practices in light of this decision.

What should companies do? First and foremost, incur the time and trouble to have a second set of eyes review any adverse employment decision before it is announced. In fact, if the decision impacts more than one employee, you should consider a third set.

Ask yourself, what is the impact on employees over 40? Is it disproportionate? If so, why? Is there a solid, supportable business reason for the decision?

The more reasonable the employer's "factor other than age" is, the shorter the step to prove the merits of its defense.

The Knolls Atomic Power decision should send a reminder to employers to carefully consider and review its employment decisions. Forewarned is forearmed.

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