



U.S. Equal Employment Opportunity Commission

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## Questions and Answers on EEOC Final Rule on Disparate Impact and “Reasonable Factors Other Than Age” Under the Age Discrimination in Employment Act of 1967

The following questions and answers explain the EEOC’s [final rule concerning Disparate Impact and Reasonable Factors Other Than Age \(RFOA\)](#).

### **1. What are the purposes of the ADEA related to this rule?**

The purpose of the ADEA is to prohibit employment discrimination against people who are 40 years of age or older. Congress enacted the ADEA in 1967 because of its concern that older workers were disadvantaged in retaining and regaining employment. The ADEA also addressed concerns that older workers were barred from employment by some common employment practices that were not intended to exclude older workers, but that had the effect of doing so and were unrelated to job performance.

### **2. What does the ADEA do?**

It prohibits discrimination against workers because of their older age with respect to any aspect of employment. In addition to prohibiting intentional discrimination against older workers (known as “disparate treatment”), the ADEA prohibits practices that, although facially neutral with regard to age, have the effect of harming older workers more than younger workers (known as “disparate impact”), unless the employer can show that the practice is based on an RFOA. **This rule concerns only disparate impact discrimination and the Reasonable Factors Other than Age defense** to such claims.

### **3. What is the purpose of the rule?**

The rule responds to two Supreme Court decisions<sup>[1]</sup> in which the Court criticized one part of the Commission’s existing ADEA regulations. The Court upheld EEOC’s longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the regulations which said that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a “business necessity.”<sup>[2]</sup> The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA. The Court also said that the RFOA defense is easier to prove than the business necessity defense but did not otherwise explain RFOA.

The rule does two things:

- It makes the existing regulation consistent with the Supreme Court’s holding that the defense to an ADEA disparate impact claim is RFOA, and not business necessity; and
- It explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

### **4. Who is required to follow the rule?**

The rule applies to all private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations. Although the ADEA applies to the federal government as an employer, the rule does not apply to federal employers by virtue of section 633a(f) of the ADEA.

### **5. Does the rule apply to all employment practices?**

No. The rule applies to only a few kinds of employment practices. Specifically, it applies only to practices that are **neutral** on their face, that **might harm older workers** more than younger workers, and that apply to **groups** of people. For instance, it applies to tests used to screen employees or to some procedures used to identify persons to be laid off in a broad reduction-in-force (“RIF”).

### **6. When does an employer have to show that its practice was based on an RFOA?**

An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and established that the practice harmed older workers substantially more than younger workers.

**7. Do other statutory defenses apply to disparate impact claims?**

RFOA is the standard defense to ADEA impact claims. The final rule revises section 1625.7 of the regulations, which only addresses the RFOA defense, and does not change other regulatory sections that apply to the ADEA’s other affirmative defenses.<sup>[3]</sup> However, the rule does not preclude an employer from asserting another statutory provision in response to a particular claim. For example, if an employee alleged that a practice required by a seniority system had a disparate impact, the employer could defend the claim by relying on section 4(f)(2) of the ADEA, which precludes using disparate impact analysis to challenge the provisions of a seniority system.

**8. What determines whether an employment practice is based on Reasonable Factors Other than Age?**

An employment practice is based on an RFOA when it was **reasonably designed and administered to achieve a legitimate business purpose** in light of the circumstances, including its potential harm to older workers.

**Example 1:**

If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department’s actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.

The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It includes the following list of **considerations relevant to assessing reasonableness**:

- The extent to which the factor is related to the employer’s **stated business purpose**;
- The extent to which the employer **defined the factor accurately** and **applied the factor fairly and accurately**, including the extent to which managers and supervisors were **given guidance or training** about how to apply the factor and avoid discrimination;
- The extent to which the employer **limited supervisors’ discretion** to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer **assessed the adverse impact** of its employment practice on older workers; and
- The **degree of the harm to individuals within the protected age group**, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer **took steps to reduce the harm**, in light of the burden of undertaking such steps.

**9. Must employers show that they used each of the considerations listed in the EEOC’s regulation to establish the defense?**

No. The considerations merely describe the most common characteristics of reasonable practices. The rule makes clear that the defense could be established absent one or more of the considerations, and that there could even be a situation in which the defense is met absent any of the considerations. Similarly, the defense is not automatically established merely because one or more of the considerations are present.

**10. Consideration 1625.7(e)(2)(i) refers to the extent to which the factor is related to the employer’s stated business purpose. What is a “stated business purpose”?**

The “stated business purpose” is the business reason articulated by the employer for adopting, or implementing, the employment practice in question. “Stated” does not mean that the purpose must be written.

Note that **consideration 1625.7(e)(2)(i) focuses on the method that the employer used to achieve its purpose, rather than the purpose itself**. For example, if a police department is concerned about losing its employees to neighboring departments and decides to raise police officer salaries to match those in surrounding communities, the goal of retaining officers is not relevant to the determination of reasonableness. On the other hand, the extent to which the chosen method (raising salaries for certain employees) relates to the purpose (retaining staff) is relevant to the determination of reasonableness.

**11. Consideration 1625.7(e)(2)(ii) is “[t]he extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination.” How would an employer show that it defined and applied the factor fairly and accurately?**

The extent to which the employer defined and applied the factor fairly and accurately refers to the steps the employer took to make sure that the practice was **designed and applied to achieve the employer’s intended goal while taking into account potential harm to older workers**. The following examples illustrate the point:

**Example 2:**

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

**Example 3:**

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer’s stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in Example 2, above.

**12. Does considering the extent to which the employer defined and applied the factor fairly and accurately mean that an employer must validate a test or other selection criterion as it would under Title VII?**

No. If a particular employment practice disproportionately harms applicants or employees based on race, color, religion, sex, or national origin, Title VII requires the employer to demonstrate that the practice is “job related for the position in question” and “consistent with business necessity.” For example:

- Title VII’s business necessity defense would typically require an employer that gave a physical fitness test that disproportionately excluded women to produce a validation study in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, showing that the test accurately measures safe and efficient job performance.
- In contrast, the ADEA’s RFOA defense does not require employers to formally validate tests or other selection criteria. Instead, **employers are required to demonstrate only that their choices were reasonable**. The extent to which a practice measures skills related to a job informs the reasonableness of the practice.

**13. Does the reference in consideration 1625.7(e)(2)(ii) to “the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination” require employers to train their supervisors or provide a certain type of training?**

No. As noted, the considerations are not requirements, and many employer practices will necessitate little, if any, guidance. However, showing that it provided guidance or training in appropriate circumstances will help the employer establish that its actions were reasonable.

Moreover, the rule’s reference to “guidance or training” recognizes that the manner in which employers convey their expectations to managers will vary depending on the circumstances. For example, a smaller employer might reasonably rely entirely on brief, informal, oral instruction.

**14. Consideration 1625.7(e)(2)(iii) is “[t]he extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes.” Does this consideration mean that it is unreasonable to use subjective decisionmaking?**

No. In many cases, it may be crucial for an employer to assess employee or applicant qualities such as flexibility and willingness to learn -- qualities that are often assessed subjectively. The rule does not say that employers may not seek these qualities in its workforce, or that they are not valuable.

However, consideration 1625.7(e)(2)(iii) does recognize that giving supervisors unconstrained discretion to evaluate employees or applicants using subjective criteria may result in disproportionate harm to older workers, because it allows supervisors’ biases and stereotypes to infect the decisionmaking. Therefore, it is particularly useful to provide guidance when asking supervisors to evaluate subjective criteria that are subject to age-based stereotypes, such as productivity, flexibility, willingness to learn, and technological skills. For example, an employer that wants its supervisors to evaluate technological skills might attempt to reduce possible harm to older workers by instructing managers to look specifically at objective measures of the specific skills that are actually used on the job.

**15. Consideration 1625.7(e)(2)(iv) is “[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers.” Does this consideration require an employer to perform an adverse impact analysis of its employment practices?**

No. The extent to which the employer assessed the adverse impact of its employment practice on older workers is simply one way of determining whether the employer considered the potential harm to older workers.

In many cases, the employer will not need to assess whether the practice disproportionately harmed older workers, because the practice is not a neutral practice that affects more than one person. For example, terminations for cause and voluntary separations generally are not the kinds of neutral practices that could have a disparate impact.

Where an **assessment of impact** is warranted, **the appropriate method will depend on the circumstances**, including the **employer’s resources** and the **number of employees affected** by the practice. For example, a large employer that routinely uses sophisticated software to monitor its practices for race- and sex-based disparate impact may be acting unreasonably if it does not similarly monitor for age-based impact. Other employers, lacking the resources or expertise to perform sophisticated monitoring, may show that they acted reasonably by using informal methods of assessing impact.

**16. Consideration 1625.7(e)(2)(v) is “[t]he degree of harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.” What does the consideration require?**

Again, this is a consideration, not a requirement. The consideration reflects the fact that an employer can increase its ability to defend against a claim of age-based disparate impact if it can show that it **balanced the potential harm to older workers** against the **cost and difficulty** of taking steps that would still accomplish its business goal but reduce the harm on older workers.

For instance, where the impact of an employment practice on older workers is minimal, the fact that an employer failed to take multiple steps to reduce harm would not mean that its chosen method is unreasonable. However, the greater the potential harm, the more likely that an employer would be expected to avail itself of available options that would reduce the harm without unduly burdening the business.

**17. Does consideration 1625.7(e)(2)(v) require an employer to search for and use the least discriminatory method for achieving its purpose?**

No. The rule does **not** require an employer to search for options and use the one that has the least severe impact on older individuals. However, an employer’s efforts to reduce the harm to older individuals are not irrelevant. There may be circumstances in which the employer knew, or should have known, of a way to noticeably reduce harm to older workers without sacrificing cost or effectiveness; in these circumstances, it could be unreasonable for the employer to fail to use such an option.

**18. Must an employer keep special documentation to prove that it reasonably designed and administered the practice to achieve a legitimate business purpose in light of potential harm to older workers?**

No. If disparate impact is established, the employer can support an RFOA defense with **evidence** that would be admissible in court, including testimony. The rule does not change existing recordkeeping requirements under the ADEA (see 29 C.F.R. Part 1627); it does not require, and should not prompt, documentation other than that which an employer would make as part of its normal business operations. However, being able to document the reasons for the design and administration of a practice can help an employer establish the RFOA defense.

[1] Smith v. City of Jackson, 544 U.S. 228 (2005); Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008).

[2] “Business necessity” is the defense to a claim of disparate impact under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[3] See, e.g., 29 C.F.R. §§ 1625.6 (BFOQ), 1625.8 (seniority systems), 1625.10 (employee benefit plans).