

# DISPARATE IMPACT AND THE ADEA

## A SUMMARY OF OLDER WORKERS' CLAIMS OF UNINTENTIONAL EMPLOYMENT Discrimination

**By: Gary S. Kessler and Phil McNicholas**

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In the U.S., employees and candidates for employment may only be evaluated for employment decisions (*e.g.*, hirings, firings, promotions) based on their ability to perform job-related duties. Congress has prohibited employers from considering immutable factors like race, gender, and age while making employment decisions. Most Americans know that intentional employment discrimination creates liability for an employer. This accountability is maintained through proceedings known as “disparate treatment” claims in which an employee charges an employer with discrimination and then has to prove that the employer overtly discriminated. In addition to disparate treatment claims, demographic groups, which Congress has deemed “protected,” like racial minorities, females and older workers, are also authorized to file claims against employers for unintentional discrimination. Disparate Impact Claims of unintentional discrimination, known as “disparate impact,” use statistical evidence to demonstrate that a protected trait factored into an employer’s decision-making — either consciously or subconsciously — even without any objective evidence of discriminatory intent. If a protected worker can show that an employer used a specific employment policy or practice within the decision-making process, which resulted in members of a protected class being less successful than unprotected workers (*i.e.*, “adversely impacted”), the employer may be liable for discrimination. In this article, the elements of a disparate impact claim by older workers are explored. Congress created protection for older workers from employment discrimination by enacting the Age Discrimination in Employment Act (ADEA). ADEA disparate impact claims are unique because ADEA claimants face tougher hurdles to prove disparate impact than members of other protected classes. Older workers are not as protected under the Supreme Court’s interpretation of the ADEA as classes protected by Title VII (*e.g.*, race, national origin, gender). The Supreme Court has conceded that age is a trait that in some instances may actually affect quality of work performance, so claims for unintentional discrimination are more highly scrutinized.

### **Element #1: Identify a Specific Employment Policy Or Practice That Led to Adverse Impact**

The first element of a successful disparate impact claim under the ADEA requires identifying the specific policy or practice used by an employer in making employment decisions that allowed for adverse impact on older workers. A claimant cannot merely assert that older workers were less successful as a result of the employment decisions, but must discern the particular policy or practice used by the employer that permitted age to become an illicit factor in the decision-making. Generally, an older worker cannot simply claim that employment decisions alone produced an adverse impact on older workers. A policy or practice within the employment decisions that caused the adverse impact must be identified. Additionally, a claimant cannot simply challenge the policy or practice of using subjectivity in decision-making. A claimant must identify a specific policy or practice within the process, to provide the employer a chance to defend the policy or practice as reasonable, notwithstanding the adverse impact it caused on older workers.

## **Element #2: Demonstrate That Older Workers Were Adversely Impacted by the Employment Decisions**

Once a specific employment policy or practice has been identified, a claimant must demonstrate that older individuals were treated substantially less favorably than their younger counterparts. A claimant will need to use statistics and compare how older workers and younger workers were selected in the employment decisions to demonstrate a significant difference in impact. Different courts require varying levels of adverse impact in order to hold an employer liable. Some courts consider the “four-fifths rule” as set forth by the Equal Employment Opportunity Commission (EEOC), which requires that the percentage of protected workers who are hired (or survive a negative employment decision) is less than four-fifths of the percentage of unprotected workers who are hired or survive. Other courts focus on the “two standard deviations” test, which requires that a statistical analysis (*e.g.*, binomial, hypergeometric, chi-square) be performed and that the results for protected workers are at least two standard deviations worse than unprotected workers. Claimants should review case law from their courts to determine what type of analysis is favored by that jurisdiction. One habitual point of contention regarding statistical demonstration of adverse impact is what group of older and younger individuals should be compared. For instance, if a claimant challenges an employer’s hiring process, statistical experts must choose whether to compare hiring rates among all work-eligible individuals in the surrounding region, just individuals who actually applied for positions, or other possible groupings. A court will ultimately decide which comparison is more relevant.

## **Element #3: Isolate a Policy Or Practice As the Cause of Adverse Impact**

After an ADEA claimant has identified a policy or practice that was the source of adverse impact and demonstrated that older workers were adversely impacted by employment decisions, the claimant must meet a causation burden by proving that the adverse impact is traceable to the challenged policy or practice as opposed to other components of the employment decision-making process. Courts use this element to ensure that a claimant has accurately identified the component of the decision-making process which led to adverse impact. To isolate a policy or practice and show causation of adverse impact, statistical experts are typically engaged. Statisticians will analyze available data to deduce whether an identified policy or practice can be conclusively demonstrated as the unique cause of adverse impact. Often, statistical experts use correlation and regression analyses to demonstrate that age was illicitly permitted to become a factor in employment decisions. Correlation analyses can indicate a relationship between a factor like age and a particular result (*e.g.*, termination, promotion, hiring). Correlation can demonstrate a relationship like “an increase in age tends to increase termination rate,” which at a statistically significant level may be concluded as not merely coincidental. Statisticians must then perform regression analyses in order to rule out the possibility of correlation between age and results being caused by the influence of other legitimate factors. Regression analyses provide that next step by isolating a particular factor from the influence of other factors to demonstrate whether the factor not only correlates with a particular result but causes or predicts that result. For example, if age maintains its correlation with negative employment decisions when other potential influencing factors are “regressed,” then age is an independent predictor of termination and has definitively and illicitly factored into employment decisions.

## **Employers’ Defense ‘Reasonable Factors Other Than Age’ Were Used**

Assuming a claimant has been able to prove all three *prima facie* elements of a disparate impact claim under the ADEA, an employer still has the opportunity to defend its policy or practice by establishing that “reasonable factors other than age” (RFOA) were used and age was only an incidental factor that caused adverse impact. In other words, an employer can still “confess and avoid” liability by proving that even though older workers were impacted adversely, the decision to use the employment policy or practice in making employment decisions was reasonable. An employer carries the burdens of proof and

persuasion regarding an RFOA defense. An employer does not need to prove that the least discriminatory means were used to attain the legitimate goals of the employment decisions, but only that the policy or practice used was objectively reasonable. A claimant may respond to an employer's suggested RFOA defense by submitting evidence that opposes the employer's contention of reasonableness. It is insufficient for a claimant to show only that other less discriminatory practices were available — rather, a claimant should respond with evidence that the practice selected by the employer was unreasonable and, therefore, the employer should have selected different means for achieving its employment goals. If a claimant provides sufficient evidence to dispute reasonableness, a fact issue exists that can only be settled by a jury.

*Example* Assume Company X decides it needs to execute a reduction-in-force (RIF) because of low revenues. Company X makes its termination decisions based on multiple factors, including individual interviews with management, past performance ratings, and 5k run times. John, an older worker fired in the RIF, asserts a disparate impact claim under the ADEA against Company X. First, John must identify the particular practice that caused the adverse impact. John could assert that considering 5k times — a facially neutral policy that does not overtly discriminate against older workers — caused older employees to be fired at a higher rate than younger employees. Next, John would need to demonstrate that older workers were more frequently terminated in the RIF than younger employees. John could demonstrate this by hiring a statistical expert to select comparison groups and then use the four-fifths rule, two standard deviation techniques, or other statistical techniques accepted by the court where John filed suit. John would then be charged with isolating Company X's policy of considering 5k run times as the true cause of adverse impact on older employees. This step requires statistically separating 5k run times from other potential causes like interviews and work performance. A statistical expert would likely perform analyses that show other possible causes of adverse impact did not in fact affect the rate at which older workers were terminated, while age negatively impacted an employee's ability to meet required 5k times. Finally, Company X is given the opportunity to confess and avoid by showing that it was reasonable to consider 5k run times when making termination decisions. If running or physical conditioning is an important part of Company X employees' duties, and 5k run times were used to establish a minimum standard for performing work duties, then this factor could be reasonable regardless of its effect on older workers. Company X could avoid liability in spite of John's *prima facie* case of age discrimination. However, if consideration of 5k times is declared unreasonable (e.g., if Company X is a law firm), then Company X will be held liable for age discrimination.

### **Current Trend Recent Supreme**

Court decisions have made ADEA disparate impact claims increasingly difficult for claimants to prove. Courts have enforced stricter standards for identification and isolation of a specific policy or practice and have been reluctant to permit challenges of generalized policies or practices. Also, even when a *prima facie* case has been established, courts have been quick to grant employers RFOA defenses. These recent results have spurred debates among academics as to whether it has become too difficult for older workers to form productive ADEA disparate impact claims. While courts must be careful not to force employers to retain or hire unqualified older workers just to avoid liability, they must also prevent enabling employers to disguise age discrimination so easily and evade liability. Legislation has been proposed in recent sessions of Congress, which would minimize the differences between burdens for ADEA disparate impact claims and Title VII disparate impact claim. Up to this point, none of these proposals have been enacted. However, if the scope of federal protection for older workers continues to narrow, it is likely that federal legislation could be passed to address this concern.

### **Conclusion**

In sum, it is possible for older workers who suffer negative consequences from employment decisions to pursue discrimination claims even when there have been no overt expressions of discriminatory intent. The courts have found this necessary to give full effect to Congress' intended results from the ADEA

and Title VII. Without disparate impact claims, discriminatory employment decisions could be easily masked. As it is, employers need to be sure they act reasonably and have justifiable factors for employment decisions.