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EEOC Amends Regulations to Clarify That Age Discrimination in Employment Act Does Not Prohibit "Reverse" Age Discrimination

On July 6, 2007, the United States Equal Employment Opportunity Commission ("EEOC") published a final rule amending its regulations under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[1] The purpose of the amendments is to harmonize the EEOC regulations with the United States Supreme Court's decision in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004). In *Cline*, the Supreme Court held that the ADEA only prohibits employment discrimination based on relatively older age, not age-based employment decisions in general. Thus, the amendments remove language from the EEOC's regulations which barred employers from discriminating against younger individuals in favor of older ones.

The *Cline* Decision

In *Cline*, the employer eliminated its future obligation to pay retiree health benefits for any employee then under 50 years old. A group of employees between ages 40 and 49 sued the employer over this practice, alleging that the employer violated their rights under the ADEA by singling out older employees for preferential treatment. The Supreme Court rejected this claim. Resolving a conflict among the federal Circuit Courts of Appeals, the Supreme Court ruled that the ADEA did not prohibit an employer from favoring the relatively old over the relatively young in employment decisions, even where the younger employees were within the class protected by the ADEA—*i.e.,* 40 years of age or older. The ADEA, with certain exceptions, prohibits discrimination in employment "against any individual . . . because of such individual's age," where the individual is at least 40 years old. 29 U.S.C. §§ 623, 631. The Court in *Cline* acknowledged that the phrase, "because of [an] individual's age," was open to an interpretation that it prevented employers from favoring older individuals over younger ones, since the reference to "age" contains no express modifier. The Court also recognized that the EEOC, the agency charged with enforcing the ADEA, had concluded in its regulations that the ADEA barred employers from favoring older over younger workers when both are at least age 40. However, the Court found that the EEOC's regulatory interpretation was "clearly wrong," and that the word "age" as used in the ADEA "takes on a definite meaning from being in the phrase 'discriminat[ion] . . . because of such individual's age,' occurring as that phrase does in a statute structured and manifestly intended to protect the older from arbitrary favor for the younger." The *Cline* Court concluded that the "the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes," demonstrated that "the statute does not mean to stop an employer from favoring an older employee over a younger one."

1 The final rule publishing these amendments can be found in the Federal Register at 72 Fed. Reg. 36,873 to 36,875 (Jul. 6, 2007). The amended regulations will be codified at 29 C.F.R. §§ 1625.2, 1625.4, and 1625.5.

The Amended EEOC Regulations

To conform to the *Cline* decision, the EEOC amended its regulations effective July 6, 2007. The amendments now specifically provide that employers may favor an older individual over a younger individual because of age under the ADEA, even if the younger individual is at least age 40. Also, while the prior regulations barred employers from posting advertisements expressing a preference for older individuals, the amended regulations now specifically allow employers to use such phrases as, "over age 60," "retirees," "supplement your pension," and similar phrases in help wanted notices and other employment advertisements. However, in response to a concern raised during the public comment period that the amended regulations may be construed as creating an enforceable right requiring employers to favor older individuals, the EEOC included language in the amendments specifically providing that "the ADEA does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such preferences."

Consistent with the prior EEOC regulations, the amendments provide that an employer's request for an applicant's age or date of birth on an employment application form does not, in itself, violate the ADEA. However, the regulations state that the EEOC will closely scrutinize such requests to ensure that the information is not being sought for an unlawful purpose. In the preamble to the final rule publishing the amendments, the EEOC expressly points out that the amendments should not be construed as encouraging employers to request an applicant's age or date of birth on an employment application.

State and Local Laws Prohibiting "Reverse" Age Discrimination Not Affected

The amended regulations remind employers that the ADEA does not affect state or local laws that prohibit employers from favoring older individuals over younger ones. This is significant because a number of courts interpreting parallel state anti-discrimination laws have recognized claims of "reverse" age discrimination by younger individuals alleging they have experienced discrimination in favor of older individuals.[2] Thus, employers considering whether to implement policies designed to favor older workers or applicants should consult legal counsel to ensure that such policies do not run afoul of applicable state or local anti-discrimination laws.

2 *See, e.g., Ace Elec. Contrs. v. IBEW, Local Union No. 292*, 414 F.3d 896, 902-03 (8th Cir. 2005) (unlike the ADEA, the Minnesota Human Rights Act prohibits employers from making employment decisions based on age, even where the decision benefits older workers); *Zanni v. Medaphis Physician Servs. Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App.) (Michigan's Elliott Larsen Civil Rights Act "protects workers who are discriminated against on the basis of their youth"), *appeal denied*, 618 N.W.2d 596 (Mich. 2000); *Bergen Commercial Bank v. Sisler*, 723 A.2d 944, 957 (N.J. 1999) (New Jersey Law Against Discrimination's "prohibition against age discrimination is broad enough to accommodate [plaintiff's] claim of age discrimination based on youth"); *Ogden v. Bureau of Labor*, 699 P.2d 189, 192 (Or. 1985) (en banc) (interpreting Oregon's age discrimination law as allowing claims by younger workers); *McLean Trucking Co. v. State Human Rights Appeal Bd*, 437 N.Y.S. 2d 309 (1st Dep't 1981) (upholding finding that employer violated New York State Human Rights Law when it applied a minimum age requirement of 24 to reject a 23-year old applicant), *aff'd*, 55 N.Y.2d 910 (1982).