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Can Your Corporate Flight Department Match the FAA's Requirement for Commercial Pilots to Retire at Age 65?

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Can an employer impose a maximum age requirement for pilots operating private aircraft under Part 91 of the Federal Aviation Regulations (FAR) to retire at age 65 similar to that imposed by the Federal Aviation Administration (FAA) on commercial pilots operating pursuant to Part 121 of the FAR?

As explained in more detail below, such a requirement would create substantial risk for a claim of illegal discrimination under the Age Discrimination in Employment Act (ADEA), particularly for those employers who employ pilots in states outside the Fifth Circuit (Texas, Louisiana, and Mississippi).

Corporate flight departments have long considered matching the mandatory retirement age requirement first imposed by the FAR upon commercial airline pilots pursuant to FAR Part 121 (now known as the Age 65 Rule). Prior to the current "Age 65 Rule," there was an "Age 60 Rule," which was in place from 1959 until 2007, when Congress passed the Fair Treatment for Experienced Pilots Act and raised the maximum age for commercial pilots from 60 to 65. However, since it was first adopted in 1959, and continuing through today, the rule only applies to pilots and operators operating under Part 121 of the FAR, which regulates air carriers and other commercial flight operations, including national and regional airlines and cargo airlines (including FedEx and other international courier services). The Age 65 Rule does not apply to pilots operating private aircraft pursuant to Part 91, which governs general aviation (i.e., not-for-profit aviation such as corporate flight operations).

Under the ADEA, employers are prohibited from discriminating against employees with respect to their compensation, terms, privileges, or conditions of employment because of their age (40 or older). Examples of actions that would qualify as discriminatory include hiring, firing, demoting, or denying promotion. *See* 9 U.S.C. § 621, et seq. This prohibition against discrimination also generally applies to mandatory retirement policies, with two prominent exceptions. The first exception allows a mandatory retirement age if the employer can show that age is a "bona fide occupational qualification;" this applies when safety issues are involved – in the case of firefighters and police officers, for example. *See* 29 U.S.C. § 623; see also 29 C.F.R. § 1625.6. The second exception applies to workers in a "bona fide executive or high policymaking position." *See* 29 C.F.R. § 1625.12. This second exception would not apply to pilots, except in the most rare of situations where the pilot happened to be a top executive of the company with policymaking authority

Employers have long argued that the FAA's imposition of a maximum age on commercial airline pilots due to health concerns related to age clearly demonstrates that a maximum age for private pilots is a bona fide occupational qualification for the job, and should, thus, satisfy the first exception to the ADEA's general prohibition of mandatory retirement ages. However, from the outset, the EEOC has refused to accept that position, arguing before numerous courts including U.S. Circuit Courts of Appeal that the airline pilots operate larger, more complicated aircraft, with more passengers, with considerably more working hours on average compared to private pilots.

Courts have more often than not agreed with the EEOC, including in 1988 against Boeing and in 1991 against Lockheed Martin. *E.E.O.C. v. Lockheed Corp.*, 1991 WL 101185, at *1 (C. D. Cal. Jan. 3, 1991) (granting

injunction against Lockheed related to mandatory retirement age for its private pilots); *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213 (9th Cir. 1988) (reversing lower court award of summary judgment to Boeing and noting that "[t]here is serious doubt that the FAA Rule reflects a determination by FAA that age 60 is a [bona fide occupational qualification] as defined by ADEA for the commercial pilots to whom it applies, much less a BFOQ for Boeing pilots"). A district court has only agreed with a corporate flight department once, at least until the more recent *Exxon* case discussed below. *E.E.O.C. v. El Paso Natural Gas Co.*, 626 F. Supp. 182 (W.D. Tex. 1985) (finding that corporate pilots' work was substantially the same as the Part 121 pilots to whom the mandatory retirement age applied and approving of the corporate flight department's use of same as a bona fide occupational qualification).

More recently, Exxon was involved in protracted and very contentious litigation with the EEOC related to its implementation of its mandatory retirement age for pilots. The litigation lasted from 2006 until 2014 and reached the U.S. Court of Appeals for the Fifth Circuit. Ultimately, the Fifth Circuit found that Exxon presented enough evidence that its pilots flew similar aircraft to the Part 121 carriers and also found that Exxon presented persuasive testimony from expert witnesses that it was not possible or reliable to individually test pilots over the age of 60 to determine if they were at increased risk of sudden incapacitation. *EEOC v. Exxon Mobil Corp.*, 560 Fed. Appx. 282, 289 (5th Cir. 2014). As to the EEOC, the Fifth Circuit found that the EEOC failed to provide any evidence as to why the FAA did not apply the rule to Part 91 operators and also found that the safety concerns behind the rule could be applied to Exxon's operations. The Fifth Circuit therefore affirmed the lower court's award of summary judgment to Exxon, and dismissed the action filed by the EEOC.

Although the *Exxon* case is certainly a win for the employer and precedential for future private companies wishing to implement a similar rule, the court made it clear that the decision was based on the specific facts presented in that case. If a different flight department operates smaller aircraft than Exxon, or flies for less hours on average, that would lower the relevance of the decision. It would also lower the relevance of the decision if the EEOC or other plaintiff in future litigation was able to present expert testimony suggesting that there are reliable tests to determine whether older pilots are at increased risk of sudden incapacitation, which the EEOC was unable to do in the *Exxon* case. Additionally, the decision is only mandatory precedent in the Fifth Circuit, which includes only Texas, Louisiana, and Mississippi. Courts in other circuits could certainly rule in favor of the pilot or EEOC, even based on the same facts at issue in the *Exxon* case.

Accordingly, there is significant risk presented in applying a mandatory retirement age to Part 91 pilots. If a company operates its flight department similar to Exxon and employs pilots only in the Fifth Circuit, that risk is reduced significantly. However, if a company either does not employ pilots solely in Texas, Louisiana, and/or Mississippi, and/or is not dealing with a similar flight department as Exxon, there is a great deal of risk in implementing such a rule. Although it can certainly make logical sense that a mandatory retirement age applicable to certain pilots could be applied to others, there is no helpful binding precedent to support such a notion outside the Fifth Circuit.

One thing a company could do to alleviate safety concerns without presenting nearly as much risk from an age discrimination perspective is to require all of its pilots to carry First Class Medical Certificates, which must be renewed with an examination every six months for pilots over 40 years old. See the FAA guide here. That is not typically required for Part 91 corporate operators but is something a company could do to potentially enhance screening on its pilots without exposing the company to a great deal of potential liability.