

# EEOC Exempts Coordinating Retiree Health Benefits with Medicare

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## Introduction

The Equal Employment Opportunity Commission (EEOC) published a Notice of Proposed Rulemaking (NPRM) on July 14, 2003, that sought to exempt from the Age Discrimination in Employment Act (ADEA)<sup>1</sup> “the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program.”<sup>2</sup>

Nearly four and one-half years later, the proposed rule of July 2003 became final.<sup>3</sup> As a result, private and public employers sponsoring benefit plans may now coordinate retiree healthcare benefits with Medicare.

Plan sponsors coordinated benefits before 2001 even though, under the ADEA, it has long been unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training, and a Medicare-eligible retiree might very well have considered age to be the reason for the coordination of benefits.<sup>4</sup>

Plan sponsors were able to coordinate benefits despite the Older Workers Benefit Protection Act of 1990 (OWBPA), which amended the ADEA specifically to prohibit employers from denying benefits to older employees.<sup>5</sup> Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.<sup>6</sup> The legislative history of the OWBPA seemed to accept coordination of Medicare-eligible retiree health benefits without expressly requiring that such coordination meet the “equal benefit or equal cost” standard.<sup>7</sup> In the years before 2001, employers and plan sponsors relied on this legislative history to the OWBPA when structuring retiree health benefits, concluding that it allowed them to coordinate employer-sponsored retiree health benefits with Medicare eligibility.<sup>8</sup>

Employers might provide “bridge” coverage between retirement and Medicare eligibility, furnishing former employees, such as public school teachers, who retire early with retiree health benefits until their Medicare eligibility commenced, typically at

age sixty-five, or employers might supplement Medicare benefits after eligibility commenced.

## Erie County Defines EEOC Enforcement

The landscape changed in 2001 after the EEOC altered its enforcement policy in the wake of the decision in *Erie County Retiree Ass’n v. County of Erie (Erie County)*.<sup>9</sup> The Third Circuit held in *Erie County* that an employer violated the ADEA if it reduced or eliminated retiree health benefits when retirees became eligible for Medicare, unless any of the ADEA’s “safe harbors” is applicable.<sup>10</sup> The court concluded that Erie County had used a proxy for age—Medicare eligibility—as a basis for differential treatment.<sup>11</sup>

The safe harbor in the ADEA, that the *Erie County* court found might justify the differential treatment, was the equal benefit or equal cost standard.<sup>12</sup> Under this safe harbor, the employer or plan sponsor has the burden of proving that the benefits available to Medicare-eligible retirees were the same as the benefits provided to retirees not yet eligible, or that the employer or plan sponsor was spending the same amount for the benefits for both groups of retirees.<sup>13</sup> The Third Circuit remanded the case for a determination as to whether the standard had been satisfied by the County of Erie.<sup>14</sup>

In response to the *Erie County* decision, the EEOC adopted the Third Circuit’s rule in its enforcement policy. Thereafter, in late 2000 and early 2001, a host of interested parties—“labor organizations, benefits experts, state and municipal governments, and employers”—advised the EEOC that the rule in *Erie County* was having unintended consequences of eroding benefits because employers now had an incentive to reduce or eliminate health benefits for retirees. Rather than suffer the burden of justifying the coordination of benefits, plan sponsors were terminating plans for retirees. In response, the EEOC rescinded the enforcement policy to study the matter.<sup>15</sup>

## The EEOC Exemption

After months of study, the EEOC concluded that the equal benefit or equal cost safe harbor required “complex comparisons of multiple objective and subjective variables, including types of plans, levels and types of coverage, deductibles, geographical areas covered, and level of provider choice offered by each plan.”<sup>16</sup> Faced with such a burden of proof, employers could simply eliminate or reduce coverage to avoid running afoul of the ADEA. Because of the rising cost of healthcare—“a double-digit increase in their health care costs in 2003 for the third consecutive year”—and the decline in employer-sponsored retiree health benefits, the EEOC chose to exercise its exemption authority under Section 9 of the ADEA and propose explicitly to permit the coordination of employer-provided retiree health coverage with eligibility for Medicare.<sup>17</sup> The EEOC sought to add the exemption as Section 32 to part 1625 of Title 29 of the Code of Federal Regulations (CFR).

The 2003 NPRM justified the proposed exemption because “[u]nrestricted coordination of employer-sponsored retiree health

benefits with Medicare . . . permits employers to provide a valuable benefit to early retirees who otherwise might not be able to afford health insurance coverage and allows employers to provide valuable supplemental health benefits to retirees who are eligible for Medicare.”<sup>18</sup>

The American Association of Retired Persons (AARP) disagreed with the EEOC’s exercise of its exemption authority. AARP filed suit in the Eastern District of Pennsylvania in 2005, challenging the proposed regulation under the Administrative Procedure Act<sup>19</sup> and the ADEA.<sup>20</sup> Based on the EEOC’s receipt of “30,000 letters from individual citizens,” the AARP’s concern was the converse of the EEOC’s: that “if the practice of coordinating retiree health benefits with eligibility for Medicare . . . is exempted from ADEA coverage, employers might reduce or even eliminate the health benefits of Medicare-eligible retirees.”<sup>21</sup>

The district court originally granted summary judgment for the AARP because the proposed exemption was contrary to law under the *Erie County* decision.<sup>22</sup> The court issued a permanent injunction enjoining the EEOC from publishing or otherwise implementing its exemption.<sup>23</sup> After an intervening U.S. Supreme Court decision,<sup>24</sup> the EEOC moved for relief from the judgment, citing the intervening change in law.<sup>25</sup> The district court reversed itself and granted summary judgment for the EEOC, holding that the EEOC lawfully exercised its regulating authority.<sup>26</sup> The district court dissolved the injunction, but it stayed that order and left the injunction intact pending the AARP’s appeal to the Third Circuit.<sup>27</sup>

The Third Circuit held last year that the exemption was within the EEOC’s authority under the ADEA and valid according to the requirements of the Administrative Procedure Act.<sup>28</sup> The EEOC successfully argued that its proposed regulation was consistent with the ADEA because, “[b]y definition, the power to grant ‘exemptions’ provides an agency with authority to permit certain actions at variance with the express provisions of the statute in question.”<sup>29</sup>

After the Third Circuit subsequently confirmed that its decision lifted the district court’s injunction on August 31, 2007, the EEOC proceeded with the final rule.<sup>30</sup> The EEOC concluded that reasonable exemptions under Section 9 of the ADEA<sup>31</sup> may be established from any or all of the provisions of the ADEA if the EEOC finds any particular exemption to be necessary and proper in the public interest.<sup>32</sup>

The EEOC’s conclusion from the foregoing history is that there are sometimes legitimate reasons for making employment decisions based on age “and that there are ‘too many different types of situations’ involving age-based considerations for a ‘strict application of [the ADEA’s] general prohibitions’ to be desirable in all of them . . . .”<sup>33</sup>

In this particular situation under discussion, plan sponsors are free to coordinate their retiree health benefits with Medicare. In 2008, employers may offer “carve-out” plans that reduce the benefits available under a health plan by the amount payable by Medicare and may make Medicare the primary payor of health benefits for Medicare-eligible retirees. For those retirees who are not yet Medicare-eligible, employers may provide retiree health

coverage only to them (but not to their dependents or spouses) until they are old enough to qualify for Medicare without violating the ADEA.<sup>34</sup>

- 1 29 U.S.C. §§ 621-634, as amended by the Older Workers Benefit Protection Act, Pub. L. No. 101-433 (1990).
- 2 See 68 Fed. Reg. 41542-41549 (July 14, 2003), available at <http://edocket.access.gpo.gov/2003/03-17738.htm>. This article will refer to Medicare throughout, without repeating the inclusion of “State-sponsored retiree health benefits program.” “A comparable state health benefits program refers to plans that were created to provide primary health benefits for state and local government employees who were not covered by Medicare and that, like Medicare, base eligibility on age.” 72 Fed. Reg. at 72940. It is not a reference to any State Medicaid plan, to which the exemption discussed in this article does not apply. *Id.*
- 3 See 72 Fed. Reg. 72938-72945 (Dec. 26, 2007).
- 4 29 U.S.C. § 623.
- 5 Pub. L. No. 101-433 (1990).
- 6 See *Erie County Retirees Ass’n v. County of Erie*, 220 F.3d 193, 203-205 (3d Cir. 2000), cert. denied, 532 U.S. 913 (2001).
- 7 See *id.* at 205-208 and n.6 (“On the floor of the Senate, Senators Hatch and Metzenbaum indicated that “coordination with government-provided benefits as specified by the EEOC guideline [29 C.F.R. § 1625.10] . . . would remain permissible” under the OWBPA (citation omitted).”).
- 8 The legislative history of the OWBPA is discussed at length in *Erie County Retirees Ass’n v. County of Erie*, 220 F.3d at 205-208 (“Since the ADEA covers only employees and those individuals seeking employment, nothing in the bill would apply the provisions of the ADEA to retirees.”).
- 9 220 F.3d 193 (3d Cir. 2000), cert. denied, 532 U.S. 913 (2001).
- 10 *Id.* at 210-213.
- 11 *Id.* at 215.
- 12 *Id.* at 213. See 29 U.S.C. § 623(f)(2)(B)(i) and 29 C.F.R. § 1625.10(e) (1989).
- 13 220 F.3d at 216. See 29 U.S.C. § 623(f)(2).
- 14 220 F.3d at 216.
- 15 72 Fed. Reg. at 72939 and n.5.
- 16 *Id.* at 72939.
- 17 68 Fed. Reg. at 41542-41543, 41547, and 29 U.S.C. § 628. The EEOC also noted that financial transparency compelled by accounting regulations had caused an increased focus on the cost of health benefits for employers. See 68 Fed. Reg. at 41543-41544 (Financial Accounting Standards Number 106).
- 18 68 Fed. Reg. at 41547.
- 19 5 U.S.C. § 551 *et seq.*
- 20 *AARP v. EEOC*, 383 F.Supp.2d 705, 706 (E.D. Pa. 2005).
- 21 72 Fed. Reg. at 72939-72940.
- 22 *AARP v. EEOC*, 383 F.Supp.2d at 712.
- 23 *Id.*
- 24 The intervening decision was *Nat’l Cable and Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), which held that prior judicial interpretation of a statute (such as the *Erie County* decision) bars subsequent agency interpretations only where the precedent “unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill.” 545 U.S. at 983.
- 25 *AARP v. EEOC*, 390 F.Supp.2d 437, 441 (E.D. Pa. 2005). The district court found a gap in the ADEA for the EEOC to fill regarding whether the ADEA applies to retiree benefits at all. *Id.* at 453-454.
- 26 *Id.* at 460, 462.
- 27 *Id.* at 442, 462-463.
- 28 *Am. Ass’n of Retired Pers. v. EEOC*, 489 F.3d 558, 561-562 (3d Cir. 2007), cert. denied, \_\_\_ U.S. \_\_\_ (March 24, 2008).
- 29 *Id.* at 563.
- 30 72 Fed. Reg. at 72941-72942 and n.12.
- 31 29 U.S.C. § 628.
- 32 Brief of Respondent Equal Employment Opportunity Commission in Opposition to Petition for Writ of Certiorari, *Am. Ass’n of Retired Pers. v. EEOC*, No. 07-662 (U.S., filed Feb. 21, 2008), at 7-8.
- 33 *Id.* at 11 n.3.
- 34 72 Fed. Reg. at 72939 and 72945.

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