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CAB 03-07

EEOC Proposes Rules on Retiree Health Benefits and Medicare

SUMMARY The Equal Employment Opportunity Commission (EEOC) has published a proposed rule that would allow employer-sponsored retiree health plans to carve out Medicare-eligible retirees. The proposed rule represents a major reversal of the policy that the EEOC adopted following a federal appellate court decision prohibiting direct coordination of benefits between Medicare and an employer's retiree health plan. The proposed EEOC exemption would become effective on the day of publication of final regulations.

DISCUSSION *The Erie County Decision and EEOC's Policy*

In August 2000, the U.S. Court of Appeals for the Third Circuit ruled in *Erie County Retirees Association v. County of Erie* that the 1967 Age Discrimination in Employment Act (ADEA) prohibits an employer's retiree health program from providing greater benefits for employees prior to their eligibility for Medicare benefits than it does for Medicare-eligible employees. In October 2000, the EEOC adopted the court's reasoning as the agency's national enforcement policy, but then rescinded that position in August 2001 to further consider the issue.

Meanwhile, Erie County itself complied with the judicial ruling in the manner predicted by most experts: in no position to foot the bill for the same costs that Medicare would cover, the county reduced health care benefits for *all* employees, including those who were not yet eligible for Medicare. The older retirees wound up no better off than prior to the ruling; rather, benefits were cut for the younger retirees.

The Exemption

The EEOC's newly proposed regulations include an extensive preamble discussing the ADEA's legislative history and background, the current economic and demographic forces, and the changing design of employer-provided retiree health plans. The EEOC observes that employers that provide retiree health benefits have a legitimate interest in providing extra benefits for early retirees as a bridge until the individuals become eligible for Medicare benefits.

The ADEA grants the EEOC the authority to "establish such reasonable exemptions to and from any or all provisions of the Act as it may find necessary and proper in the public interest." Applying that rarely used authority, the EEOC proposes to establish a broad exemption for unrestricted coordination of employer-sponsored retiree health benefits with Medicare or state-sponsored health benefit programs. The exemption from the ADEA's age discrimination rules applies only to retiree health plans and not to other conditions of employment or benefits.

Under the exemption, an employee benefit plan would be permitted to alter, reduce, or even eliminate health care benefits that are provided to retired

participants when the individual is eligible for Medicare health benefits or for health benefits under a state-sponsored retiree health benefits program. The exemption would also apply to spousal and dependent benefits that are included as part of the employer's retiree health plan, even if the reductions for the nonretiree are not similar to those made in the retiree's own health care benefits. No other aspects of ADEA coverage, such as the application of the age discrimination rules to employer-provided disability benefits, would be affected by the proposed new exemption.

Effective Date and Future Activity

While the EEOC proposes that the exemption take effect upon publication of a final regulation, the agency intends to apply the exemption to existing and to newly created employer-provided retiree health benefit plans. The proposal at least reflects the EEOC's current position and employers can expect that the agency will not be actively enforcing the *Erie* decision. The EEOC seeks comment on the proposed exemption; and since some feedback from older retirees and groups representing them can be expected, employers with retiree health programs should consider weighing in with their views to the EEOC. Employers within the Third Circuit — Pennsylvania, New Jersey, Delaware, and the Virgin Islands — continue to operate under the shadow of the *Erie* decision but can expect the EEOC proposed rule to be adopted ultimately as the nationwide policy.

Although Congress could possibly enact statutory language to reverse the EEOC's regulation, it is not likely to do so. In the Medicare reform bill that the Senate recently approved, language similar to the EEOC's proposed regulation is included. Therefore, Congress does not seem opposed to the EEOC's stance taken in the proposed regulation. Both the Medicare reform bill's provision and the EEOC's proposed regulation contain prospective effective dates, raising the prospect of continued litigation over employer actions taken prior to the respective dates.

ACTION Employers that have not yet amended their retiree health plans to respond to the *Erie* case by eliminating coordination with Medicare should consider waiting for the final EEOC rule. If the retiree health plan was amended in response to *Erie*, the employer may want to consider reversing the changes, although final action should not be taken until the EEOC publishes its definitive rule. Employers with any interest in providing retiree health benefits should submit comments to the EEOC by September 12, 2003.

For assistance with the EEOC's proposed rules on retiree health benefits and Medicare, please contact your Milliman consultant.

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