

Employers Can Still Coordinate Retiree Medical Plans with Medicare— Even in the Third Circuit

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On June 4, 2007, a unanimous three-judge panel of the U.S. Court of Appeals for the Third Circuit upheld an Equal Employment Opportunity Commission (EEOC) regulation that would exempt from the Age Discrimination in Employment Act (ADEA) employer coordination of retiree health benefits with Medicare benefits.

In *AARP v. EEOC*, No. 05-4594 (3d Cir. 2007), the court upheld a lower court's decision to lift an injunction that the American Association of Retired Persons (AARP) originally obtained in March 2005 to block implementation of the EEOC exemption (Exemption). In so ruling, the court upheld the Exemption, reasoning that "the proposed exemption permits the narrow practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare and state-sponsored health programs for the necessary and proper purpose of encouraging employers to provide the greatest possible health benefits for all retirees. The regulation is consistent with the purposes and intent of the ADEA and is a reasonable exercise by the EEOC of authority delegated to it by Congress."

The EEOC proposed the Exemption in response to a prior Third Circuit decision that altered the landscape surrounding the ADEA and retiree benefits. To the surprise of many practitioners, in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), the Third Circuit held that the ADEA's prohibitions against age discrimination applied to retirees and specifically to the practice of reducing retiree health benefits when retirees become eligible for Medicare. This Third Circuit decision, along with significant increases in benefits costs, encouraged many employers to discontinue their retiree health benefit plans so as not to violate the ADEA.

In response, in July 2003 the EEOC proposed the Exemption, which would permit employers to coordinate their retiree health benefit plans with Medicare or a comparable state health benefit. The EEOC approved the proposal in April 2004 and scheduled the Exemption for publication in the Federal Register.

On February 4, 2005, the AARP sought a temporary restraining order in federal court in the Eastern District of Pennsylvania—where the *Erie County* decision is controlling—in an effort to prevent the EEOC from publishing the Exemption. The AARP argued that the EEOC exceeded its authority by promulgating a rule that was "not in accordance with the law." The district court approved a stipulation between the EEOC and the AARP that stayed the publication of the Exemption for 60 days. On March

30, 2005, the same district court issued a ruling in favor of the AARP, permanently enjoining the EEOC “from publishing or otherwise implementing the regulation at issue.” The district court found that the EEOC did not have the authority to promulgate such a rule, as the proposed rule violated congressional intent “as expressed in the plain language of the ADEA and as interpreted by the U.S. Court of Appeals for the Third Circuit.”

In its most recent decision, the Third Circuit found that the EEOC’s proposed Exemption was “reasonable” and “necessary and proper in the public interest.” The Third Circuit emphasized that many employers were reducing retiree health benefits for younger retirees rather than providing retirees age 65 and older with the same level of retiree benefits that younger retirees receive to avoid violating the ADEA. The court recognized that the Exemption will allow employers to reduce health benefits to retirees older than 65 while providing greater benefits for younger retirees. However, the court concluded that over time the Exemption would likely benefit all retirees.

With the removal of the injunction, the EEOC may now finalize the Exemption. Although it appears that this seven-year saga may soon be over, it is still uncertain whether the AARP will continue its fight and seek review by the U.S. Supreme Court. Even if the Supreme Court ultimately upholds the Exemption, *Erie*’s legacy continues with respect to employee benefit plans other than retiree health plans coordinated with Medicare. Therefore, employers providing greater retiree benefits to younger employees (e.g., life insurance) should continue to proceed cautiously, especially if the plans cover employees in the Third Circuit.

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