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Employee Benefits

A Littler Mendelson Newsletter

Coordination of Retiree Health Benefits with Medicare and State Health Benefits

By Russell D. Chapman and Andrea Jackson

On December 26, 2007, the EEOC published its final rule permitting an exemption from the ADEA for employers who offer retiree health care benefits that coordinate with Medicare. The final rule confirms the ability of employers to continue the practice of offering retirees eligible for Medicare benefits that differ from those offered to retirees who are under the age of 65. The exemption is effective immediately and applies to all current or newly created retiree benefits plans.

The final rule was drafted in reaction to a string of decisions by the Third Circuit Court of Appeals. Beginning with *Erie County Retirees Association v. County of Erie*, the court held that: (1) the ADEA applies to retired workers as well as current employees; and (2) the ADEA requires employers to spend the same amount on health benefits provided to retirees over and under age 65. Shortly thereafter, many employers (including the County of Erie) began dropping retiree health benefit coverage for *all retirees*. Their rationale? For many, the cost of providing retiree benefit coverage in compliance with the ADEA was simply too high. For this reason, many saw the ironic result of a court's desire to maximize access to retiree benefits having the opposite effect.

In response to *Erie* and its often unintended results, the EEOC drafted a proposed rule that exempted from the ADEA the coordination of retiree health

benefits with Medicare. In an attempt to prove that no good deed goes unpunished, the proposed rule was immediately contested by the AARP who argued that the rule violated the ADEA and *Erie*. The Third Circuit again reviewed the issue; this time the court ruled that the EEOC properly exercised the authority granted in the ADEA to exempt certain employer actions in the public interest. This, combined with case law supporting judicial deference to agency interpretation, led the court to affirm the EEOC's ability to exempt from the ADEA the practice of coordination of retiree health benefits with Medicare. Thus, the AARP decision paved the way for finalization of the rule by the EEOC, despite AARP's request for review of the case by the United States Supreme Court, which is pending.

The final rule creates an exemption from the ADEA and permits retiree employee benefit plans that provide health benefits to be altered, reduced, or eliminated when a participant is eligible for Medicare (or for the health benefits under a comparable state health benefit plan), whether or not the participant actually enrolls in the benefit program.

The final rule affects individuals who are eligible for Medicare (age 65 or older, the individual or spouse has worked for at least 10 years in Medicare-covered employment and is a citizen or permanent resident of the U. S.), and enrolled in a retiree health benefit plan. The cov-

ered spouse or dependent of such an individual is also affected by the exemption.

The final rule specifically states that benefits for spouse and dependents under a retiree health plan need not be identical to those offered to the retiree, therefore, such benefits may be altered, reduced or eliminated regardless of whether benefits for the retiree have been changed.

The exemption does not apply to plans covering active employees who are at or over the age of Medicare eligibility. These employees must continue to receive the same benefits, under the same conditions that it offers to any current employee under the age of Medicare eligibility.

The exemption will be narrowly construed and apply only to the coordination of retiree benefits with Medicare (or comparable state health benefit plan). Other aspects of the ADEA are not affected by the exemption.

In creating the rule, the EEOC notes that while employers have no legal obligation to offer retiree health benefits, these benefits clearly allow individuals to acquire affordable health insurance coverage at a time when private health insurance coverage might otherwise be cost prohibitive. And further, that it is in the best interest of employers and employees for the EEOC to allow a policy that permits employers to offer these benefits to the greatest extent possible. Citing the aging Baby Boomer population, the EEOC and the Third Circuit agreed that the need for such benefits outweighs the potential for abuse of the ADEA.

Under the EEOC's Final Rule, employers are now free to provide a greater contribution to health benefit coverage for retirees under age 65. Employers who choose to proceed with retiree medical "bridge" or "offset" medical plans may encourage many older workers to retire with the confidence that their health care needs will continue to be met at accustomed levels, thus alleviating anxiety about diminished coverage prior to Medicare eligibility. In this way, the final rule presents the best hope for a win-win

situation for both employers and older and retired employees.

Employers who offer retiree health should review their plan to ensure that it is designed to comply with the requirements of the exemption. This is especially true for so-called Medicare carve-out plans, which are specifically discussed under the exemption. Those plans that do not comply should be amended as soon as possible to assure compliance with the final rule.

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