

April 4, 2005

AARP At Odds With EEOC Over Retiree Medical Benefits

A federal district court judge has blocked efforts by the Equal Employment Opportunity Commission (EEOC) to begin enforcing a rule that would have allowed employers to differentiate benefits for Medicare-eligible retirees without running afoul of the Age Discrimination in Employment Act (ADEA). On March 30, 2005, the U.S. District Court for the Eastern District of Pennsylvania (E.D. Pa.) granted summary judgment to the AARP in a case it had brought against EEOC earlier this year to keep the agency from officially adopting that agency's ADEA Exemption for Retiree Health Benefits. In response to the AARP's strong opposition, and in light of the 2004 presidential election, the EEOC held off taking further action on the proposed exemption last year.

By way of background, employers across the country for years have provided retirees with Medicare supplement benefits, including medical benefits where Medicare is primary and the employer plan secondary. Back in 2000, the Court of Appeals for the Third Circuit (which includes Pennsylvania) decided *Erie County Retiree Association v. County of Erie (Erie County)*. There, retired employees challenged the county's practice of reducing health benefits for retirees once they became Medicare-eligible. The court held that the practice violated the ADEA, because Congress had intended that the ban on age discrimination prohibited reducing retiree health benefits upon reaching age 65. Recognizing that Medicare-eligible retirees received medical benefits that were less costly to employers because Medicare provided some benefits, the court held that unless the county provided benefits to Medicare-eligible retirees that met the equal cost/equal benefit exception to ADEA, the county violated the statute.

In response to *Erie County*, the EEOC adopted the Third Circuit's ruling as its national enforcement policy. As a result of *Erie County*, and the EEOC's subsequent adoption of that decision, a number of employers dropped retiree health benefits altogether — this at a time when the cost of providing these benefits was increasing dramatically.

A year later in 2001, EEOC rescinded its position in support of *Erie County*. The EEOC changed its position — thus

creating an ADEA exemption for retiree health benefits — in an effort to reverse the adverse impact of *Erie County*. See the firm's *One Minute Memo* of April 29, 2004 at <http://www.seyfarth.com/db30/cgi-bin/pubs/omm042804.pdf>

The AARP challenged the EEOC's rationale for the exemption, arguing that the rule would only accelerate the decline in the availability of retiree health benefits. The district court in *AARP v. EEOC* held that the Third Circuit's ruling in *Erie County* dictated the outcome. Where congressional intent is clear and unambiguous, as the Third Circuit concluded in *Erie County*, a court must give effect to the intent of Congress — and not to an agency's contrary interpretation.

While not disputing the holding in *Erie County*, the EEOC tried unsuccessfully to argue that it had the power to exempt conduct otherwise prohibited under ADEA, provided that the exemption was "reasonable" and "necessary and proper in the public interest." The court rejected the EEOC's argument on three grounds:

- An administrative agency may not issue regulations or rules contrary to the intent of Congress. Because the Third Circuit had already concluded that Congress intended that the ADEA prohibited an employer from reducing health benefits to Medicare-eligible retirees, the agency was not at liberty to say otherwise;
- An agency's rulemaking authority does not take precedence over the substantive provisions and prohibitions of the statute under which the agency has exercised its rulemaking authority; and
- While the EEOC is authorized to issue rules and exemptions where the Congress has left a gap or an ambiguity in the law for the agency to fill or interpret, no relevant gap or ambiguity had been left by Congress in the ADEA as it relates to retiree health benefits.

In response to the ruling, Cari M. Dominguez, Chair of the EEOC, stated that she will request that the Justice Department appeal the ruling to the Third Circuit. Those who supported the EEOC's efforts have expressed disappointment with the

ruling, seeing it as a major setback for employers wishing to maintain employer-provided health benefits for Medicare-eligible retirees. If employers cannot recognize Medicare as primary coverage and/or supplement Medicare benefits, some say more employers will discontinue retiree health benefits altogether.

Even before yesterday's ruling, health benefits for pre and post-65 retirees have been eroding steadily. According to the Kaiser Family Foundation, between 1988 and 2004, the percentage of employers offering retiree health benefits nearly dropped by half. In 1988, 66% of employers with 200 or more employees provided retiree health benefits. By 2004, this number had dropped to 36%.

Among other factors, the rapid increase in the cost of providing health benefits has contributed to the decline in their availability. Since 2001, employers have had to absorb annual double digit increases in health benefit costs. Currently, it is estimated that 5 to 10% (or more) of an employer's payroll is spent on retiree health costs, with retiree benefits making up nearly one-third of an employer's total health care expenditures, according to the Kaiser/Hewitt 2004 Survey on Retiree Health Benefits. Moreover, with the passage of the Medicare Prescription Drug program, it is estimated that between 5 and 10% of employers will drop their health coverage for Medicare-eligible retirees.

It is hard to say whether the EEOC's ADEA exemption could have reversed or slowed the decline in the availability of retiree health benefits. What can be said in light of the March 30 ruling is that, in the future, unless the district court's decision is reversed, employers will feel even greater economic pressure to discontinue employer-sponsored retiree health benefits.

If you have any questions concerning ADEA and retiree medical benefits, please contact the Seyfarth Shaw Employee Benefits or Labor & Employment attorney with whom you work or any Employee Benefits or Labor & Employment attorney on the website at www.seyfarth.com.

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