

One Minute Memo[®]



Third Circuit Permits Reduction In Retiree Benefits To Coordinate with Medicare or State-Sponsored Benefits

On June 4, 2007, the Federal Court of Appeals for the Third Circuit allowed the Equal Employment Opportunity Commission (EEOC) to implement its proposed regulation permitting employers to reduce or eliminate employer-sponsored retiree health benefits when retirees become eligible for Medicare or for a state-sponsored retiree health program. (*AARP v EEOC*, No. 05-4594, 6/4/07). The ruling resolved seven years of uncertainty faced by employers that maintain traditional retiree programs coordinated with Medicare.

Seven years ago, in the case of *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000) (*Erie County*), the Third Circuit had ruled that, because Medicare eligibility turns upon age, the Age Discrimination in Employment Act, 29 USC §§ 621-34 (ADEA) did not permit reduction or termination of retiree health benefits upon Medicare eligibility unless the employer met the "equal benefit or equal cost" defense set forth in Section 4 of the ADEA.

Three years later, in July 2003, the EEOC issued a proposed regulation which would permit reductions or terminations to coordinate with Medicare. In what became a protracted legal battle, the American Association of Retired Persons (AARP) challenged the proposed EEOC regulation and won the first skirmish in *AARP v. EEOC*.

In February 2005, the district court below ruled in favor of AARP and issued an injunction forbidding the EEOC from implementing the controversial exemption regulation.

Six months later, in September 2005, the district court reversed itself and ruled in favor of the EEOC. The court based the reversal on an intervening U.S. Supreme Court decision which held that prior judicial interpretation of a statute bars subsequent agency interpretations of a statute only where the precedent "unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *National Cable and Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In spite of the reversal, the district court left the injunction in place pending decision on appeal.

On June 4th, the Third Circuit lifted the injunction and affirmed the district court's result on completely different grounds. The appellate court first found that Section 9 of the ADEA clearly and expressly provides the EEOC with the authority to provide "narrow exemptions from the prohibitions of the ADEA." The court recognized that the ADEA did not grant the EEOC unlimited authority, but determined that the EEOC had demonstrated that the exemption at issue in the case was reasonable and necessary and in the public interest. The court heeded the EEOC's concern that, without the exemption, employers

would reduce all retiree health benefits to a lower level for both Medicare-eligible retirees and retirees under 65 in an effort to avoid ADEA liability. 68 Fed. Reg. at 41, 543.

The court also rejected AARP's arguments that the proposed regulation constituted unlawful agency activity under the federal Administrative Procedures Act and represented an arbitrary and capricious change in agency policy. In doing so, the court expressed its concern that many retirees in both age groups depend upon employer-sponsored benefits, and that the proposed regulation best served the interest of all retirees by permitting employers to provide valuable supplemental health benefits to Medicare-eligible retirees and to those retirees who might not otherwise be able to afford health insurance coverage.

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