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Honorable Paul D. Clement
Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: *AT&T Corp. v. Hulteen*, et al., No. 07-543

Dear Solicitor General Clement:

I write on behalf of The ERISA Industry Committee ("ERIC") to urge you to recommend that the Supreme Court grant the petition for certiorari in *AT&T Corp. v. Hulteen.*

ERIC is a non-profit association representing America's largest private-sector employers. ERIC's members sponsor, administer, and provide services to pension plans, health care coverage plans, and other employee benefit arrangements governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* Millions of active and retired workers and their families receive pension, health care, and other benefits from employee benefit plans sponsored by ERIC's members. Over the years since ERISA's enactment, ERIC has participated as *amicus curiae* in the Supreme Court in cases with the potential for far-reaching effects on employee benefit plan design or administration. [1]

The Ninth Circuit's decision in *Hulteen* is, in our judgment, erroneous and potentially quite harmful to the employee benefit system. By requiring companies to make retroactive increases in the credited service of female employees who took pregnancy leaves before the effective date of the Pregnancy Discrimination Act of 1978 ("PDA"), the Ninth Circuit's decision could impose substantial unanticipated liabilities on the pension plans and other seniority-based benefit plans sponsored by a number of ERIC's members. If is allowed to stand, the Ninth Circuit's decision will weaken the financial condition of both the plans

[1] *See, e.g., LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1027 (2008) (Roberts, C.J., concurring in part and in judgment); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

directly affected by the decision and the employee benefit system as a whole. Such consequences are not in anyone's interest – least of all the employees who participate in defined benefit pension plans and other plans providing benefits that are based on an employee's length of service or seniority.

AT&T's counsel has informed us that the plaintiffs in *Hulteen* have sought to downplay both the significance of the circuit split created by *Hulteen* and the importance of the issue it addresses by suggesting that the Ninth Circuit's decision will have limited effects. That is not so. Indeed, plaintiffs' counsel has acknowledged that the Ninth Circuit's "decision has a significant impact on important retirement and pension benefits for women nationwide."[2] In fact, a number of ERIC's member companies – including companies not involved in the telecommunications industry – would be directly affected by the Ninth Circuit's ruling.

Before the PDA took effect, AT&T treated pregnancy leaves as personal leaves, rather than as disability leaves, and women who took pregnancy leaves were credited with seniority and with service for pension purposes only for the first 30 days of their pregnancy leaves. This practice was lawful before the enactment of the PDA. *See Gilbert* v. *Gen. Elec. Co.*, 429 U.S. 125 (1976).

After the PDA became effective, AT&T abolished its prior rules and treated pregnancy leaves in the same way it treated temporary disability leaves. As a result, female AT&T employees accrued full seniority and service credit during their post-PDA pregnancy leaves. However, when AT&T calculated the pension benefits of female employees who took pregnancy leaves before the PDA's effective date and retired after that date, AT&T applied its new seniority and service-crediting rules to service after the PDA became effective and continued to apply its pre-PDA seniority and service-crediting rules to employees' pre-PDA service.

AT&T is not the only company that continues to apply its pre-PDA rules to calculate the pre-PDA seniority and service of female employees who took pregnancy leaves before the PDA became effective. Before the PDA became effective, a number of ERIC member companies had pregnancy leave rules that were similar to AT&T's pre-PDA rules. These companies responded to the enactment of the PDA in the same way AT&T did: by applying their PDA rules to pregnancy leaves after the PDA became effective and by continuing to apply their pre-PDA rules to pregnancy leaves before the PDA's effective date. Like AT&T, these companies continued to rely on their pre-PDA rules when calculating pre-PDA service for purposes of determining the pension benefits of employees who took

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[2] *See* Press Release of Equal Rights Advocate, www.equalrights.org/media/HulteenPR081707.pdf (last visited April 9, 2008).

pregnancy leaves before the enactment of the PDA and who retired after the PDA became effective.

These companies would be adversely affected by a decision that imposes liability for continuing to calculate pre-PDA service on the basis of their plans' pre-PDA rules – rules that were entirely legal prior to the enactment of the PDA. Each affected company has relied on the established rule that the PDA does not apply retroactively and does not require companies to recalculate the service of female employees who took pre-PDA pregnancy leaves – a rule that the Ninth Circuit's *Hulteen* decision upsets.

If allowed to stand, the Ninth Circuit's *Hulteen* decision will impose conflicting rules and potentially substantial unanticipated liabilities on pension and other plans sponsored by ERIC member companies and on the companies that fund those plans. ERIC's members do business in both the Ninth Circuit and other circuits, including the Sixth and Seventh Circuits where the courts of appeal have ruled that the PDA does *not* require pre-PDA service to be recalculated. By issuing a ruling that conflicts with the Sixth and Seventh Circuits' decisions, the Ninth Circuit has subjected companies and their pension plans to conflicting rules, contrary to one of ERISA's central objectives: to allow multi-state employers to administer their benefit plans on the basis of uniform nationwide rules. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987).

Unless the Ninth Circuit's *Hulteen* decision is reversed, the adverse consequences of that decision will extend well beyond AT&T, the telecommunications industry, and companies that have not applied the PDA retroactively: the *Hulteen* decision will further diminish employers' confidence in their ability to make reliable estimates of both their plans' future benefit obligations and the employers' future funding obligations and will, in particular, further weaken the private pension system by giving employers additional reasons to terminate their plans, to cease benefit accruals under their plans, or to close their plans to new entrants. *See Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("Litigation cannot compel an employer to make plans more attractive (employers can achieve equality more cheaply by reducing the highest benefits than by increasing the lower ones). It is possible, though, for litigation about pension plans to make everyone worse off.") (Easterbrook, J.).

For all these reasons, we respectfully ask the Solicitor General to recommend that the Supreme Court grant the petition for certiorari.

Sincerely,

John M. Vine
Counsel to
The ERISA Industry Committee