September 12, 2003

COMMENTS OF THE ERISA INDUSTRY COMMITTEE ON THE EEOC'S PROPOSED EXEMPTION FOR RETIREE MEDICAL BENEFITS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

The ERISA Industry Committee ("ERIC")[1] hereby submits the following comments on the proposal to amend the EEOC's regulations to make clear that the practice of altering, reducing, or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or State-sponsored retiree health benefits is exempt from the prohibitions of the Age Discrimination in Employment Act of 1967 ("ADEA"). In its notice of proposed rulemaking, the EEOC asked that comments on the exemption be submitted by September 12, 2003. *See* 68 Fed. Reg. 41,452 (July 14, 2003).

Summary of Comments

1. ERIC strongly supports the exemption. The exemption will advance the public interest, and especially the interests of older workers and their families, by assuring that the ADEA does not discourage employers from providing health benefits to retirees and by remedying the negative consequences of the Third Circuit's decision in the *Erie County* case.

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[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, compensation, health, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

2. ERIC recommends that the exemption be modified to provide that the exemption applies to conduct that occurred before the final rule is published in the Federal Register as well as to conduct that occurs thereafter.

3. If -- contrary to ERIC's recommendation -- the exemption does not apply retroactively, the final rule should state that the exemption does not imply that the practices covered by the exemption would be unlawful in the absence of the exemption.

Comments

The exemption was proposed to remedy the negative consequences of the *Erie County* decision.[2] In *Erie County*, the U.S. Court of Appeals for the Third Circuit held that the ADEA forbids health plans from differentiating between retirees who are eligible for Medicare and those who are not unless the ADEA's "equal cost, equal benefit" test is satisfied.[3] In view of the dramatic increases in the cost of providing retiree health coverage, there is no question but that many employers will respond to *Erie County* by eliminating or reducing retiree health coverage. When *Erie County* was settled, for example, Erie County's health plan for pre-Medicare retirees was downgraded.[4] This is precisely the result Congress intended to avoid when it amended the ADEA to address employee benefits.

1. ERIC strongly supports the exemption. The exemption will advance the public interest, and especially the interests of older workers and their families, by assuring that the ADEA does not discourage employers from providing health benefits to retirees.

Under Section 9 of the ADEA, the EEOC "may establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest." The proposed exemption easily meets the requirements of Section 9 because the exemption will ensure that the ADEA does not discourage employers from providing health benefits to retirees. The exemption will thereby help to preserve the existing health care coverage of millions of retirees and their dependents, benefiting the Nation as a whole and older workers in particular.

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[2] *Erie County Retirees Ass'n v. County of Erie*, 220 F.2d 193 (3d Cir. 2000).

[3] Under the equal cost, equal benefit test, an employer may provide different benefits under the terms of a bona fide employee benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . .." 29 U.S.C. § 623(f)(2)(B)(i).

[4] 68 Fed. Reg. 41,546 (July 14, 2003).

Employer-sponsored retiree health care plans provide critically needed health care coverage to some 10 million retirees and their families.[5] Many employer-sponsored retiree health plans provide greater benefits to retirees who are not yet eligible for Medicare than they provide to retirees who are Medicare-eligible. This practice is a sensible and cost-effective means of meeting retiree health care needs by providing a "bridge" that carries the retiree from the start of retirement until eligibility for Medicare.

Three years ago, in the *Erie County* case, the Third Circuit held that the ADEA forbids health plans from differentiating between retirees who are eligible for Medicare and those who are not unless the ADEA's "equal cost, equal benefit" test is satisfied. The court reached this conclusion even though the legislative history of the ADEA's employee benefit provisions makes clear that Congress did not intend to forbid the widespread practice of providing health coverage to retirees only until they became eligible for Medicare.

When Congress adopted the Older Workers Benefit Protection Act ("OWBPA") to amend the ADEA to address the treatment of employee benefits, one of the explicit Congressional decisions was to use the term "worker" in the equal cost, equal benefit test, rather than the term "individual." *See* 136 Cong. Rec. 25,355 (1990). The legislative history shows that Congress made this change in order to allow the elimination or reduction of retiree medical benefits at Medicare eligibility. The Statement of Managers emphasized Congress's intent:

> "*Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits.* Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. *These practices are not prohibited by this substitute.*"[6]

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[5] *See Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion* at 1, U.S. General Accounting Office (May 2001) (GAO-01-374) ("2001 GAO Report").

[6] 136 Cong. Rec. 25,353 (1990) (Statement of Senate Managers) (emphasis added). On October 2, 1990, the final substitute version of S. 1511 was presented in the House of Representatives. *See id.* at 27,055. The Managers on the House side specifically adopted and incorporated into the record the Statement of the Senate Managers, including the Senate (continued…)

The ramifications of the *Erie County* decision are being felt not only by employers within the Third Circuit, but also by employers with a nationwide workforce who are subject to suit under the ADEA wherever their employees or retirees are located. Thus, even before the issue has been decided by any other court, *Erie County* is having a national impact and jeopardizing the health care coverage of millions of retirees.

Although employer-provided retiree health plans provide critically needed benefits to millions of retirees, the continued availability of employer-provided retiree health benefits is highly uncertain. Employers are not required by law to provide health benefits to either active employees or retirees, and the courts have ruled that employers can modify or terminate their retiree health benefits at any time as long as they have reserved the right to do so in the governing health plan documents or collective bargaining agreements.[7]

Erie County provides a strong incentive for those employers that provide retiree health benefits to cut back on or even to eliminate those benefits completely. For years, rapidly escalating health care costs have endangered retiree health plans, and have discouraged employers from offering such plans. Nationwide since the 1980's there has been a substantial decline in the percentage of retirees covered by employer-sponsored retiree health plans. With the aging of the baby-boom generation, both the number and proportion of Americans potentially affected by a decline in employer-sponsored retiree health plans is increasing.

In recent years, the costs of retiree health coverage have grown dramatically. Between 2001 and 2002 alone, the cost of retiree health benefits increased by an estimated 16% on average among large employers, according to a recent survey.[8] Many employers have responded to these cost increases by eliminating retiree health coverage altogether. Over the last decade the level of retiree health coverage has declined steadily.[9] While an estimated 60%-70% of large employers provided retiree health benefits during the 1980's, fewer than 40% offered such coverage by 1998.[10] According to the U.S. Department of

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Managers' statement that employers were permitted to provide different benefits to Medicare-eligible retirees. *See id.* at 27,061-062. Later, Representative Goodling introduced into the record a summary of technical corrections to the final version of S. 1511. According to the summary, the bill "clarif[ies] . . . that . . . an employer is not required to offer health benefits to both pre-Medicare eligible and post-Medicare eligible retirees." *Id.* at 27,070.

[7] *See, e.g., Sprague v. General Motors*, 133 F.3d 388 (6th Cir. 1998).

[8] *The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey*, 10 (Dec. 2002).

[9] *Id.* at v.

[10] *Private Health Insurance: Declining Employer Coverage May Affect Access for 55- to 64-Year-Olds*, U.S. General Accounting Office at 7 (June 1998) (GAO/HEHS-98-133).

Health and Human Services, in 2000, only 12% of all private establishments offered health benefits to workers retiring before age 65, and only 10.7% offered coverage to Medicare-eligible retirees.[11]

In view of the fragile condition and increasing cost of retiree health benefits, there is no question but that many employers will respond to *Erie County* by cutting back on such benefits. This is a direct result of the unpalatable alternatives available under *Erie County*: either increase health care expenditures or reduce the coverage of all retirees or pre-age-65 retirees. The cut-backs include --

- reducing benefits for pre-Medicare retirees,
- converting to a defined contribution retiree health plan under which the employee's coverage and benefits are limited to a prescribed amount, and
- eliminating retiree health benefits altogether.

In view of the cost pressures on employers, employers can be expected to curtail or eliminate retiree health benefits, not to increase them.[12] When *Erie County* was settled, for example, Erie County's health plan for pre-Medicare retirees was downgraded. This is precisely the result Congress intended to avoid when it amended the ADEA to address employee benefits. Senator Hatch, one of the managers of the Senate bill explained that "[m]any employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare," and that "[t]his compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages."[13] He further explained:

> "It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate benefits.
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[11] *Percent of private sector establishments that offer heath insurance by plan options and insurance offerings to retirees by State: United States, 2000*, Medical Expenditure Panel Survey, Agency for Healthcare Research & Quality, U.S. Department of Health & Human Services.

[12] *See* 2001 GAO Report at 12-18.

[13] *See, e.g.,* 136 Cong. Rec. 25,356 (1990).

> "If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?"[14]

Moreover, without employer-sponsored health benefits, retirees will have great difficulty in obtaining health insurance coverage, and any plans that are available to retirees will be expensive and frequently unaffordable.[15]

In short, rather than promoting greater employer-provided coverage for older retirees, *Erie County* has significantly limited employers' flexibility to provide cost-effective health coverage to a broad range of retirees, and might well lead to the curtailment of health benefits for retirees under age 65 or to the elimination of retiree health benefits altogether.

The purposes of the ADEA are "to promote employment of older persons based on their ability rather than age," "to prohibit arbitrary age discrimination in employment," and "to help employers and workers find ways of meeting problems arising from the impact of age on employment." The proposed exemption will remedy the negative consequences of the erroneous decision in *Erie County* and ensure that the ADEA does not discourage employers from providing health benefits to their retirees. The exemption will advance the ADEA's goals by making it feasible for employers to provide post-employment health benefits to older workers.

2. ERIC recommends that the exemption be modified to provide that the exemption applies to conduct that occurred before the final rule is published in the Federal Register as well as to conduct that occurs thereafter.

The EEOC's notice of proposed rulemaking states that

> "The proposed exemption would become effective on the date of publication of a final rule in the **Federal Register**. It is intended that the exemption shall apply to existing, as well as newly created, employer-provided retiree health benefit plans."[16]

This statement does not make clear whether, once the exemption becomes effective, the exemption will apply to conduct relating to an existing plan that occurred before the effective date as well as to conduct that occurs thereafter.

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[14] *Id.* at 25,537.

[15] 2001 GAO Report at 4-5, 19-24; *see also Retiree Health Insurance: Gaps in Coverage and Availability*, Statement of William J. Scanlon, Director, Health Care Issues, Government Accounting Office (Nov. 1, 2001) (GAO-02-178T).

[16] 68 Fed. Reg. 41,547 (July 14, 2003).

ERIC strongly urges that the exemption be made applicable to past as well as future conduct.[17] Retroactive application of the exemption is consistent with both Congressional intent and the EEOC's statement of intent. The legislative history of the OWBPA makes it evident that Congress did not intend to forbid the widespread practice of providing health coverage to retirees only until they became eligible for Medicare. The notice of proposed rulemaking states explicitly that the exemption will apply to existing plans as well as to new plans. As a practical matter, the exemption will be significant only for existing retiree health plans, since employers are not currently adopting new retiree health plans. The objective of the exemption is to avoid discouraging employers from continuing their existing plans. In order for the exemption to implement these purposes fully, the exemption must expressly apply retroactively as well as prospectively.

If the exemption applies only prospectively, the exemption could increase the exposure of employers to retroactive claims like those in *Erie County*[18] and encourage employers to reduce or eliminate their retiree health care benefits to offset the potential liabilities under any such claims. Such results would be directly contrary to the objectives of the OWBPA and the exemption.

3. If -- contrary to ERIC's recommendation -- the exemption does not apply retroactively, the final rule should state that the exemption does not imply that the practices covered by the exemption would be unlawful in the absence of the exemption.

The notice of proposed rulemaking emphasizes that the proposal is "a narrow exemption from the prohibitions of the ADEA"[19] and recites that the EEOC filed a brief *amicus curiae* in *Erie County*, "asserting . . . that (1) retirees are covered by the ADEA and (2) employer reliance on Medicare eligibility in making distinctions in employee benefits violated the ADEA, unless the employer satisfied one of the Act's specified defenses or exemptions."[20]

ERIC is concerned that the foregoing statements might cause some to infer that the EEOC believes that *Erie County* was correctly decided, and that the EEOC believes that employers who do not satisfy one of the defenses under the ADEA are subject to retroactive liability because their retiree health plans are linked to Medicare eligibility. ERIC

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[17] Of course, ERIC does not advocate applying the exemption retroactively to change the outcome of cases that have already been decided, such as *Erie County*.

[18] Employers' exposure to retroactive claims will be increased if the exemption applies only prospectively and if the exemption is viewed as reflecting the EEOC's view that *Erie County* correctly applied the law in effect before the exemption became effective.

[19] 68 Fed. Reg. 41,547.

[20] *Id.* at 41,545 n.25.

strongly disagrees with such views: ERIC took an opposing point of view in the *amicus curiae* brief it filed with the Supreme Court in support of Erie County's petition for a writ of certiorari.

Regardless of one's point of view on the merits, this rulemaking is not an appropriate vehicle to establish the EEOC's position on the *Erie County* issue.[21] The purpose of the exemption is to permit employers, consistent with long-standing practice, to provide health benefits for retired participants that are altered, reduced, or eliminated when the participant is eligible for Medicare (or State-sponsored) health benefits, not to establish a liability trap for employers. If the exemption does not apply retroactively, the final rule should -- at the very least -- make clear that the purpose of the exemption is to resolve a controversial issue and that it should not be inferred from the exemption that the practices covered by the exemption would be unlawful in the absence of the exemption.

The U.S. Department of Labor has followed a similar practice in issuing exemptions under the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Department's ERISA exemptions typically state that "the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction."[22] If the EEOC's retiree health exemption does not apply retroactively, the EEOC should include a statement of this kind in its final rule to discourage others from citing the exemption to support their claims that employers are subject to retroactive liability.

ERIC very much appreciates the opportunity to submit its comments on the exemption. If further comment or additional information would be helpful, please let us know.

THE ERISA INDUSTRY COMMITTEE

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[21] In its October 2000 Compliance Manual Chapter on Employee Benefits, the EEOC initially adopted the Third Circuit's position in *Erie County* as its national enforcement policy. In August 2001, however, the Commission unanimously voted to rescind the portions of the Compliance Manual that discussed *Erie County*. 68 Fed. Reg. 41,545 n.25 (July 14, 2003).

[22] *See, e.g.,* PTE 2002-51, 67 Fed. Reg. 70,623, 70,627 (Nov. 25, 2002); Amendment to PTE 86-128, 67 Fed. Reg. 64,137, 64,138 (Oct. 17, 2002).