



THE ERISA INDUSTRY COMMITTEE (ERIC)

Representing the Employee Benefits Interests of America's Largest Employers

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April 21, 2004

The Honorable Cari M. Dominguez, Chair
The Honorable Naomi C. Earp, Vice Chair
The Honorable Paul Steven Miller, Commissioner
The Honorable Leslie E. Silverman, Commissioner
The Honorable Stuart J. Ishimaru, Commissioner
Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507
FAX: 202-663-4114

Re: Retiree Health Benefits

Ladies and Gentlemen:

I am writing on behalf of The ERISA Industry Committee ("ERIC") to reiterate our strong support for the EEOC's intent to issue an exemption recognizing that an employer does not violate the Age Discrimination in Employment Act (the "ADEA") merely because it provides health benefits to pre-Medicare retirees only until they become eligible for Medicare. (See ERIC letter memorandum August 15, 2002.) We strongly agree with the EEOC's original announcement that the "new rule will ensure that the application of the ADEA does not discourage employers from providing health benefits to their retirees."

Application of ADEA Was Not Intended to Discourage Health Care Coverage

It is critical that any application or interpretation of ADEA does not discourage the provision of health benefits to retirees. 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 reasonable, fair, 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.

In the *Erie County* case, 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. The court reached this conclusion even though the legislative history of the ADEA's employee benefit provisions emphasized that Congress did not intend to forbid the widespread practice of providing health coverage to retirees only until they became eligible for Medicare:

"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." (136 Cong. Rec. 25,353 (1990) (Statement of Managers) (emphasis added)).

Impact of EEOC's Decision Will Be Widespread

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, *Erie County* is having a national impact and jeopardizing the health care of millions of retirees who are not yet Medicare-eligible (for example, retirees under age 65 who are not disabled and who do not have End Stage Renal Disease and retirees over age 65 who do not have 40 quarters of qualifying employment).

Although employer-provided retiree health plans provide critically needed benefits to millions of retirees on a voluntary basis, *Erie County* provides a strong incentive for employers who provide retiree health benefits to cut back on or even to eliminate those benefits completely. 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. (U.S. General Accounting Office Report 01-374, Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion 12-18 ("May 2001") ("GAO Report")).

For example, when *Erie County* was settled, Erie County's health plan for pre-Medicare retirees was downgraded. This is precisely the result Congress sought to avoid when it amended the ADEA to address employee benefits. (136 Cong. Rec. 25,357 (1990)) 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, frequently unaffordable, and thus unattainable. (GAO Report at 4 & 19-24.)

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 exemption contemplated by the EEOC will ensure that the ADEA does not discourage employers from providing health benefits to their retirees. It will enhance, not subvert, the ADEA's goals.

Employer-sponsored retiree health care plans provide critically needed health care coverage to some 10 million retirees and their families. The EEOC should act promptly to assure that this vital source of retiree health benefits is not jeopardized.

Very truly yours,

Mark J. Ugoretz
President