UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, et al., Plaintiffs v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	2:05-cv-00509-AB

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This is a case about the unintended consequences of a rule and subsequent administrative decisionmaking designed to alleviate those consequences. Defendant Equal Employment Opportunity Commission ("EEOC") took the position that the Age Discrimination in Employment Act's equal benefit or equal cost rule applies to retiree health benefits, and the Third Circuit agreed. *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). The EEOC subsequently determined that the rule was having the unintended consequence of discouraging employers from providing retiree health benefits, which employers are not required by law to provide. Generally, employers who provide retiree health benefits do so by coordinating those benefits with Medicare, either by providing health care benefits to retirees only until they become eligible for Medicare, or by providing full benefits to pre-Medicare retirees and supplemental benefits to Medicare-eligible retirees. The *Erie County* rule requires employers either to determine that the benefits that its Medicare-eligible retirees receive under the complex and ever-evolving Medicare program are the same as those received by retirees not yet eligible for Medicare (equal benefit), or to expend at least as much money for Medicare-eligible retirees as for retirees not yet eligible for Medicare (equal cost). The EEOC determined that the cost component of the rule made no sense in the retiree health benefit context given the existence of Medicare benefits, and the benefit component has proved to be impracticable. Accordingly, the EEOC exercised its statutory authority under the ADEA to create an exemption from the statute for the practice of coordinating employer-sponsored health benefits with Medicare eligibility.

Plaintiffs complain, first, that the EEOC's exemption runs afoul of *Erie County*, in which the Third Circuit ruled (consistent with the EEOC's advocacy) that the practice of coordinating

retiree health benefits with Medicare eligibility violates the ADEA unless the employer can demonstrate compliance with the equal benefit or equal cost rule. This argument fails because it disregards the EEOC's statutory authority to do exactly what it did – create an exemption to the ADEA when necessary to the public interest. The balance of Plaintiffs' arguments boil down to disagreement with the EEOC about its determination of where the public interest lies. But Congress gave that responsibility to the EEOC, not to Plaintiffs, and the EEOC's determination is accordingly entitled to the Court's deference. Despite its advocacy of full ADEA coverage for coordination of retiree health benefits with Medicare eligibility before the Third Circuit in *Erie County*, the EEOC subsequently determined that the best was the enemy of the good. Application of the *Erie County* rule was a disincentive to employers to provide for Medicare bridge coverage and other health insurance plans which may furnish a higher level of coverage to pre-Medicare retirees than to Medicare recipients. Because employers are not required to provide *any* health care coverage to retirees, except through contracts into which they enter voluntarily, the EEOC decided to exempt from the ADEA the practice of coordinating retiree health benefits with Medicare eligibility in order to remove a disincentive to providing such coverage. The exemption reflects the EEOC's reasoned application of its expertise in age discrimination issues to a difficult and complex issue entrusted to it by Congress. For these reasons, Plaintiffs do not have any likelihood of success on the merits.

Nor can Plaintiffs establish irreparable injury. At most, Plaintiffs have demonstrated speculative harm that may or may not result from implementation of the exemption. Plaintiffs have not demonstrated that their employers will terminate their retiree health benefits as a result of the exemption. Rather, they assume that an “inevitable” result of the exemption is that they

will lose their retiree health benefits. It is well settled, however, that a preliminary injunction cannot be predicated on speculative harm. Therefore, Plaintiffs have not satisfied their burden of demonstrating irreparable harm. Accordingly, their motion for a preliminary injunction should be denied.

BACKGROUND

In 1967, Congress enacted the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"). The stated 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." 29 U.S.C. § 621(b). Although the ADEA was originally enforced by the Department of Labor, the EEOC assumed enforcement authority over the ADEA on July 1, 1979 pursuant to Reorganization Plan No. 1. 43 Fed. Reg. 19,807 (May 9, 1978).

Section 4 of the ADEA makes it unlawful for an employer to discriminate against an individual on the basis of age with respect to "compensation, terms, conditions, or privileges of employment." 29 U.S.C. § 623(a)(1). In 1989, the Supreme Court held that the ADEA did not prohibit discrimination in employee benefits, such as health insurance. *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, (1989). In response to the decision in *Betts*, Congress enacted the Older Workers Benefit Protection Act of 1990 ("OWBPA"), Pub L. No. 101-433, 104 Stat. 978 (1990), which amended the ADEA to define the term "compensation, terms, condition or privileges of employment" in Section 4 as including employee benefits. 29 U.S.C. § 630(l).

A. Employer-Provided Retiree Health Benefits

For many years, retirees have relied on employer-sponsored health benefit plans for health coverage: "Employer group coverage affords many retirees health benefits that are otherwise unavailable to or not affordable for them."[1] (Comments of AARP of 9/12/03, at 2.) While federal law does not require private, state, or municipal employers to provide health benefits for all retirees,[2] some employers do so to maintain a competitive advantage in the marketplace – using these and other benefits to attract and retain the best talent available to work for their organizations. (Comments of Society for Human Resource Management ("SHRM") of 9/12/03, at 2.)

Since Medicare was created in 1965, many employers who provide retiree health benefits have coordinated those benefits with the health benefits provided to eligible individuals under Medicare. *See* Final Substitute: Statement of Managers, 136 Cong. Rec. 25,353 (Sept. 21, 1990); Age Discrimination in Employment Act Proposed Regulation for Retiree Health, 68 Fed. Reg. 41,542, 41,544 (July 14, 2003) (hereinafter "NPRM"). Employers customarily do this by utilizing one of three types of plans, or a combination thereof:

- Bridge plans that provide retirees who are not yet eligible for Medicare with health benefits to fill the gap between retirement and Medicare-eligibility. These plans end when a retiree becomes eligible for Medicare.

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[1] *See also* U.S. General Accounting Office, *Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion*, at 1 (GAO Doc. No. GAO-01-374) (2001) (hereinafter, "GAO Report"); The Henry J. Kaiser Family Foundation & Health Research and Educational Trust, *Employer Health Benefits, 2002 Annual Survey*, at v (2002) (hereinafter "Kaiser Survey 2002"). The relevant excerpts from these materials, and all other administrative materials cited herein, are attached to the Declaration of James G. Allison.

[2] The Federal Employee Health Benefits Act, 5 U.S.C. § 809, *et seq*., requires the federal government to continue offering full health benefits to all of its retirees.

- Supplement plans that provide Medicare-eligible retirees with health benefits to supplement Medicare benefits through a special health benefit plan. Employers often continue to provide health insurance for retirees not yet eligible for Medicare through the health benefit plan for active employees.

- Wrap-around plans, the most generous and least common type of plans, that provide all retirees with health benefits, but carve out those benefits provided by Medicare for Medicare-eligible retirees.

See id.; *Hearing Before the House Comm. on Education and the Workforce*, 107th Cong. (2001) (statement of William J. Scanlon, Director of Health Care Services, GAO).

B. The *Erie County* Decision

In *Erie County,* a group of Medicare-eligible retirees alleged that the county violated the ADEA by offering them health insurance coverage that was inferior to the coverage offered to retirees not yet eligible for Medicare. *Erie County*, 220 F.3d at 196. Prior to 1992, Erie County offered current employees and retirees separate but similar traditional indemnity health insurance coverage. *Id*. In February 1998, however, in an effort to control escalating health benefit costs, the county decided to offer health benefits to Medicare-eligible retirees through a coordinated health plan provided by a health maintenance organization (HMO) and Medicare. *Id.* at 197. Eligible retirees had to enroll and pay for Medicare Part B Medical Insurance in order to participate in the plan. *Id.* Retirees not yet eligible for Medicare continued to be covered by a traditional indemnity plan until October 1998, when they were transferred to a hybrid point of service plan where each insured could select between an HMO and the traditional indemnity option on an as-needed basis. *Id*.

The District Court held that the Medicare-eligible retirees did not have a claim under the ADEA. *Erie County Retirees Ass'n. v. County of Erie*, 91 F. Supp. 2d 860, 879 (W.D. Pa. 1999).

The retirees appealed to the Third Circuit and, in January 2000, the EEOC filed an *amicus curiae* brief, arguing 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. (Brief of Amicus Curiae Equal Employment Opportunity Commission, *Erie County Retirees Ass'n. v. County of Erie*, 220 F.3d 193 (3d Cir. 2000) (No. 99-3877) (Pls. Ex. D).) The Third Circuit agreed with the EEOC and held that the ADEA prohibits an employer from treating "retirees differently with respect to health benefits based on Medicare eligibility," unless the employer could show either that the benefits available to Medicare-eligible retirees were equal to the benefits provided to retirees not yet eligible for Medicare, or that it was expending equal costs for both groups of retirees. *Erie County*, 220 F.3d at 214. The court also ruled that the costs incurred by Medicare on behalf of Medicare-eligible retirees could not be considered in the calculation. *Id.* at 216. It remanded the case to determine whether the county could meet the ADEA's equal benefit or equal cost defense.[3] *Id.* at 217.

On remand, the county conceded that it could not meet the equal cost prong using the Third Circuit's formulation of the test. *Erie County Retirees Ass'n v. County of Erie*, 140 F. Supp. 2d 466, 477 (W.D. Pa. 2001). The district court then found that the county did not provide equal benefits to its retirees because (1) Medicare-eligible retirees were required to pay the Medicare Part B premium, which was greater than the premium paid by retirees not yet eligible

[3]Under the ADEA, it is not unlawful "to observe 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).

for Medicare; (2) Medicare-eligible retirees were only provided coverage through an HMO, while retirees not yet eligible for Medicare were able to choose between HMO and traditional indemnity coverage for each health incident; and (3) Medicare-eligible retirees were required to use a drug formulary for prescription drugs, while retirees not yet eligible for Medicare were not. *Id.* at 475-77.

Erie County was decided against the backdrop of rising health care costs and declining employer-sponsored retiree health benefits. Multiple studies showed double-digit increases in the cost of retiree health coverage.[4] New accounting rules also required retiree health benefits to be included as a financial liability on a company's balance sheets, adversely affecting the calculation of the company's profits and losses.[5] In other words, economic and accounting factors were already creating a strong incentive for employers to reduce their expenditures for retiree health benefits when *Erie County* was decided.

C. The EEOC's Adoption of *Erie County* and its Aftermath

In October 2000, the EEOC adopted the *Erie County* ruling as its national enforcement policy. EEOC Compliance Manual, Section 3: *Employee Benefits*, at § 3-IV B (2000).[6] The

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[4]Anna M. Rappaport, *Postemployment Benefits: Retiree Health Challenges and Trends — 2001 and Beyond*, *in Compensation and Benefits Management*, Autumn 2001, at 56; The Henry J. Kaiser Family Foundation & Health Research and Educational Trust, *Employer Health Benefits 2001 Annual Survey*, at 1 (2001) (hereinafter "Kaiser Survey 2001").

[5]Anna M. Rappaport, *FAS 106 and Strategies for Managing Retiree Health Benefits*, *in Compensation and Benefits Management*, Spring 2001, at 37 (hereinafter "Rappaport"); Paul Fronstin, *Retiree Health Benefits: Trends and Outlook*, *in EBRI Issue Brief No. 236*, August 2001, at 1 (hereinafter "Fronstin").

[6]The Compliance Manual is a publicly available sub-regulatory document, available at http://www.eeoc.gov/policy/compliance.html.

Manual stated that health plans that coordinate with Medicare "will be lawful under the ADEA as long as the *total* health coverage available to older retirees is at least equal, in type and value, to that offered . . . [to] younger retirees. . . . Where, on the other hand, older retirees do not receive an equal benefit . . . the employer will be required to meet the equal cost defense to justify the resulting age based inequality." *Id.* (emphasis in original). The EEOC thereby made clear that it was following the *Erie County* decision by instituting a nationwide enforcement policy that providing lower levels of benefits to older retirees than to younger retirees can be justified only under the equal benefit or equal cost rule or pursuant to other ADEA defenses. *Id*. Several EEOC field offices began to investigate the retiree health plans offered by school districts, primarily in the Midwest, and subsequently filed hundreds of directed and individual charges.[7] (Comments of American Federation of Teachers ("AFT") of 9/12/03, at 3 n.4.)

Over the next few months, the EEOC began receiving information from various sources suggesting that its adoption of the *Erie County* rule as a national enforcement policy was having serious, unintended consequences on the provision of employer-sponsored retiree health benefits. Age Discrimination in Employment Act Regulation for Retiree Health Benefits, (Final Rule approved by Commission Apr. 22, 2004, publication pending) (to be codified at 29 C.F.R. §§ 1625,1627), at 4-5 (hereinafter "Final Rule"). Public school systems and unions explained to the Commission that they typically offered health benefits to their retirees in the form of Medicare bridge plans that would not meet the equal benefit or equal cost test announced in *Erie County*. (*See* Comments of AFT at 2; Comments of Minnesota School Board Association ("MSBA") of

[7]A directed charge is one that is initiated by the Commission itself pursuant to Section 7 of the ADEA. 29 U.S.C. § 626.

9/12/03, at 1-2; Comments of National Education Association ("NEA") of 9/12/03, at 2; Comments of Wisconsin Association of School Boards ("WASB") of 9/12/03, at 2.) The NEA stated: "Under this holding, the basic plan design that is used by most of the employers who provide medical insurance benefits to retired education employees is legally suspect." (Comments of NEA at 2.) Both groups expressed certainty that their limited financial resources would force them to cut retiree health benefits, or eliminate them altogether, in order to comply with *Erie County*. (Comments of AFT at 2; Comments of MSBA at 1-2; Comments of NEA at 2-3.)

Concerns about the *Erie County* rule were not limited to public school systems. A broad spectrum of public, private, and professional organizations criticized the Commission's actions, contending that *Erie County* was another burden to add to the already rising costs of health insurance. NPRM, 68 Fed. Reg. at 41,546; Final Rule at 2. The concerns were particularly acute for public workers such as firefighters and law enforcement officers who, like teachers, frequently retire before Medicare eligibility and receive retiree health benefits through Medicare bridge plans. (Comments of Burke, Williams & Sorenson ("BWS") of 9/12/03, at 2.)

In May 2001, the General Accounting Office issued a report critical of the effect of EEOC enforcement of *Erie County* on retiree health programs. GAO Report at 16. The GAO report acknowledged that many employers were eliminating retiree health benefits due to their considerable cost, but suggested that the *Erie County* ruling might be providing additional incentive for employers to eliminate retiree health benefits. *Id.*

Private employers, benefits consultants, and actuaries also explained that many existing Medicare supplement plans would violate the *Erie County* rule. *See* NPRM, 68 Fed. Reg. at

41,545. To comply with *Erie County*, employers would have to either:

- increase the Medicare-eligible retirees' benefits to match the pre-Medicare retirees' benefits;
- reduce the pre-Medicare retirees' benefits to match the Medicare-eligible retirees' benefit; or
- eliminate medical benefits for all retirees.

(Comments of AFT at 2; Comments of ERISA Industry Committee ("ERIC") of 9/12/03, at 5; Comments of Wisconsin Education Association Council ("WEAC") of 9/12/03, at 1-2); NPRM, 68 Fed. Reg. at 41,545-46. A wide array of voices informed the EEOC that employers would not choose to increase benefits for Medicare-eligible employees.

D. Rescission and Study of *Erie County* Enforcement Policy

Concerned about the detrimental effect of *Erie County* enforcement on retiree health plans, the Commission voted unanimously in August 2001 to rescind the retiree health benefits portion of the Compliance Manual in order to allow further study and evaluation of the relationship between the ADEA and retiree health benefits. NPRM, 68 Fed. Reg. at 41,545 n.25. The EEOC subsequently conducted a thorough review of scholarly studies and publications regarding retiree health benefits, held meetings with a wide range of stakeholder representatives, analyzed the various remedial options available to the Commission, and obtained expert analysis regarding the viability of various remedial options. NPRM, 68 Fed. Reg. at 41,542.

The EEOC's review of relevant studies revealed certain clear trends regarding retiree health benefits:

- Employers commonly provided different health benefits to their retirees based on Medicare eligibility;[8]

- Health care costs, including those for retirees, were rising substantially;[9]

- Large companies were more likely to sponsor retiree health insurance than were smaller companies;[10]

- The number of employers offering retiree health benefits was declining. For example, one survey showed only 34 percent of large employers offered retiree health coverage in 2002, compared to 66 percent of similar companies in 1988.[11]

The EEOC believed that its enforcement of the *Erie County* rule would exacerbate this trend of decreasing provision of retiree employee benefits. Studies also identified this problem with national enforcement of the *Erie County* rule:[12]

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[8]GAO Report at 6.

[9]William M. Mercer, *Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans 2000*, (2001), available at www.mercerhr.com; Kaiser Survey 2001 at 1; Kaiser Survey 2002 at 1.

[10]GAO Report, at 8; Kaiser Survey 2002 (34% of large employers (those with more than 200 employees) versus 5% of small employers offer retiree health).

[11]Kaiser Survey 2002 at 142; *see also* William M. Mercer, *Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans 2002*, (chart) (2002) available at www.mercerhr.com (noting that the number of employers with 500 or more workers who offer retiree health coverage decreased by 17 percent between 1993 and 2001 for both pre- and post-Medicare eligible retirees); *see also* Hewitt Associates LLC, *Trends in Retiree Health Plans*, (chart) (2001) (15% decline in the number of large employers providing pre-Medicare retiree health coverage occurred between 1991 and 2000 versus an 18% decrease for Medicare-eligible retirees during the same period). Studies also demonstrated that small companies were facing even greater challenges in providing health benefits. *See, e.g.*, Kaiser Survey 2002 at 3 (67% of small employers (3-199 employees) offered health benefits in 2000, while only 61% offered such benefits in 2002).

[12]*See also* GAO Report at 16-17; Rappaport at 38 ("If attempts to appeal the *Erie County* decision are unsuccessful, the employer community likely will seek remedial legislation and, if that fails, may eliminate many retiree medical programs altogether.").

> With health care costs currently increasing sharply and some employers already dropping retiree health benefits or making it harder for retirees to qualify for retiree health benefits, it is unlikely that employers will increase the level of health benefits for Medicare-eligible retirees. Instead, because of the legal and cost concerns raised by the Erie County decision, they are likely to cut back on benefits for early retirees . . . . Furthermore, the Erie County ruling may result in more employers eliminating retiree health benefits altogether.

Fronstin at 14.

The EEOC also continued to meet with employee representatives, employers, labor unions, human resource consultants, benefit consultants, actuaries, and state and local government representatives.[13] NPRM, 68 Fed. Reg. at 41,542. Many of the groups were concerned that employers would comply with the *Erie County* rule by reducing existing coverage for pre-Medicare retirees or eliminating retiree health benefits altogether. Final Rule at 2, 6. Labor leaders also explained that the constraints of the *Erie County* rule were negatively impacting their ability to negotiate for retiree health benefits. *Id.* at 5.

E. The Notice of Proposed Rulemaking on Retiree Health Benefits.

On July 14, 2003, the EEOC published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register. 68 Fed. Reg. 41,542 (July 14, 2003).[14] The NPRM stated that the EEOC "proposes to amend its regulations governing age discrimination in employment to exempt from

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[13]These groups included the American Association of Retired Persons (AARP), AFL-CIO, American Federation of Teachers (AFT), National Education Association (NEA), United Auto Workers (UAW), American Academy of Actuaries (AAA), American Bar Association Joint Committee on Employee Benefits Committee, American Association of Health Plans, U.S. Chamber of Commerce, American Benefits Counsel, Society for Human Resource Management (SHRM), Equal Employment Advisory Counsel (EEAC), Hewitt Associates, ERISA Industry Committee, and Blue Cross Blue Shield Association.

[14]Pursuant to Executive Orders 12067 and 12866, explained below, the EEOC coordinated with other affected federal agencies and the Office of Management and Budget before issuing the proposed regulation.

the prohibitions of the Age Discrimination in Employment Act of 1967 the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program. This exemption will ensure that the application of the ADEA does not discourage employers from providing health benefits to their retirees." *Id.*

In considering how to address this problem, the EEOC examined whether it would be possible to apply the traditional equal benefit or equal cost test in its regulations to employer-sponsored retiree health benefit plans, but determined that doing so would place employers in the untenable position of having to reduce or eliminate retiree health benefits or risk violating the ADEA. NPRM, 68 Fed. Reg. at 41,546. The EEOC also examined whether various alternatives to the traditional equal benefit or equal cost test could be utilized for employer-provided retiree health plans. *Id.* For the following reasons, the EEOC determined that none of the considered alternatives would allow employers readily and cost-efficiently to determine which practices were or were not permissible under the ADEA:

- proposals concerning the equal cost test were rejected because they required unduly complex and burdensome actuarial calculations to account for differences in plan design, levels and types of coverage, the Medicare premium assessed for each gender in each geographical area, and the deductibles and co-pays charged in each plan;[15] NPRM, 68 Fed. Reg. at 41,546

[15]All of these calculations, with any resulting necessary plan adjustments, would need to be made annually, or whenever changes were made to any component of Medicare or any retiree health benefit plan offered by an employer. In addition, employers who have multiple plans would have to separately determine whether each plan was in compliance. (*See* Letter of John J. Schubert, Chairperson of American Academy of Actuaries, to David Frank, Legal Counsel (October 16, 2002), available at www.actuary.org/pdf/health/eeoc_16oct02.pdf.) (outlining 12 factors that would complicate equal benefit or equal cost calculations).

- proposals concerning the equal benefit test were rejected because employers could not easily and with certainty determine whether every aspect of their pre-Medicare retiree health plan was identical to Medicare. *Id*.

Given all of these problems and concerns, the EEOC rejected the idea of attempting to redefine the equal benefit or equal cost defense. Final Rule at 6. It concluded that a narrow exemption from the prohibitions of the ADEA, pursuant to its exemption authority provided by 29 U.S.C. § 628, was the most effective way to assure that the Act did not cause further erosion of retiree health benefits and that the Act's protections for older employees and retirees otherwise remained intact.

The NPRM set forth the reasons why the EEOC's proposed exemption was in the public interest, including a detailed explanation of the need for remedial action and why the EEOC proposed an exemption rather than other regulatory alternatives. *See infra*. The NPRM invited "comments on this proposed exemption from all interested parties, including employee rights organizations, labor unions, employers, benefits groups, actuaries, and state and local governments." *Id.* at 41,547. The NPRM noted that the Commission would consider any comments "received by 9/12/03," but also stated that "[c]omments received after the closing date will be considered to the extent practicable." *Id*. at 41,542. The Commission considered all comments received by October 14, 2003 because of the significant interest expressed in the NPRM shown by the public and the technical difficulties faced by the Commission in receiving such a large volume of comments via facsimile.

F. Summary of Comments

The EEOC received 44 organizational comments. Twenty-seven organizations supported the EEOC's proposed exemption, while 17 organizations opposed the exemption. Comments

supporting the proposed exemption confirmed the information that the EEOC had gathered in its reexamination of the *Erie County* rule:

> 1. Rising health care costs were inducing employers to find ways of reducing retiree health benefits (Comments of American Benefits Council ("ABC") of 9/12/03, at 1; Comments of BWS at 2; Comments of Equal Employment Advisory Council ("EEAC") of 9/9/03, at 2);
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> 2. Compliance with *Erie County,* either as currently interpreted or through some sort of regulatory "safe harbor," required unreasonably complex and/or expensive measures for the majority of employers (Comments of American Association of Health Plans ("AAHP") of 9/8/03, at 2);
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> 3. Faced with these circumstances, employers were likely to reduce or eliminate retiree health benefits if compliance with *Erie County* was required. (Comments of AFT at 2-3; Comments of Baker, Donelson, Bearman, Caldwell & Berkowitz ("BDBCB") of 9/4/03, at 2; Comments of Delaware State Education Association ("DSEA") of 9/11/03; Comments of HR Policy Association ("HRPA") of 9/12/03, at 3).

In sum, the EEOC's proposed exemption rule was deemed by these comments as "urgently needed to slow the erosion of retiree health benefits that has been accelerated by *Erie County*," (Comments of AAHP at 2), because the "economic consequences of the holding in *Erie County* . . . can hardly be overstated." (Comments of NEA at 2.)

The EEOC also received comments opposing the proposed exemption.[16] These opposing comments made three basic arguments: (1) that the Commission lacked authority to enact the proposed rule, (2) that the Commission had not studied the issue sufficiently to warrant an

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[16]Seventeen organizations filed opposition comments, including AARP, American Service Association, Lucent Retirees Organization, and the National Association of Retired Federal Employees. Thirty-seven petitions, comprised of approximately 700 total signatures, opposed to the exemption also were received, as were approximately 22,569 comments from individual citizens. The majority of individual comments were in the format of a "form letter" drafted by AARP, some of which included additional handwritten comments from the sender. The EEOC also received a list of 12,700 names from AARP of persons who were, according to AARP, opposed to the regulation as the exemption was explained to them by AARP.

exemption, and (3) that the proposal would allow employers to freely shift the cost of retiree health benefits to retirees and that retirees over age 65 would lose their employer-provided health coverage. These opposing comments did not include any studies or other information refuting the Commission's findings, nor did they suggest alternatives to the proposed exemption.

G. Final Rule Approved by the Commission

After considering the comments during the notice and comment period, the Commission voted 3-1 at an April 22, 2004 open meeting to approve a final rule that would exempt from the ADEA the practice of coordinating retiree health benefits with Medicare. (Meeting of Equal Employment Opportunity Commission to Discuss Proposed Rule Regarding Retiree Health Benefits Under the Age Discrimination in Employment Act (Washington D.C., April 22, 2004) (hereinafter "Open Meeting")) As stated in its preamble, the final rule was created "[t]o address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits." Final Rule at 1. The preamble also details the substance of public comments regarding the exemption, the EEOC's analysis of the issues raised, the Commission's longstanding view that retirees are covered by the ADEA, and a detailed analysis of the EEOC's regulatory authority and the reasons for the current exercise of that authority. The exemption applies solely to the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare (or a comparable State health benefits program). The exemption does not otherwise affect an employer's ability or obligation to offer health or other employment benefits to retirees, consistent with the law. The exemption does not affect the enforcement of contracts to provide health benefits to retirees, such as a collectively bargained obligation to provide health benefits, nor any other non-ADEA legal obligation to provide health

benefits. Final Rule at 4.

The exemption does not change or otherwise affect the Commission's longstanding position that (1) retirees and their benefits are covered by the ADEA; and (2) providing lower levels of employee benefits, including early retirement incentive benefits, will violate the ADEA unless the employer meets one of the narrow exceptions set out in the ADEA. Final Rule at 3.

H. Additional Steps Before Implementation of the Final Rule

After the Commission approved the rule on April 22, 2004, the exemption was sent to other affected agencies for comment pursuant to Executive Order 12067, 43 Fed. Reg. 28,967 (June 30, 1978).[17] The EEOC then submitted the exemption to the Office of Management and Budget (OMB) for review on December 29, 2004, pursuant to Executive Order 12866.[18] The EEOC has stipulated that it will not publish the Final Rule before April 5, 2005, to allow the Court time to rule on Plaintiffs' motion for preliminary injunction. (Order of February 7, 2005.)

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[17]Executive Order 12067 empowers the EEOC to issue rules and regulations pertaining to employment discrimination. 43 Fed. Reg. at 28,967. Prior to issuing such regulations, however, the Executive Order requires the EEOC to "advise and offer to consult with the affected Federal departments and agencies during the development of any . . . regulations . . . and [to] formally submit [them] . . . to affected . . . agencies at least 15 working days prior to public announcement." *Id.* Further, it calls on the EEOC to "use its best efforts to reach agreement with the agencies on matters in dispute." *Id*.

[18]Executive Order 12866 was issued in response to concerns that federal regulations were imposing unreasonable and costly burdens on businesses. 58 Fed. Reg. 51,735 (Sept. 30, 1993). It requires federal agencies, including the EEOC, to analyze the economic and reporting burdens imposed by its regulations on businesses, particularly small businesses. It empowers OMB's Office of Information and Regulatory Affairs (OIRA) to serve as the final step in the regulatory process, assessing the agency's analysis of its regulations. Federal agencies may not publish or enact regulations prior to obtaining approval from OIRA.

ARGUMENT

Preliminary injunctions are "extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *Allegheny County Prison Employees Indep. Union v. County of Allegheny*, 315 F. Supp. 2d 728, 737 (W.D. Pa. 2004). Although Plaintiffs have the burden of demonstrating "a reasonable probability of eventual success in the litigation" and that Plaintiffs will be irreparably injured if such extraordinary relief is not granted, *Oburn v. Shapp*, 521 F.2d 142, 147 (3d Cir. 1975), "[i]t is well-established that district courts are to engage in a balancing test to determine whether there is an overall need for a preliminary injunction." *Allegheny County Prison*, 315 F. Supp. 2d at 736; *Oburn*, 521 F.2d at 147. Specifically, the district court should take into account "the possibility of harm to other interested persons from the grant or denial of the injunction, and [] the public interest." *Id.* In this case, consideration of these factors compels denial of injunctive relief.

On the merits, Plaintiffs' statutory arguments are unfounded because they ignore express language of the ADEA, and their assertion that the challenged exemption is arbitrary and capricious represents a disagreement with the considered decision of the EEOC. Plaintiffs face only speculative harm and ignore the real and significant harm that a preliminary injunction would likely cause to employers, unions, and retired employees. The public interest requires that employers have the flexibility to alter retiree health benefits once retirees become eligible for Medicare without fear of liability under the ADEA. For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

A. The EEOC Is Authorized by Statute To Establish Exemptions to the ADEA

The entire premise of Plaintiffs' statutory arguments is misguided. Plaintiffs contend that the Court should conclude that the EEOC is not statutorily authorized to issue the challenged exemption – despite express statutory language to the contrary – because the exempted conduct is currently prohibited by the ADEA. (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, and Stay of the Effective Date of Agency Regulations ("Pls. Mem.") at 2.) Such reasoning is circular in the context of a statutory exemption. Instead, the appropriate question is whether 29 U.S.C. § 628 authorizes the EEOC to exempt prohibited conduct from the ADEA. *See* 29 U.S.C. § 628 ("Section 9").

In making that determination, the Court should apply the standard set forth in *Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984). The first step of the *Chevron* analysis asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Only if the statute is deemed ambiguous should the Court reach the second step of the *Chevron* analysis, which asks whether the "agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (describing this inquiry as "whether the statute unambiguously forbids the Agency's interpretation, and, if not, [] whether the interpretation for other reasons, exceeds the bounds of the permissible"). A "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by

the administrator of an agency." *Chevron*, 467 U.S. at 844. Under *Chevron*, Plaintiffs' statutory arguments are unfounded.

1. The Language of Section 9 Is Clear and Should Be Given Effect by the Court

The statutory language of Section 9 plainly authorizes the EEOC to establish "reasonable exemptions" to the ADEA. *See* 29 U.S.C. § 628. That Section provides in relevant part that the EEOC "may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628. The task of resolving the dispute over the meaning of this provision "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *see also Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 491 (3d Cir. 2003) ("We begin the process of statutory interpretation with the plain meaning of the statute – we must first consider the text."). Where, as here, that meaning is clear, the statutory language "is also where the inquiry should end." *Ron Pair*, 489 U.S. at 241; *see also Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 222 (3d Cir. 2003) ("Where the intent of Congress 'has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.").

Congress's use of the term "exemption" in Section 9 clearly contemplates that the EEOC may excuse from liability under the ADEA certain conduct that the Act otherwise proscribes. *See* Black's Law Dictionary at 593 (7th ed. 1999) (defining "exemption" as "[f]reedom from a duty, liability, or other requirement"); Random House Dictionary of the English Language at 677 (2d ed. 1987) (defining "exemption" as "to free from an obligation or liability to which others are subject; release"); Concise Oxford English Dictionary (2004) (defining "exempt" as "free from an obligation or liability imposed on others"). Thus, Plaintiffs' contention that the EEOC has no

authority to issue the proposed exemption *because* "the ADEA unmistakably prohibits age discrimination in health care benefits" is beside the point. (Pls. Mem. at 13; *see also* Pls. Mem. at 11-23 (discussing prohibitions found in ADEA and *Erie County*).)

Plaintiffs devote an inordinate amount of space in their brief stating the obvious, namely, that the proposed regulation exempts conduct that is prohibited by the ADEA and is contrary to binding caselaw in this Circuit. (Pls. Mem. at 11-12 (discussing *Erie County*'s holding that the "plain language [of the ADEA] indicates that Congress intended [the equal benefit or equal cost principle] to apply when an employer reduces health care benefits based on Medicare eligibility");[19] Pls. Mem. at 18-20 (discussing Older Workers Benefit Protections Act's prohibition against "discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations").) Clearly if that conduct were not proscribed by the ADEA there would be no need for an exemption. Moreover, for that to be a legitimate basis for invalidation of the exemption, this Court would have to treat the exemption authority in Section 9 of the ADEA as surplusage – which courts should not do. *See Tavarez v. Klingensmith*, 372 F.3d 188, 190 (3d Cir. 2004) ("If possible, we must give effect . . . to every clause and word of a statute, . . . and be reluctan[t] to treat statutory terms as surplusage" (internal citations omitted)). Since the language of Section 9

[19] Plaintiffs also erroneously suggest that the EEOC no longer interprets the ADEA as covering "retirees who are subjected to discriminatory modifications in employment-related health benefits" – the EEOC's position in *Erie County*. *See, e.g.,* Pls. Mem. at 2 ("The EEOC 'exemption' . . . constitutes an astonishing and impermissible 180-degree about face by the EEOC . . . ."). Nothing could be further from the truth. Rather, it is precisely *because* the EEOC recognizes that such practices are prohibited by the ADEA, that they are potentially subject to an exemption from the ADEA. *See* NPRM, 68 Fed. Reg. at 41,542; *see also EEOC v. Seafareers Int'l Union*, 394 F.3d 197, 201 (4th Cir. 2005) (recognizing that "congressional delegation to administrative bodies may reflect the need to alter policy in response to changing conditions").

expressly authorizes the EEOC to establish statutory exemptions, Plaintiffs' arguments are to no avail.

2. The Legislative History of the ADEA Supports Giving "Exemption" Its Ordinary Meaning in Section 9

Although recourse to the legislative history is not necessary here because the language of Section 9 is clear, that history provides further support that the EEOC is authorized to establish exemptions from the ADEA. *See Donovan*, 336 F.3d at 222 ("Recourse to the legislative history . . . is unnecessary in light of the plain meaning of the statutory text." (internal quotations omitted)); *Velis v. Kardanis*, 949 F.2d 78, 81 (3d Cir. 1991) ("There is no need to resort to legislative history unless the statutory language is ambiguous."). Other than recitations of the language of the provision, (*see, e.g.,* 113 Cong. Rec. 31248, 32149, 31252 (Nov. 6, 1967); 113 Cong. Rec. 34738, 34739 (Dec. 4, 1967)), Section 9 was not an issue in the floor debates on the ADEA. Its grant of exemption authority, however, is entirely consistent with a pervasive theme in those debates, namely, that administration of the ADEA be flexible given the "[m]any different types of employment situations." 113 Cong. Rec. at 31251 ("Administration of this law must place emphasis on case-by-case basis, with unusual working conditions weighed on their own merits"); *see also* H.R. No. 805, 90th Cong., 1st sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2220.

Specifically, Congress observed that

> Too many different types of situations in employment occur for the strict application of general prohibitions and provisions. It is enough that the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad guidelines for its implementation.

Id. That Congress intended to authorize the entity charged with the Act's administration to have the flexibility to issue exemptions when its application "fostered unintended consequences" cannot be doubted. NPRM, 68 Fed. Reg. at 41,542 (recognizing that "[i]mplicit in [Section 9's] authority is the recognition that the application of the ADEA could, in certain circumstances, foster unintended consequences that are not consistent with the purposes of the law and are not in the public interest"). Therefore, to the extent it is relevant, the legislative history of the ADEA supports reading Section 9 as granting the EEOC exemption authority.

3. The EEOC's Interpretation of Its Exemption Authority Is Entitled to Deference

Even if the Court concludes that the exemption language in Section 9 is ambiguous, the EEOC's determination that the exemption is in the public interest is reasonable and entitled to deference. *See Seafarers*, 394 F.3d at 207 (concluding that courts are "empowered only to ensure that the agency did not contravene the expressed intent of Congress, nor unreasonably apply its mandate"). As previously discussed, the ADEA expressly provides that the EEOC "may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest." 29 U.S.C. § 628. The statute does not define "public interest." However, the purpose of the ADEA is 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*." 29 U.S.C. § 621(b) (emphasis added).

The proposed exemption is consistent with that purpose because it gives employers the flexibility to alter the health benefits of retirees once they become eligible for Medicare. *See*

NPRM, 68 Fed. Reg. at 41,543 ("The Commission believes that it is in the best interest of both employers and employees for the Commission to pursue a policy that permits employers to offer these benefits to the greatest extent possible."). Since employers are not required by law to provide retiree health benefits, although they may have contractual obligations to do so, this exemption provides an alternative to employers' refusal to provide such benefits altogether. Thus, the proposed exemption counteracts this potential undesired consequence of strict compliance with the statute. That Congress anticipated such consequences would occur and could be remedied through an exemption cannot be doubted. *See* 29 U.S.C. § 628; *see also* 113 Cong. Rec. at 31251 ("Administration of this law must place emphasis on case-by-case basis, with unusual working conditions weighed on their own merits."); H.R. No. 805, 1967 U.S.C.C.A.N. at 2220 ("The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions."). Thus, the exemption furthers the purpose of the Act and should be afforded *Chevron* deference.

4. The EEOC's Proposed Exemption Satisfies the Requirements of 29 C.F.R. § 1627.15

Contrary to Plaintiffs' assertions, (Pls. Mem. at 23-25), the exemption also satisfies the requirements of the EEOC's implementing regulation pursuant to Section 9. That regulation provides in relevant part that "a reasonable exemption from the Act's provisions will be granted only if it is decided, after notice published in the Federal Register giving all interested persons an opportunity to present data, views, or arguments, that a strong and affirmative showing has been made that such exemption is in fact necessary and proper in the public interest." 29 C.F.R. §

1627.15. The exemption is both procedurally and substantively valid. First, the exemption was subjected to notice-and-comment rulemaking, which satisfied the procedural requirements of the implementing statute. *See id.*; *see also* NPRM, 68 Fed. Reg. at 41,542-49.

Second, the establishment of the exemption was supported by the "strong and affirmative" showing required by § 1627.15. Final Rule at 2. As is evident from the Final Rule, there was ample evidence that "[the EEOC's] prior policy created an incentive for employers to reduce or eliminate retiree health benefits," and that therefore the public interest would be "best served by an ADEA policy that permits employers greater flexibility to offer these valuable benefits." Final Rule at 2; *see, e.g.,* NPRM, 68 Fed. Reg. at 41,544 ("The 2001 Mercer/Foster Higgins study shows that the number of employers with 500 or more workers who offer retiree health coverage decreased by 17 percent between 1993 and 2001 for both pre- and post-Medicare eligible retirees."); *id.* ("Union representatives have informed EEOC that increasing numbers of employers have refused to include retiree health among the benefits to be provided to employees."); *id.* ("As a result of [] increased costs and accounting changes, employers have actively examined ways to reduce health care costs, including by reducing, altering or eliminating retiree health coverage."); *id.* at 41,545 ("Many benefit experts cautioned that the *Erie County* decision would exacerbate the erosion of employer-sponsored retiree health benefits."); *see also* Pt. I.B., *infra*. Plaintiffs' contentions that the exemption did not comply with the EEOC's implementing regulation are therefore without merit.

5. Section 9 Is a Lawful Delegation of Authority

Although not the model of clarity, Plaintiffs' brief appears to make an unlawful delegation claim as to the EEOC's exemption authority. (Pls. Mem. at 26 ("Congress did not delegate to the

EEOC any authority to analyze or influence national health care policy.").)[20] "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Article I, Section 1 of the Constitution prohibits such delegation by vesting "[a]ll legislative Powers . . . in a Congress of the United States." Const. Art I, § 1. Congress, however, may confer upon agencies "authority or discretion as to [the law's] execution." *Loving v. United States*, 517 U.S. 748, 758-59 (1996). In doing so, Congress "must lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman*, 531 U.S. at 472. "[S]uch legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1988). The Supreme Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474-75. Thus, the Court has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving*, 517 U.S. at 771.

Statutes "authorizing regulation in the 'public interest'" have been upheld as providing a sufficiently "intelligible principle" to guide the agency's discretion. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (regulation of airwaves by FCC); *New York Central Sec. Corp. v. United States*, 287 U.S. 12, 24-25 (1932) (approval of railroad consolidations by ICC); *Milk Indus. v. Glickman*, 967 F. Supp. 564, 567-68 (D.D.C. 1997) (approval of dairy compact by the Secretary of Agriculture). The Supreme Court has recognized

[20] Plaintiffs' unconstitutional delegation claim is more explicit in their complaint. *See* Compl. at 22 (seeking "decree that defendant's issuance of [the] exemption . . . violates the doctrine of separation of powers embodied in the United States Constitution").

that "[i]t is a mistaken assumption that [the public interest standard] is a mere general reference to public welfare without any standard to guide determinations." *New York Central*, 287 U.S. at 24-25. Consistent with these authorities, the Court should uphold the statute here against Plaintiffs' unlawful delegation challenge.

Section 9 of the ADEA establishes the "public interest" as the intelligible principle for the EEOC's exemption authority. That Section authorizes the EEOC to establish reasonable exemptions from the Act "as it may find necessary and proper in the public interest." 29 U.S.C. § 628. The EEOC has invoked this provision only twice - including now in the instant case - since authority for implementing the ADEA was transferred from the Department of Labor to the EEOC. Therefore, in practice, it is clear that the EEOC has been sufficiently guided by the public interest in its use of that exemption authority. Since by its terms and in practice, Section 9 is well within the permissible scope of agency discretion, Plaintiffs' unconstitutional delegation challenge must fail.

B. The EEOC's Decision to Exempt from the ADEA the Practice of Coordinating Employer-Sponsored Retiree Health Benefits with Medicare Eligibility is Not Arbitrary and Capricious

Plaintiffs are no more likely to prevail on their claim that the EEOC's decision to exempt from the ADEA the practice of coordinating employer-sponsored retiree health benefits with Medicare eligibility is arbitrary and capricious and therefore violates the Administrative Procedures Act ("APA"). See 5 U.S.C. § 706(2)(A) (authorizing courts to hold illegal and set aside action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). To determine whether agency action is arbitrary or capricious, the Court must consider "whether the decision was based on a consideration of the relevant factors and whether

there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). Plaintiffs have the burden of showing that there was a clear error in judgment based on the relevant factors or that there was not "a rational connection between the facts found and the choice made." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The scope of review under the arbitrary and capricious standard "is narrow and a court is not to substitute its judgment for that of the agency." *Id.*; *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 853 (3d Cir. 1999). A party challenging agency action under the arbitrary and capricious standard faces an "exacting burden[,]" *Southwestern Pa. Growth Alliance v. Browner*, 121 F.3d 106, 111 (3d Cir. 1997), and the Court's "'only task is to determine whether [the EEOC] considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" *Id*. (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983)).

1. The EEOC Reasonably Concluded That *Erie County* Created a Disincentive to Providing Retiree Health Benefits

Information gathered by the EEOC corroborates its concern that the EEOC's adoption of the *Erie County* decision as its national enforcement policy was likely to exacerbate the general trend toward reduced retiree health benefits. NPRM, 68 Fed. Reg. at 41,546. Employers expressed the concern that their existing benefits packages might not comply with the EEOC's new policy. Final Rule at 2. Many of these packages were designed based on reliance on the legislative history of the 1990 amendments to the ADEA, which suggests that the practice of coordinating retiree health benefits with Medicare-eligibility is lawful under the ADEA. NPRM, 68 Fed. Reg. at 41,545 (citing Final Substitute: Statement of Managers, 136 Cong. Rec. S25353

(Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990)); Final Rule at 7 (noting employer reliance on this history). Benefits experts informed the EEOC that its new policy was likely to push such employers to cut back on their benefits in order to comply. NPRM, 68 Fed. Reg. at 41,545 n.27; Final Rule at 2.

The EEOC also heard similar concerns from the employee side. Unions reported that "meaningful negotiations about the future provision of employer-sponsored retiree health benefits [were] becoming increasingly futile." NPRM, 68 Fed. Reg. at 41,544. "Union representatives have informed the EEOC that increasing numbers of employers have refused to include retiree health among the benefits to be provided to employees. A significant number of employers have agreed to provide retiree health only if the benefit terminates when the retiree becomes eligible for Medicare." *Id.*; *see also* Comments of NEA at 2; Comments of AFT at 2; Final Rule at 2.

Later developments in the *Erie County* litigation heightened the EEOC's concern that its victory in that case was having unintended results:

> In an attempt to comply with the court's ruling, the county transferred younger retirees from the hybrid point of service plan–where each retiree had the ability to select between HMO or traditional indemnity plan coverage on an as-needed basis–to an HMO plan similar to that available to retirees over age 65 that did not provide such an option. The county also required employees not yet eligible for Medicare to pay a monthly amount for such coverage equal to the monthly amount of Medicare Part B premiums that retirees over age 65 paid. The result, therefore, is a decrease in health benefits for retirees generally; older retirees receive no better health benefits, while younger retirees must pay more for health benefits that offer fewer choices.

NPRM, 68 Fed. Reg. at 41,546 (citing *Erie County Retirees Ass'n v. County of Erie*, 192 F. Supp. 2d 369 (W.D. Pa. 2002)). Information provided to the EEOC suggested that similar results

appeared imminent in public school districts in Minnesota and Wisconsin, where the EEOC had initiated enforcement actions targeting the widespread practice of offering Medicare bridge plans as part of early retirement incentive programs ("ERIPs"). (Comments of MSBA at 2-3 (elaborating on how efforts to comply with *Erie County* rule resulted in decreased employee benefits); Comments of WASB at 2 (confirming that the EEOC's *Erie County* enforcement policy tended to reduce or eliminate benefits); Comments of WEAC at 2 (same); Final Rule at 5 (referring to comments provided by public school districts).)

Plaintiffs obviously disagree with the EEOC's assessment of this evidence, but there is plainly no basis for their assertion that it rested on nothing more than idle employer threats. (Pls. Mem. at 32.) Accordingly, EEOC's reasonable judgment regarding the prospects for employer-sponsored retiree health benefits "deserves [the Court's] deference notwithstanding that there might also be another reasonable view." *Worldcom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (discussing FCC's adoption of thresholds for a pricing order).

2. The EEOC Reasonably Concluded That the Equal Benefit or Equal Cost Rule Was Unworkable In Practice

Plaintiffs take issue with the EEOC's finding that the cost of compliance with the *Erie County* decision would be prohibitive for many employers, especially small-and medium-sized employers unable to hire sophisticated employee benefit professionals. NPRM, 68 Fed. Reg. at 41,546; Final Rule at 7. Plaintiffs argue instead that employers can readily determine whether providing health benefits to retirees who are not yet eligible for Medicare violates the ADEA. (Pls. Mem. at 31.) According to Plaintiffs, the EEOC's own regulations explain that an employer need provide only an equal benefit to each set of retirees or can justify providing lesser benefits

to older retirees if it expends an equal cost. *Id.*; *see* 29 C.F.R. § 1625.10(e). However, as the EEOC explained in its rulemaking, the equal cost test as a practical matter cannot be met, and employers have little or no ability to determine whether or not the equal benefit test is met. NPRM, 68 Fed. Reg. at 41,546; Final Rule at 2, 6. Because an employer's decision to provide retiree health care benefits is voluntary, and because failure to meet the equal benefit or equal cost rule makes an employer subject to liability under the ADEA, the EEOC quite sensibly concluded that application of the statute was an impediment to employers' provision of such benefits. Accordingly, the Court should uphold the EEOC's decision to exempt the practice of coordinating retiree health benefits with Medicare eligibility from the ADEA.

a) The Equal Cost Test

Because the cost of a Medicare-eligible retiree's *Medicare* benefits does not count under the equal cost test as part of the *employer's* cost, (29 C.F.R. § 1625.10(e); *Erie County*, 220 F.3d at 216), an employer generally, perhaps invariably, would be unable to demonstrate that the employer had incurred an equal cost to provide health insurance for pre- and post-Medicare-eligible retirees. *See Erie County*, 220 F.3d at 216 (recognizing that employers may not be able to satisfy the equal cost safe harbor). Plaintiffs assert that an employer can readily know what its per capita costs are for its retirees. (Pls. Mem. at 31.) But the EEOC's concern was not that an employer could not determine its costs, but that employers do not even attempt to equal costs for Medicare-eligible retirees because, given the existence of Medicare, it makes no sense to do so. NPRM, 68 Fed. Reg. at 41,546.

The equal cost test, as a practical matter, also makes little sense from the employee's perspective. A 45-year-old teacher who hopes to retire at age 55 and expects to receive Medicare

benefits at age 65 is confronted with a potential 10-year gap in health insurance coverage. That teacher rationally can prefer that her employer pay more for her health insurance when she is aged 55 to 65 than after she turns 65 and becomes eligible for Medicare. In an environment in which health care costs are increasing, the teacher also rationally can conclude – given that the school district does not have to provide *any* health benefits after she retires – that she will not insist that her employer expend equal amounts before and after she turns 65. Not surprisingly, teachers' unions support the exemption. (Comments of AFT; Comments of NEA.)

The EEOC duly considered modifying the equal cost component of the rule by allowing the employer to count the cost of Medicare, which, after all, is indirectly paid by employers' taxes. But, as the EEOC explained in the NPRM, this kind of modification of the equal cost test would have been unworkable:

> [T]he government's cost to provide Medicare services does not reflect what similar benefits would cost an employer in the marketplace. Nor can an employer's Medicare tax obligation . . . be considered the "cost" of any specific retiree's Medicare benefits inasmuch as most retirees have been employed by multiple employers over the course of their careers and employer FICA contributions are paid into a general Medicare fund that is not employee-specific. Additionally, the fact that employees themselves pay a portion of the cost of Medicare further complicates cost valuation.

NPRM, 68 Fed. Reg. at 41,546. Plaintiffs do not take issue with that analysis.[21]

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[21] Plaintiffs do contend that, assuming *arguendo* that costs are "germane," the EEOC should use "costs chosen by Congress" in 29 U.S.C. § 623(*l*)(2)(E). (Pls. Mem. at 32.) But the costs set forth in that provision relate to "health care benefits" defined "*solely*" for the purpose of making severance pay deductions for health benefits. 29 U.S.C. § 623(*l*)(2)(D) (emphasis added). This provision is unrelated to employer obligations under the ADEA not to discriminate in health care benefits. In any event, the cited provisions in effect recognize that providing health coverage to younger retirees does cost more (at least as far as the employer is concerned) than providing coverage to Medicare eligible retirees.

b) The Equal Benefit Test

In principle, the equal benefit test may appear to be a more promising avenue for an employer to demonstrate compliance with the ADEA. While Medicare costs cannot be counted in the equal *cost* calculus, the EEOC, the Third Circuit's *Erie County* decision, and even Plaintiffs all recognize that in principle the *benefits* provided for by Medicare *are* counted in assessing whether younger and older retirees are treated equally. *See Erie County*, 220 F.3d at 216; 29 C.F.R. § 1625.10(e); Pls. Mem. at 17, 31. Thus, at least theoretically, an employer who provides younger retirees a plan equal to but not greater than Medicare benefits does not violate the ADEA even if it provides no benefits to older, Medicare-eligible retirees; or an employer who provides early retirees with a Medicare-equal plan plus "X" additional benefits and also provides Medicare eligible retirees with "X" would satisfy the equal benefit test even though the employer's costs under either scenario are much greater with respect to the younger retirees.

In practice, however, as the EEOC learned through hard experience, the world is different. *See* NPRM, 68 Fed. Reg. at 41,546; Open Meeting Tr. at 5, 13-14, 15, 16. Medicare coverage is only available from the Government, and an employer cannot simply buy Medicare coverage for its younger retirees from the Medicare program. *See* 42 U.S.C. § 1395c (setting forth basic pre-conditions for Medicare coverage). Plans that employers actually can buy can differ in a whole host of particulars from what Medicare covers, and the value, *i.e.*, the "benefit," of a different mix of features may differ according to the differing objective circumstances and different subjective views of retirees, younger and older alike. Is a plan with a high deductible but a low co-pay better or worse than a plan with a low deductible and a high co-pay? Is a plan with no dental, some vision, and excellent mental health coverage better or worse than one with

good dental, no vision, and mediocre mental health coverage? Is an HMO that offers comprehensive preventative care and no co-pays better or worse than a plan that lets a patient see any doctor who participates in the Medicare program but does not cover preventative care?[22]

In any such comparison, *either* plan omits benefits contained in the compared-to plan; for some retirees the benefits, even of a plan other retirees on balance might prefer, are not of equal value and kind to those omitted benefits. Thus, employers, unions, insurance companies, and actuaries – stakeholders who had to puzzle out how to comply with *Erie County* in practice, not just in Plaintiffs' lofty abstract principle – informed the EEOC that because of the bewildering variety of medical plans and potential variables in insurance coverage, for the employer "*trying* to provide an equal benefit for somebody who is covered by Medicare" and someone who is not, it nevertheless "becomes almost impossible" to tell whether the benefits *are* equal. Open Meeting Tr. at14 (emphasis added). Small employers, even large employers, are unlikely to be able to determine easily (if at all) whether any given set of benefits they might like to offer retirees is or is not equal, or even approximately equal, to what the notoriously baroque provisions of the Medicare Act may provide. *See id.* at 5, 13-14, 15, 16.[23]

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[22]A particular difficulty that employers would face in attempting to match the benefits of Medicare is that Medicare is a moving target. For example, the physicians who choose to participate in Medicare are subject to change every year. 42 U.S.C. § 1395u(h). If a large number of doctors drop out of the program in a particular region for a particular year, does that make the HMO option more attractive?

[23] It is no answer to say that the EEOC could require insurance companies to offer Medicare-equal benefit packages and to define what insurance companies must do to have their benefit packages qualify as Medicare-equal. As Plaintiffs themselves explain (Pls. Mem. at 25-26), the EEOC has neither the statutory mandate nor the institutional expertise to regulate the health care industry. Any effort to adjust the test would have embroiled the EEOC in ever-more complex minutiae of health policy analysis.

Most employers are unlikely to make the complicated and arcane benefit comparisons necessary to even attempt to devise benefit packages that are equal to, but do not exceed, those of Medicare. In the absence of the exemption, even the employers that do have such resources would run the risk of being found liable for violating the *Erie County* rule. And that risk is encountered *only* by employers who *do* provide health benefits to retirees – something that no employer is required by law to do. *See* NPRM, 68 Fed. Reg. at 41,546. The EEOC had every reason to conclude that imposition of unrealistically complicated tests of benefit equality and vigorous enforcement of the equal benefit or equal cost rule would further erode the already declining ranks of employers who still provide such benefits. The EEOC properly and reasonably sought to remove impediments to employers' providing health insurance benefits to retirees. Because one of those impediments was the application of the ADEA to the practice of coordinating retiree health benefits with Medicare eligibility, it follows that the EEOC properly and reasonably took action to exempt that practice from the statute.

3. The EEOC Considered All Relevant Factors

There is also no basis for Plaintiffs' contention that the EEOC's rulemaking is defective because it failed to consider various factors. (Pls. Mem. at 27-32.) Specifically, Plaintiffs assail the EEOC's alleged failure to consider: (1) the impact of the exemption on older retirees, including the availability of alternatives to employer-sponsored retiree health benefits; (2) the impact of the exemption on employers that currently provide retiree health benefits; and (3) the impact on the Medicare system and the private insurance market. The first such claim, that the EEOC failed to consider the impact of the exemption on older retirees, including their ability to find alternatives to employer-sponsored retiree health benefits, bears little scrutiny. The NPRM

manifests the Commission's solicitude for *all* retirees, including older members of the protected class. *See* NPRM, 68 Fed. Reg. at 41,542 (noting EEOC's concern that application of the ADEA to retiree health benefits was "adversely affecting this important retirement benefit"); *id.* at 41,547 (estimating that one-third of Medicare-eligible retirees rely on employer-sponsored retiree health benefits to supplement Medicare). In particular, the rulemaking process contains a specific discussion of alternatives to employer-sponsored retiree health benefits for Medicare-eligible retirees:

> Alternatives to employer-sponsored retiree health coverage are costly, offer fewer benefits, and may be limited in availability . . . Retirees age 65 or older often rely on Medicare as their primary source of health coverage. Nonetheless, many retirees in this age group rely on employer-sponsored benefits to cover Medicare's cost-sharing requirements or gaps in Medicare coverage. Retirees who do not have access to employer-sponsored supplemental coverage must obtain private individual "Medicare supplement" insurance, which can be prohibitively expensive, particularly if prescription drug coverage is desired. For these reasons, employer-sponsored retiree health coverage is a valuable benefit for older persons that should be protected and preserved to the greatest extent possible.

NPRM, 68 Fed. Reg. at 41,544.

To be sure, the Commission was particularly concerned about the predicament faced by those retirees who depend exclusively on employer-sponsored retiree health benefits because they are not yet eligible for Medicare. *Id.* at 41,546 (noting that employer-sponsored retiree health benefits are the primary source of coverage for 60% of retirees aged 55-64). And quite reasonably so; for these individuals, no employer-sponsored health benefits means no health coverage at all. The overarching concern manifested by the EEOC, however, is that failure to provide the exemption was contributing to the likelihood that employers would exercise their right not to provide any health benefits to their retirees whatsoever. Final Rule at 7 (noting that

"[u]nder other proposals considered by the Commission, many employers would have discontinued retiree health coverage if they could not comply with the required actuarial analysis"); Comments of National Rural Electric Cooperative Association of 9/12/03, at 2 (emphasizing that without the exemption, many of its members will be forced to discontinue retiree health benefits entirely).

Similarly, the EEOC hardly can be said to have overlooked the impact on employers who currently provide retiree health benefits. (Pls. Mem. at 29.) Indeed, the focus of the EEOC's review of its policy was aimed at devising a mechanism whereby the EEOC could remove obstacles faced by employers who wanted to *continue* their existing practices with regard to retiree health benefits. Plaintiffs' suggestion is further belied by the comments submitted by employer representatives during the notice and comment period, which uniformly support the EEOC's actions. The Equal Employment Advisory Council commented that the "first-hand experience" of its member companies "bears out the conclusions of the many scholarly studies and reports cited in the NPRM" that employers are under pressure to reduce expenditures for retiree health benefits, and that the *Erie County* rule creates an additional disincentive for employers to continue offering such benefits. (Comments of EEAC at 2-3.) The EEOC also had the benefit of comments such as those provided by the HR Policy Association, asserting that *Erie County* was having the "perverse result" of encouraging employers "to either reduce coverage for pre-Medicare retirees, as was the response of Erie County following the ruling, or drop retiree health care coverage altogether." (Comments of HRPA at 2.) The views of employers wanting to continue coverage were well represented.

Finally, Plaintiffs cannot succeed on their claim that the Commission failed to consider the impact of the proposed exemption on the Medicare system or the private insurance market. (Pls. Mem. at 30-31.) Plaintiffs fail to explain how any action the EEOC could have taken under the circumstances – including its issuance of the exemption or a decision to continue enforcing the *Erie County* rule – could have had any impact whatsoever on the Medicare system. Thus, impact on the Medicare program is not a "relevant factor" in the decisionmaking process. *See State Farm Mut.*, 463 U.S. at 43. Plaintiffs' argument also fails to recognize that, even absent the Commission's proposed exemption, employers are free to eliminate retiree health benefits. Thus, with or without the EEOC's exemption, it is possible that retirees may lose their employer-sponsored health benefits and have to rely on government-provided benefits. The issue confronting the EEOC was not how a decision concerning retiree health benefits might have an impact on Medicare, but rather how to deal with the impact that Medicare-eligibility has on employer willingness to provide retiree health benefits. Of course, the EEOC considered that issue at length.

As for the private insurance market, the EEOC received comments from health plans and representatives of the insurance industry that were uniformly supportive of the EEOC's proposed rule. The BlueCross BlueShield Association, for example, submitted a comment supporting the EEOC's proposal and commending its efforts to remove a potential barrier to the continued provision of employer-sponsored retiree health benefits. (Comments of BlueCross BlueShield Association ("BCBS") of 9/9/03.) The American Association of Health Plans was equally supportive, on the grounds that the *Erie County* rule was likely to drive employers to reduce or eliminate retiree health benefits, and that "[s]uch a result is contrary to the interests of retired

Americans, to Congressional intent, and to sound public policy." (Comments of AAHP at 1). Comments such as these illustrate the extent to which Plaintiffs' concerns regarding the EEOC's alleged failure to consider the impact on private insurers are unfounded.

All of Plaintiffs' concerns were aired during the notice and comment period, when AARP filed public comments strikingly similar to their submission to the Court. (Comments of AARP.) The EEOC's discussion of the comments received in the Final Rule plainly acknowledges Plaintiffs' specific concerns about the Commission's authority to issue the exemption, the alleged inconsistency between the exemption and the purposes of the ADEA, and the alleged lack of support in the record for the EEOC's determination that the exemption was necessary. *See, e.g.*, Final Rule at 5 ("The Commission's Exemption Authority"). AARP's opposing comments did not include any studies or other information refuting the Commission's findings, nor did they suggest alternatives to the proposed exemption. The Final Rule's rebuttal of each of AARP's criticisms reflects the EEOC's careful consideration of the opposing viewpoint, as well as its reasons for rejecting those views. *Id.*

Ultimately, the validity of the proposed exemption rests on the EEOC's judgment regarding the likely continued effects of its policy on employers. Such "forecasts of the future" are "the sort of question on which judicial deference is especially important." *City of St. Louis v. Dept. of Transp.*, 936 F.2d 1528, 1534 n.10 (8th Cir. 1991) (evaluating agency's predictions regarding the effects of its decision on the marketplace). For the EEOC to have ignored the views of employers on this matter, which Plaintiffs disparage as "threats," would have been a grave omission. Instead, the EEOC reasonably considered the employer viewpoint, along with the views of other interested parties and the concrete example provided by the *Erie County* case

on remand. Ever mindful that employers who provide health benefits to their retirees do so voluntarily, the EEOC reasonably concluded that the best course of action was to promulgate an exemption that would allow employers the greatest flexibility to continue providing this valuable benefit.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION

Plaintiffs' claims of irreparable injury are entirely speculative. (Pls. Mem. at 34-35, 42.) The "preliminary injunction device should not be exercised unless the moving party shows that it specifically and personally risks irreparable harm." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000). Speculative harm does not satisfy this showing. *See id.* at 488 ("we have [] insisted that the risk of irreparable harm must not be speculative"); *see also Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (plaintiff has the burden of demonstrating "that, without a preliminary injunction, it will suffer irreparable harm that is neither remote nor speculative, but actual and imminent" (internal quotations omitted)). "Establishing a *risk* of irreparable harm [also] is not enough.'" *ECRI v. McGraw-Hill,* Inc., 809 F.2d 223, 226 (3d Cir. 1987). "A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'" *Id.* Plaintiffs have not come close to showing that their health benefits will be terminated as a result of the exemption. (Pls. Mem. at 32.)

Plaintiffs have offered only their unsupported assertions of the inevitability that their retiree health benefits will be terminated if the exemption is not enjoined. (Pls. Mem. at 34 ("the irreparable harm to the plaintiffs and thousands of AARP members and others flows from the inevitable cessation of health insurance benefits for Medicare-eligible retirees").) Plaintiffs

assume that "[i]f the challenged exemption is published, the employers on whose behalf [] rulemaking comments [in support of the exemption] were submitted – and others – will be free to eliminate health care benefits without fear of liability under the ADEA." (Pls. Mem. at 33.) Although this suggestion has intuitive appeal, it "do[es] not withstand rigorous scrutiny." *See Adams*, 204 F.3d at 487. "The law does not take judicial notice of matters of 'common sense' and common sense is no substitute for evidence." *Id.* Otherwise, such an approach "would essentially shift the burden to the defendant to disprove widely believed facts and would turn the preliminary injunction balancing process on its head." *Id.*

As the cases on which Plaintiffs rely make plain (*see* Pls. Mem. at 34), an actual loss of health benefits or threat of loss directed at the plaintiff is required to satisfy the irreparable harm requirement. *See, e.g., Whelan v. Colgan*, 602 F.2d 1060, 1061 (2d Cir. 1979) ("the employer trustees had 'blocked payment' of various medical and welfare benefits by the Fund to Local 584 employees who went out on strike"); *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273, 1276 (3d Cir. 1979) ("The Company considered the Union's refusal to commit itself to reimbursement to be in breach of paragraph 140. As a result, in a letter to the Union dated May 16, 1978, Fort Pitt threatened to discontinue making premium payments . . . ."); *Risteen v. Youth for Understanding, Inc.*, 245 F. Supp. 2d 1, 16 (D.D.C. 2002) (plaintiff "is already foregoing critical medical attention because he has lost his health insurance"). These cases stand in sharp contrast to the instant case.

Plaintiffs' declarations establish only that they rely on their retiree health benefits for medical care for themselves or their spouses. *See, e.g.*, Declaration of M. Elaine Clay ¶ 6 (Pls. Ex. 1); Declaration of Fred G. Dochat ¶ 6 (Pls. Ex. 2). None of the Plaintiffs, however, alleges

that their former employers have threatened to terminate or indicated that they will terminate those benefits if the exemption goes into effect. Plaintiffs' unsupported speculation about these possibilities is insufficient as a matter of law.

Another flaw in Plaintiffs' argument is that the requisite causal relationship between the exemption and the alleged harm – cessation of health insurance benefits for Medicare-eligible retirees – is lacking. *See ECRI*, 809 F.2d at 226 (describing the requisite demonstration as showing plaintiff "will be irreparably injured by denial of relief"). Regardless of whether the exemption becomes effective, Plaintiffs' former employers may decide not to provide for retiree health care benefits, because employers are not (except through contractual obligations) required to provide such benefits. *See* NPRM, 68 Fed. Reg. at 41,542 ("Employers are not legally obligated to provide retiree health benefits . . . ."). Given the number of disincentives employers have to provide for such benefits, *id*. at 41,544-46, Plaintiffs would be hard pressed to show that the issuance of the exemption, and not, for example, escalating health care costs, would cause them to lose their employee-provided health care benefits. Plaintiffs do not come close to making such a showing, in large part because they do not even point to any threats by their employers of what they speculate is the "inevitable" termination of benefits if the exemption goes into effect. Therefore, the outcome that Plaintiffs fear will not necessarily be prevented by enjoining the exemption.

On the other hand, to the extent that Plaintiffs' former employers have existing contractual obligations to provide health benefits Plaintiffs' claim of irreparable injury is further undermined. The exemption will not eliminate any such obligations. Indeed, Plaintiffs do not even describe the basis for the benefits they are currently receiving from their former employers.

More importantly, Plaintiffs have not demonstrated that the exemption will cause those benefits to end. For these reasons, a preliminary injunction is not appropriate.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR DENYING PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

Since Plaintiffs have not met their burden of demonstrating a likelihood of success on the merits or irreparable harm, this Court should deny their motion without engaging in a balancing of interests. *See South Camden Citizens in Action v. New Jersey Department of Envt'l Protection*, 274 F.3d 771, 777 (3d Cir. 1971) ("a failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction"). Nevertheless, if this Court does consider the balance of harms and the public interest, the result should be even clearer: Plaintiffs' motion should be denied.

If, as Plaintiffs request, the Court enters a preliminary injunction against the exemption, the cost and uncertainty of complying with the equal benefit or equal cost rule will remain a disincentive for employers to agree to provide for retiree health insurance coverage. The individual Plaintiffs, who are all Medicare eligible, will of course continue to receive Medicare benefits. On the other hand, retirees who are not yet Medicare eligible will face a greater likelihood (relative to the situation if the injunction is denied) that employers will decide not to provide health insurance. As the EEOC considered during the course of the rulemaking process, those individuals will be extremely limited in their health care options. NPRM, 68 Fed. Reg. at 41,544. Because these individuals are vulnerable to having no health care coverage, the Court should give substantial weight to this harm.

With respect to the public interest, it should be noted that the EEOC was required, in carrying out its exemption authority, to consider the public interest. 29 U.S.C. § 628. Thus, Congress delegated the determination of the public interest to the EEOC, and accordingly the EEOC's determination is entitled to deference. *See* Pt. I.A.3, supra. But the EEOC's view of the public interest was shared by a number of other interested parties. As the evidence the EEOC considered in establishing the exemption demonstrates, the exemption enjoys support from a broad range of stakeholders, including unions, benefits consultants, and private and public sector employees. Thus, the American Academy of Actuaries commented that its members had "witnessed and been troubled by" benefit erosion and concluded that the proposed exemption is a "reasonable and appropriate approach to address the relationship between the ADEA and retiree health benefits." (Comments of AAA at 1-2.) The American Association of Health Plans commented that "[t]he regulatory protection provided by the rulemaking is urgently needed to slow the erosion of retiree health benefits that has been accelerated by Erie County. . . . Without such protection, early retirees risk losing employer-sponsored health benefits coverage and Medicare-eligible retirees face the loss of employer-sponsored Medicare supplemental benefits." (Comments of AAHP at 2.) The American Benefits Council concurred that the exemption "will help prevent Americans across the country from losing their retiree benefits." (Comments of ABC at 1.)

Groups representing employees and employers joined in supporting the issuance of the exemption. The American Federation of Teachers shared the EEOC's belief "that the exemption will provide employers with an incentive to continue providing retiree health benefits in that critical period between retirement and eligibility for Medicare or eligibility for State-sponsored

retiree health benefits." (Comments of AFT at 3.) The Equal Employment Advisory Council supported the exemption because it will "encourage more employers to provide valuable benefits to early retirees who otherwise might not be able to afford health insurance, while also providing supplemental health insurance to retirees who are eligible for Medicare." (Comments of EEAC at 3.) Plaintiffs' characterization of the public interest is clearly out of step with the prevailing view among potentially affected parties. As these commenters recognize, the exemption reflects the best accommodation for employers who would like to continue providing retiree health benefits and retirees who depend upon such benefits for some or all of their health care needs. In an environment where many factors beyond the control of employees and employers alike have combined to create rapidly increasing health care costs, the exemption reflects a reasoned decision that attempts to avoid further erosion of retiree health care benefits. That decision is in the public interest.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for a preliminary injunction.

Dated: February 22, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, et al., Plaintiffs v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	2:05-cv-00509-AB

PROPOSED ORDER

Upon consideration of Plaintiffs' motion for preliminary injunction, Defendant's opposition thereto, the arguments of counsel, and the record in this case, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction is denied.

Dated: _____

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that this document has been filed electronically and is available for viewing and downloading from the ECF system.

/s/ Gillian Flory
GILLIAN FLORY