

# Benefits

A Littler Mendelson **Time Sensitive** Newsletter

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## EEOC Announces Relief For Employers Providing Retiree Health Benefits

*By Lisa Chagala*

On April 22, 2004, the EEOC approved a final rule that would permit employers to provide lesser benefits to retirees who are eligible for Medicare than to retirees who are not yet eligible for Medicare. This final rule would provide employers the opportunity to maintain certain retiree health programs, such as Medicare bridge programs and Medicare carve-out programs, with reduced risk of violating the EEOC's policy on the Age Discrimination in Employment Act ("ADEA").

The final rule does not become effective until approved by the Office of Management and Budget (OMB) and published in the Federal Register.

### The Erie County Decision

Prior to this final rule, the EEOC's national enforcement policy reflected the holding of *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3rd Cir. 2000), cert. denied 121 S.Ct. 1247 (2001). In that case, the Third Circuit Court of Appeals held that offering lesser benefits to Medicare eligible retirees than to non-Medicare eligible retirees was a violation of the ADEA.

Specifically, in Erie County, the employer offered non-Medicare eligible retirees the choice between an HMO program and a point of service program and offered Medicare-eligible employees only the HMO program. To prove that no violation of the ADEA occurred, the employer was required to show either (1) that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or (2) that it was expending the same costs for both groups of retirees. The case was remanded for a determination on whether the employer was able to meet this equal benefit/equal cost standard.

Two months after the Erie case, the EEOC adopted the Third Circuit decision, including the "equal benefit/equal cost" safe-harbor, into its enforcement guidelines

### Impact of Erie County

The Third Circuit decision and the EEOC's guidance was widely criticized for providing employers yet another reason to reduce or eliminate retiree health care programs. As a result of Erie County, and the EEOC's subsequent adoption of the holding of that case, many employers were left with two choices to meet the equal benefit/equal cost safe-harbor: (1) increase the benefits and/or employer cost of retiree health coverage for Medicare eligible retirees; or (2) decrease the benefits and/or employer cost of retiree health coverage for non-Medicare eligible retirees.

Not surprisingly, employers often chose to decrease, rather than increase, retiree health benefits. Notably, the County of Erie chose to decrease the level of benefits for non-Medicare eligible employees to comply with the Court's ruling. In issuing this final rule, the EEOC indicated that Erie County, as well as the EEOC's adoption of Erie County, contributed to the recent widespread decline in retiree health coverage.

### Opportunities for Employers

Employers in the Third Circuit (Pennsylvania, Delaware, New Jersey) remain subject to a private right of action under Erie County. However, this final rule could eliminate the risk of action by the EEOC, and courts might be persuaded to reconsider the issue in light of the EEOC's guidance.