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In a widely anticipated decision, a federal appeals court has allowed the EEOC to finalize a regulation that will permit an employer's retiree medical plan to coordinate with Medicare or terminate upon Medicare eligibility.

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Court of Appeals Clears Way for Retiree Benefits to Coordinate with Medicare

By Susan Katz Hoffman

On June 4, 2007, the Third Circuit Court of Appeals issued a long-awaited decision that lifts a cloud that has been threatening a common design feature of many retiree medical plans. Specifically, this decision defeated the AARP's attempt to prevent the EEOC from finalizing a Medicare coordination regulation that will permit an employer's retiree medical plan to coordinate with Medicare or terminate upon Medicare eligibility. Because this is the same court that previously ruled that such coordination violated the Age Discrimination in Employment Act (ADEA), it is expected that this decision will alleviate employer concerns about retiree medical plan designs that take Medicare eligibility into account.

Seven years ago, in *Erie County Retirees Ass'n v. County of Erie*, the Third Circuit found that the county violated ADEA by providing a Medicare Supplement policy to retirees over age 65, because the Supplement was not as favorable in certain aspects as the medical plan provided to younger retirees. While the *Erie County* ruling technically permitted employers to provide different benefits to over-65 employees, it was practically impossible to satisfy EEOC "equal cost or equal benefit" rules under any typical plan design. As a result, employers (particularly those in the jurisdiction of the Third Circuit) accelerated their termination of retiree medical programs for younger retirees. Even in the *Erie County* case itself, the result of the litigation was the reduction of benefits for younger retirees to be equal to the Medicare Supplement.

In response to the unintended negative outcome of the *Erie County* decision, the EEOC issued a proposed rule in 2003 that

would have allowed employers to provide reduced benefits or to eliminate benefits for Medicare-eligible retirees, while continuing to provide benefits for younger retirees. The AARP, however, brought suit in Philadelphia (within the jurisdiction of the Third Circuit), arguing that because that court had already ruled that such a plan design violated ADEA, the EEOC did not have authority to issue an exemption. The district court initially issued an injunction but then vacated it, while an EEOC appeal was pending, based on a 2005 Supreme Court case allowing subsequent agency interpretations to overrule judicial interpretations where the judicial interpretation is not the only reasonable one. The AARP then appealed the vacation of the injunction.

There were two questions on appeal. The first question was whether the EEOC had authority to issue an exemption even if the Medicare-eligible retiree benefit cutbacks would otherwise violate ADEA. Section 9 of ADEA grants the EEOC the authority to provide exemptions to "any and all" provisions of ADEA so long as the exemptions are "reasonable" and "necessary and proper in the public interest." The court held that this provision unambiguously allows the EEOC to legalize an employer action that otherwise would be illegal, provided the EEOC action is reasonable and in the public interest, and also ruled that this delegation was not an unconstitutional grant of legislative authority to the EEOC.

The second question was whether the EEOC had properly determined that the exemption was reasonable and in the public interest. Based on EEOC findings that retiree benefits

were being reduced or eliminated, and in particular were being cut back for younger retirees in response to the *Erie County* decision, the EEOC justified the exemption as allowing employers to offer retiree benefits “to the greatest extent possible.” The Court affirmed the reasonableness of this determination and noted that the exemption was supported by both employer organizations and labor organizations.

The proposed regulation has not been finalized, although the EEOC has voted to make it final. Under applicable procedures, the regulation must clear review by the Office of Management and Budget and then be published as a final rule in the Federal Register. Once it is finalized, employers will be able to coordinate retiree medical benefit programs with Medicare eligibility without fear of *Erie County*-type lawsuits.

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