

## Employee Benefits E-news

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### **EEOC Publishes Final Rule Regarding Employer Maintenance of Retiree Health Plans**

Effective December 26, 2007, the Equal Employment Opportunity Commission ("EEOC") published a final rule that will allow employers to maintain retiree health plans that coordinate benefits with Medicare and comparable State health benefits programs, without violating the Age Discrimination in Employment Act of 1967 ("ADEA"). The EEOC indicated that this exemption is being adopted to address concerns that the ADEA was previously being interpreted in such a way as to create an incentive for employers to eliminate retiree health benefits.

The ADEA applies to all employers with at least 20 employees, by generally prohibiting covered employers from discriminating against an employee or job applicant who is at least 40 years of age. Many employers provide healthcare benefits that reduce automatically when a retiree reaches the age at which he is eligible for Medicare. Various parties have claimed that an employer violates the ADEA's protections when it reduces or eliminates benefits for retirees based upon age. The exemption in the EEOC's final rule permits employers to offer retirees a wide range of health plan designs that incorporate Medicare or comparable State health benefit programs without violating the ADEA. For example, in order to ensure that all retirees have access to some healthcare coverage, employers may provide retiree health coverage to only those retirees who are not yet eligible for Medicare. They also may supplement a retiree's Medicare coverage without having to demonstrate that the coverage is identical to that of non-Medicare eligible retirees.

The exemption applies to dependent and spousal healthcare benefits provided to a retired participant. The EEOC will apply the exemption regardless of whether an individual participant actually receives Medicare benefits. However, the exemption does not apply to health benefits for current employees that have not retired but are over the age of Medicare eligibility. Medicare laws require employers to offer to current employees who are eligible for Medicare the same healthcare benefits, under the same conditions, that they offer to any current employee under the age of Medicare eligibility.

The rule only exempts the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program. ADEA coverage of any other aspect of an employer-sponsored retiree health plan, or of any other employer act, practice, or benefit of employment, including employer-sponsored health plans for current employees, is not affected by the rule. This means the new rule does not provide an exemption for age-based distinctions in pension benefits, life insurance benefits, disability benefits, or other welfare-type benefits.

While the new final EEOC rule is important for employers that provide retiree healthcare benefits at a reduced level when a retiree becomes eligible for Medicare, there is one significant limitation to the exemption's reach. In 2000, the United States Court of Appeals for the Third Circuit held that an employer violated the ADEA if it provided lesser retiree health benefits to retirees eligible for Medicare than it provided for retirees not eligible for Medicare, unless the employer could 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 has been submitted to the United States Supreme Court on appeal.

If the Supreme Court agrees to hear the case, and if it further rules that benefit reductions triggered by Medicare eligibility violate the ADEA, then the EEOC's new final rule will be negated for all purposes other than for EEOC proceedings, and all federal courts must follow the Supreme Court's decision. If the Supreme Court agrees to hear the case, but determines that healthcare benefit reductions triggered by Medicare eligibility do not violate the ADEA, the Third Circuit's prior ruling will be overruled. If the Supreme Court declines to hear the case, the Third Circuit's decision will still be binding on employers within the Third Circuit, which covers Pennsylvania, New Jersey and Delaware. This is the most likely outcome, as the Supreme Court agrees to hear only a small portion of the cases submitted to it every year. It is thus important for employers doing business within the Third Circuit to understand

the limited impact the EEOC's final rule will have on them. The EEOC will recognize an exemption from the ADEA when an employer-provided healthcare benefit is reduced or eliminated upon reaching Medicare eligibility, but a retiree may still sue the employer in federal court within the Third Circuit alleging that this kind of Medicare coordination violates the ADEA. Federal courts treat the EEOC's published rules with deference, but such rules are not binding upon courts.

If you have questions regarding EEOC rules or other employee benefits matters, please contact your regular Butzel Long attorney, a member of the Butzel Long Employee Benefits Practice Group, or the author of this e-news alert.

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