UNC SCHOOL OF GOVERNMENT

PUBLIC EMPLOYMENT LAW BULLETIN NUMBER 34 | MARCH 08

Coordinating Retiree Health Benefits With Medicare: The EEOC Issues Its Long-Delayed Final Rule

by Diane M. Juffras

On December 26, 2007, the federal Equal Employment Opportunity Commission published its final rule permitting employers to coordinate their retiree health benefit plans with eligibility for Medicare. The rule answers, at least for now, a difficult question: Is it unlawful age discrimination to reduce a retiree's health benefits when the retiree becomes eligible for Medicare? The answer is no.

As issued in its final form, the rule permits employers to offer retiree health benefits that may change, be reduced, or even be eliminated when a participant becomes eligible for Medicare. The rule is set out at the end of this Bulletin.[1]

History and Debate Surrounding the Rule

The new rule has a tortuous litigation history. For many years, both public and private employers who offered retiree health benefits had commonly provided for those benefits to cease once a retiree became eligible for Medicare at age 65. Some employers provided Medicare-eligible retirees with supplemental health insurance policies (so-called "Medigap" policies), while others terminated coverage altogether. A problem arose. The federal Age Discrimination in Employment Act (ADEA) prohibits employers from making age-based distinctions when providing employee benefits. In 1998, a group of public employer retirees from Erie County, Pennsylvania, challenged the practice of coordinating retiree health benefits with Medicare as one that violated the ADEA. When the case reached the federal Third Circuit Court of Appeals (which does not cover North Carolina), that court held that an employer indeed violated the ADEA if it reduced benefits when a retiree became eligible for Medicare,

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1. The rule was published in the Federal Register at 72 Fed.Reg. 72938 (December 26, 2007) and has been added to the Code of Federal Regulations as section 1625.32 of Title 29 (29 C.F.R. § 1625.32).

unless the employer could show that it was providing either the same benefits or ones of equal cost to both pre- and post-Medicare eligible retirees.[2] In 2000, the Equal Employment Opportunity Commission (EEOC) adopted this interpretation of the ADEA as its enforcement policy.[3]

Subsequently, however, state and local governments, unions, and private employers told the EEOC that in response to this interpretation, many employers would simply eliminate retiree benefits entirely.[4] After studying the issue further, the EEOC reversed itself and in 2003 drafted a rule that created an exemption from the ADEA for the practice of coordinating retiree benefits with a retiree's eligibility for Medicare. The ADEA gives the EEOC the authority to create reasonable exemptions from the act's provisions when the EEOC finds it "necessary and proper in the public interest."[5]

In response to the EEOC's proposed rule, the American Association of Retired Persons (AARP) filed suit, arguing the EEOC had exceeded its statutory authority.[6] In 2007, the Third Circuit held that the EEOC had the authority to make the new rule.[7] Following that decision, the EEOC published the final version of the rule in December, 2007. The AARP has appealed the Third Circuit's decision to the U.S. Supreme Court.[8]

The Final Rule's Bottom Line

Until and unless the U.S. Supreme Court says otherwise, under the EEOC's final rule public employers may provide health care coverage to retirees who are under age sixty-five *without* having to offer any coverage to retirees who qualify for Medicare. Alternatively, an employer may offer a full health insurance plan to retirees under sixty-five and a Medicare-supplement plan or "carve-out" (where Medicare is the primary insurer and the private plan provides secondary coverage) to those sixty-five and older. [9] There is no longer any requirement that the Medicare-coordinated plan cost the employer as much as the pre-Medicare full coverage plan. The final rule applies equally to plans already in existence and to new plans.

The rule emphasizes, however, that under both the ADEA and the rules governing the Medicare program, employers may not offer a reduced health care benefit to current employees — as opposed to retirees — who are age sixty-five or older and eligible for Medicare. Current employees who are eligible for Medicare must be offered the same health insurance benefits as similarly situated employees who are under sixty-five.

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2. Erie County Retirees Association v. Erie County, 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001).
3. *See* the section entitled "Supplementary Information" in the preamble that precedes publication of the actual regulations in the Federal Register at 72 Fed.Reg. 72937 (December 26, 2007).
4. *Ibid*.
5. *See* 29 U.S.C. § 628; *Erie County*, 220 F.3d at 563-65.
6. *See* A.A.R.P. v. Equal Employment Opportunity Comm'n, 383 F.Supp.2d 705, 708 (E.D.Pa 2005).
7. *See* A.A.R.P. v. Equal Employment Opportunity Comm'n, 489 F.3d 558, 568 (3d Cir. 2007).
8. *See* 76 U.S.L.W. 3288 (November 19, 2007).
9. This is what the State of North Carolina does, for example. The State provides state employees with employer-paid retiree health insurance through the Teachers' and State Employees' Comprehensive Major Medical Plan ("State Health Plan"). This coverage ceases to be primary once participants are eligible for Medicare, and instead pays those covered charges not paid by Medicare. *See* generally, Article 3 of Chapter 135 of the General Statutes. G.S. § 125-40.10 addresses coverage upon participant eligibility for Medicare. Many local government employers offer similar coverage to their retirees.

Public employers should note that this new rule does not affect their obligations to provide retiree health insurance to those who have already vested in the benefit and to whom they have a contractual obligation.[10]

Similarly, the final rule allowing coordination of retiree health benefits with Medicare eligibility has no effect on public employer responsibility to report the accrued value of its retiree health benefits under GASB Statement 45.[11]

The Text of the Final Rule: 29 C.F.R. § 1625.32

§ 1625.32 Coordination of retiree health benefits with Medicare and State health benefits.

(a) **Definitions.**
  (1) *Employee benefit plan* means an employee benefit plan as defined in 29 U.S.C. 1002(3).
  (2) *Medicare* means the health insurance program available pursuant to Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq*.
  (3) *Comparable State health benefit plan* means a State-sponsored health benefit plan that, like Medicare, provides retired participants who have attained a minimum age with health benefits, whether o r not the type, amount or value of those benefits is equivalent to the type, amount or value of the health benefits provided under Medicare.

(b) **Exemption.** Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan, whether or not the participant actually enrolls in the other benefit program. Pursuant to the authority contained in section 9 of the Act, and in accordance with the procedures provided therein and in § 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

(c) **Scope of Exemption.** This exemption shall be narrowly construed. No other aspects of ADEA coverage or employment benefits other than those specified in paragraph (b) of this section are affected by the exemption. Thus, for example, the exemption does not apply to the use of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section. Nor does it apply to the use of the age of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section.

10. For the legal limitations on a public employer's ability to change a retiree health benefit once it has been promised, *see* Diane M. Juffras, *Can Public Employers Eliminate or Reduce Health Benefits?*, Popular Government, Winter 2004 (Institute of Government: Chapel Hill), pp. 16-26; Diane M. Juffras, *When Can a Public Employer Reduce Employee Benefits?*, Public Employment Law Bulletin No. 30, May 2004 (Institute of Government: Chapel Hill).

11. See Retiree Health Benefits and GASB Statement 45, Chapter 5 in Employee Benefits Law for North Carolina Local Government Employers (forthcoming from the School of Government).

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