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LEGAL ALERT



## Legal Alert: EEOC Publishes Final Rule Permitting Employers to Coordinate Retiree Health Benefits with Medicare

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The Equal Employment Opportunity Commission (EEOC) has published its final rule permitting employers to coordinate retiree health benefits with eligibility for Medicare or comparable state health benefits programs. See 29 CFR Parts 1625 and 1627. Specifically, the rule creates a narrow exemption from the Age Discrimination in Employment Act (ADEA) for such plans. The rule does not otherwise affect an employer's ability to offer health or other employment benefits to retirees, consistent with the law.

Although employers are not legally required to offer retiree health benefits, some employers do so. Frequently, employers coordinate their retiree health plans with Medicare or comparable state health benefits programs, for example by offering a "carve-out" plan that reduces the benefits payable under the employer's health plan by the amount payable by Medicare or a state plan. The new rule provides that this practice does not violate the ADEA.

The legality of such "carve-out" plans, and other plans that reduce or alter retiree health benefits when the retiree becomes eligible for Medicare or a comparable state plan, was brought into question by the Third Circuit Court of Appeals in its 2000 decision in *Erie County Retirees Ass'n v. County of Erie*. In that case, the Third Circuit held that an employer violated the ADEA if it reduced or eliminated retiree health benefits when retirees became eligible for Medicare, unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it was expending the same costs for both groups of retirees.

The EEOC adopted this position in its compliance manual. However, the agency subsequently received comments indicating that the showing required by the *Erie County* decision caused many employers to either eliminate retiree health benefits entirely or reduce the coverage provided to retirees not yet eligible for Medicare. The EEOC then published a notice of proposed rulemaking in which it proposed to create a narrow exception to the ADEA for the practice of coordinating retiree health benefits with eligibility for Medicare or a comparable state program.

The AARP sued to stop the EEOC from publishing the final rule; however, the Third Circuit recently ruled that the agency can publish the rule. Accordingly, the EEOC published the final rule in the December 26 Federal Register.

The final rule is almost identical to the proposed rule, with certain modifications made in response to comments received on the proposed rule. The EEOC's new rule states, "[s]ome 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." The rule further provides, "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."

The EEOC has provided a question and answer section with the rule. Some key factors of the rule can be derived from the rule's language, the EEOC's comments to the rule, and the question and answer section:

- The rule is to be narrowly construed;
- No other aspects of ADEA coverage or employee benefits are affected by the exemption;
- The rule applies only to coordination with Medicare and comparable state plans, not other types of governmental programs, such as Medicaid;
- The rule only applies to health benefit plans, not other types of benefit plans such as life insurance or disability benefits;
- The rule applies only to retirees, not current employees.

The final rule is available at: <http://www.gpoaccess.gov/fr/index.html>. After accessing the web site, click on the browse tab and select back issues, December 26, 2007. If you have any questions regarding the new rule or any other employee benefits issues, please contact any member of Ford & Harrison's Employee Benefits and Executive Compensation Practice Group.