

CLIENT ALERT

Third Circuit Upholds EEOC Rule Permitting Retiree Health Plan Coordination of Benefits with Medicare

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The United States Court of Appeals for the Third Circuit has upheld a controversial EEOC regulation that would allow employer-sponsored retiree health plans to alter, reduce or eliminate benefits for participants who become eligible for health benefits under Medicare or similar state-sponsored programs. *AARP v. EEOC* (No. 05-4594, June 4, 2007). The court's unanimous decision would, absent further appeals, clear the way for the EEOC to finalize this rule more than four years after its initial issuance.

The controversy regarding Medicare coordination with retiree benefits originally arose because of a previous Third Circuit decision. In 2000, the Third Circuit concluded that providing retirees who are Medicare eligible with a lower level of benefits than retirees who were not Medicare eligible violated the Age Discrimination in Employment Act ("ADEA"). *Erie Count Retirees Association v. County of Erie*, 220 F.3d 193 (3rd Cir. 2000). One of the immediate repercussions of the *County of Erie* decision was to call into question coordination of retiree benefits with Medicare, *i.e.*, the longstanding industry practice whereby employer-provided retiree health benefits were either reduced or eliminated once a retiree became eligible for Medicare coverage. In 2003, the EEOC proposed to issue an exemption from the ADEA for this coordination with Medicare, based in part on the premise that employers are more likely to terminate retiree health coverage altogether than to provide the same level of benefits for retirees regardless of Medicare coverage. When the EEOC announced its intention in 2005 to finalize this exemption after a long rulemaking proceeding, the AARP filed suit to prevent the issuance of the final rule.

The district court initially sided with the AARP, ruling that the EEOC had no authority to permit a practice that the Third Circuit had previously ruled in *County of Erie* to be prohibited by the ADEA. After that ruling, however, the Supreme Court in *National Cable and Television Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), greatly expanded the ability of agencies to adopt rules that either reflected a change in agency position or that were contrary to previous court rulings. Faced with this change in the law, the district court in 2006 reversed itself and held that the EEOC's rule was not foreclosed by the *County of Erie* decision and therefore could be issued in final form. The AARP's petition for expedited appeal resulted in yesterday's ruling.

In ruling in favor of the EEOC, the Third Circuit affirmed the district court's conclusion but on a different, much broader legal basis. Finding it unnecessary to analyze the *County of Erie* or *Brand X* cases, the court concluded that the ADEA "clearly and unambiguously grants to the EEOC the authority to provide, at least, narrow exemptions from the prohibitions of the ADEA." So long as the exemptions issued by the EEOC are "narrow" and "necessary and proper in the public interest," the court concluded that there would be no basis on which to prevent finalization. Under the facts of this particular case, the court indicated that it would uphold the rule because it was (1) a narrowly crafted exception, and (2) supported by the EEOC's finding that the exemption would generally increase the likelihood that employers would continue to provide some level of retiree health benefits.

The Third Circuit's approach may have several important ramifications. First, because the court found it unnecessary to revisit the *County of Erie* decision, there may be limited grounds for appeal. The district court analyzed at length the effect of the

County of Erie decision on the EEOC's interpretive authority under the ADEA. The Third Circuit bypassed this difficult issue, stating that the EEOC would in any case have the authority to issue the narrow exemption in question and specifically reserving judgment on the viability of the *Erie* analysis. Second, the court's rationale buttresses the very narrow scope of this exemption. The rule applies only to retirees and only to health benefits. Plans that purport to limit other types of retiree benefits in areas other than health coverage, or that would limit health benefits for active employees who are eligible for Medicare, would not fit within the EEOC's exemption. Such limitations would be permissible only if they resulted in an equal level of benefits or equal amount of cost per participant as determined under other EEOC regulations governing the application of the ADEA to employee benefits. Finally, because the court focused on the EEOC's exemptive authority (rather than its more general interpretive authority) under the ADEA, the court may have indicated an additional avenue by which employers and employee benefit plans and their participants may find flexibility under the ADEA.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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