

Interplay Between the ADEA and Employer-Sponsored Retiree Health Benefits

Section 4 of the ADEA makes it unlawful for an employer to discriminate against any individual with respect to "compensation, terms, conditions, or privileges or employment, because of such individual's age." 29 U.S.C. 623(a)(1). In 1989, the Supreme Court held in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S. Ct. 256 (1989), that the ADEA, nevertheless, did not prohibit discrimination in employee benefits, such as health insurance. In response to the Supreme Court's decision in *Betts*, Congress enacted the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990) (OWBPA), which amended the ADEA and defined the term "compensation, terms, conditions or privileges of employment" in Section 4 of the Act as including employee benefits. 29 U.S.C. 630(l).

For many years after, however, there was little discussion about the interplay between the ADEA and the provision of retiree health benefits by employers. Many employers relied on legislative history to the OWBPA which states that the practice of eliminating, reducing, or altering employer-sponsored retiree health benefits with Medicare eligibility is lawful under the ADEA. Specifically, employers looked to a joint "Statement of Managers" clarifying several proposed amendments to the OWBPA, which was entered into the congressional records of both the House and Senate and accompanied the final compromise bill. On the subject of "retiree health," the Statement says:

Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retirees attain Medicare eligibility. These practices are not prohibited by this substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of

the same benefits available to a younger retiree.

Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990).

In August 2000, the United States Court of Appeals for the Third Circuit became the first federal court of appeals to examine whether an employer's coordination of its retiree health plans with Medicare eligibility violated the ADEA. *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3rd Cir. 2000). Prior to 1992, Erie County offered current employees and retirees separate but similar traditional indemnity health insurance coverage. *Id.* at 196. In February 1998, however, in an effort to control escalating health benefit costs, the county began to require all eligible retirees over age 65 to accept a coordinated health care plan provided through a health maintenance organization (HMO) and Medicare. Eligible retirees had to have Medicare Part B Medical Insurance in order to participate in the plan. *Id.* at 197. Retirees not yet eligible for Medicare continued to be covered by a traditional indemnity plan until October 1998 when they were transferred to a hybrid point of service plan where each insured could select between an HMO and the traditional indemnity option on an as-needed basis. *Id.* In a class action lawsuit, the Medicare-eligible retirees alleged that the county violated the ADEA by offering them health insurance coverage that was inferior to that offered to the county's younger retirees. *Id.* at 193. In examining whether the county's practice violated the Act, the Third Circuit held that the Statement of Managers language was not controlling and that the ADEA prohibits an employer from treating "retirees differently with respect to health benefits based on Medicare eligibility," unless the employer can meet any of the affirmative defenses provided in section 4 of the ADEA. *Id.* at 213-14.²⁵ The one affirmative defense examined in detail by the Third Circuit was the equal

benefit/equal cost defense set forth in 29 U.S.C. 623(f)(2)(B)(i). The equal benefit/equal cost defense has been part of the ADEA's regulatory framework since 1967.²⁶ Consistent with Congress' concern that employers might not hire older workers because many employee benefits become more costly with age, Department of Labor and EEOC regulations interpreted section 4(f)(2) of the ADEA as permitting employers to offer lower levels of certain employee benefits to older workers as long as the benefit cost incurred on behalf of older workers is no less than that incurred for younger workers. 29 CFR 1625.10. In the OWBPA, Congress adopted this test in section 4(f)(2)(B)(i) of the ADEA, thereby codifying the EEOC's equal benefit/equal cost rule.

In *Erie County*, the Third Circuit found that the costs Medicare incurs on behalf of retirees over age 65 cannot be considered when evaluating whether an employer has satisfied the equal cost prong and remanded the case so the district court could determine whether the county could nonetheless meet the equal benefit/equal cost test. *Id.* at 216. On remand, the county conceded that it could not meet the equal cost prong using the Third Circuit's formulation of the test. *Erie County Retirees Ass'n v. County of Erie*, 140 F. Supp.2d 466, 477 (W.D. Pa. 2001). The district court then found that the county did not provide equal benefits to its retirees because (1) age 65 retirees were required to pay a greater portion of the total cost of their health insurance premiums than younger retirees; (2) the health plan offered to older retirees did not allow participants to alternate between different forms of coverage, while the plan offered to younger retirees did; and (3) the health plan for younger retirees did not restrict participants to a prescription drug formulary, while the plan for older retirees did contain such a restriction. *Id.* at 475-77.

Many benefit experts cautioned that the *Erie County* decision would exacerbate the erosion of employer-sponsored retiree health benefits.²⁷ The

²⁵ The Commission submitted an *amicus curiae* brief in *Erie County*, asserting, based on the plain language of the ADEA, that (1) retirees are covered by the ADEA and (2) employer reliance on Medicare eligibility in making distinctions in employee benefits violated the ADEA, unless the employer satisfied one of the Act's specified defenses or exemptions. In its October 2000 Compliance Manual Chapter on "Employee Benefits," the Commission explicitly adopted the position taken by the Third Circuit in *Erie County* as its national enforcement policy. When the Commission announced in August 2001 that it wished to further study the relationship between the ADEA and employer-sponsored retiree health plans, the Commission unanimously voted to rescind those portions of its Compliance Manual that discussed the *Erie County* decision.

²⁶ In *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S. Ct. 256 (1989), the Supreme Court held that the equal benefit/equal cost test did not apply to the ADEA. Congress believed the test should apply, and the regulatory equal benefit/equal cost test was codified in the OWBPA.

²⁷ See Anna M. Rappaport, "Postemployment Benefits: Retiree Health Challenges and Trends—2001 and Beyond," in *Compensation and Benefits Management*, 52, 55 (Autumn 2001) (*Erie County* will force employers to examine the application of the ADEA to their retiree health plans with "little or no legal precedent"); Paul Fronstin, "Retiree Health Benefits: Trends and Outlook," EBRI Issue Brief No. 236, at 12-14 (Employee Benefit Research