

of retirees over age 65 rely on employer-provided retiree health plans to supplement Medicare,²⁹ the Commission believes that such a result is contrary to the public interest and necessitates regulatory action.

The Commission's Proposed Exemption

When enacting the ADEA, Congress recognized that enforcement of the Act required a case-by-case examination of employment practices.³⁰ In light of this recognition, Congress authorized the Commission to "establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest." 29 U.S.C. 628. Pursuant to that authority, the Commission proposes a narrowly drawn exemption that permits the practice of coordinating employer-provided retiree health coverage with eligibility for Medicare or a State-sponsored retiree health benefits program and shows due regard for the remedial purposes of the ADEA. Section 2(b) of the Act firmly establishes the goal of "encouraging employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b). Unrestricted coordination of employer-sponsored retiree health benefits with Medicare or a State-Sponsored health benefits program permits employers to provide a valuable benefit to early retirees who otherwise might not be able to afford health insurance coverage and allows employers to provide valuable supplemental health benefits to retirees who are eligible for Medicare.

The proposed exemption shows due regard for the Act's prohibition against arbitrary age discrimination in employment—a central concern of Congress when it enacted the ADEA. The exemption also is consistent with the Act's purpose of promoting the employment of older persons and is in accord with the Statement of Managers. See Final Substitute: Statement of Managers, 136 Cong. Rec. 25353 (Sept. 24, 1990); 126 Cong. Rec. H.27062 (Oct. 2, 1990).³¹ Therefore, the Commission

believes that the remedial purposes of the Act will be better served by allowing employers to coordinate retiree health benefits with Medicare or a State-sponsored retiree health benefits program.

Effect of Exemption

As with any exemption from remedial legislation, the proposal is a narrow exemption from the prohibitions of the ADEA. The exemption permits employee benefit plans to lawfully 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 State-sponsored retiree health benefits program. No other aspects of ADEA coverage or benefits other than retiree health benefits are affected by this exemption.

The proposed exemption would become effective on the date of publication of a final rule in the **Federal Register**. It is intended that the exemption shall apply to existing, as well as newly created, employer-provided retiree health benefit plans. As the Appendix to the proposed exemption indicates, it also is intended that the exemption shall apply to dependent and/or spousal health benefits that are included as part of the health benefits provided to retired participants. However, dependent and/or spousal benefits need not be identical to the health benefits provided for retired participants. Consequently, dependent and/or spousal benefits may be altered, reduced or eliminated pursuant to the exemption whether or not the health benefits provided for retired participants are similarly altered, reduced or eliminated.

Additional Amendments

In addition to the proposed exemption discussed above, the Commission proposes to redesignate subpart C of part 1627 as subpart C of part 1625 of Chapter XIV of Title 29 of the Code of Federal Regulations. Subpart C of part 1627 currently includes two sections. The first, which will be redesignated as section 1625.30, outlines procedures by which the Commission may exercise its exemption authority under Section 9 of the ADEA. The second, redesignated as section 1625.31, explains the parameters of an already existing exemption for special employment programs. Redesignation does not alter either the procedures by

which the Commission may exercise its exemption authority under Section 9 of the ADEA or the Special Employment Programs exemption.

Comments

The Commission invites comments on this proposed exemption from all interested parties, including employee rights organizations, labor unions, employers, benefits groups, actuaries, and state and local governments. In particular, the Commission would welcome comments on other types of government-sponsored retiree health benefit programs, including state and local government retiree health plans, that are comparable to Medicare.

In proposing this exemption, the Commission coordinated with other federal agencies in accord with Executive Order 12067, and incorporated, where appropriate, agency comments in the proposal.

Executive Order 12866 and Regulatory Flexibility Act

The proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. This rule is considered a "significant regulatory action" under section 3(f)(4) of that Order and was reviewed by the Office of Management and Budget (OMB). The Commission does not believe that the proposed exemption will have a significant impact on small business entities under the Regulatory Flexibility Act because it imposes no economic or reporting burdens on such firms.

The ADEA applies to all employers with at least 20 employees. 29 U.S.C. 630(b). The Act prohibits covered employers from discriminating in employment against any individual who is at least 40 years of age. 29 U.S.C. 623, 631. The Bureau of Labor Statistics estimates that there are 74,347,000 individuals in the U.S. labor force that are age 40 or above.³² According to Census Bureau information, approximately 1,976,216 establishments employed 20 or more employees in 2000.³³

The proposed exemption would apply to all covered employers who provide health benefits to their retirees. In 2001, the GAO concluded that about one-third of large employers and less than 10% of small employers provided such benefits to current retirees.³⁴ According to the

Fronstin, "Retiree Health Benefits: Trends and Outlook," EBRI Issue Brief No. 236, at 6–7 (Employee Benefit Research Institute Aug. 2001).

²⁹ The Henry J. Kaiser Family Foundation *et al.*, "Erosion of Private Health Insurance Coverage For Retirees: Findings from the 2000 and 2001 Retiree Health and Prescription Drug Coverage Survey," at iv (Menlo Park, CA: The Henry J. Kaiser Family Foundation, Health and Research Educational Trust and The Commonwealth Fund April 2002).

³⁰ H.R. Rep. No. 90–805 (1967), reprinted in 1967 U.S.C.A.N. 2213; S. Rep. 90–723 (1967).

³¹ While the Third Circuit in *Erie County* did not find the Statement of Managers controlling, the Commission, in the exercise of its exemption authority, is free to take a broader look at the legislative record in determining whether the

proposed exemption is consistent with the Act's purpose of promoting the employment of older persons. The Statement of Managers strongly suggests that it is.

³² Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey (April 2003).

³³ Census Bureau, U.S. Department of Commerce, Statistics of U.S. Businesses (2000).

³⁴ Hearing Before the House Comm. on Education and the Workforce, 107th Cong. (2001) (statement