

GAO, in 1999, such employer-sponsored health plans were relied on by 10 million retired individuals aged 55 and over as either their primary source of coverage or a supplement to Medicare coverage.<sup>35</sup>

The proposal—which exempts certain practices from regulation—will decrease, not increase, costs to covered employers by reducing the risks of liability for noncompliance with the statute. When the Third Circuit held that the practice of coordinating retiree health benefits with Medicare eligibility was unlawful unless an employer could meet the equal benefit/equal cost test, there was widespread concern that employers who currently provide such retiree health benefits would either have to provide greater benefits to older retirees or reduce benefits for younger retirees to comply. The Commission believes that, if required to make a choice between paying more or less to comply with the ADEA, many employers will choose to pay less by reducing or eliminating health coverage for retirees who are not yet eligible for Medicare. This result is particularly likely given the rising costs of health care in general. The proposed exemption seeks to eliminate this incentive by making clear that the ADEA permits employers to freely coordinate the provision of retiree health benefits with Medicare eligibility. This approach also benefits the significant number of employees who rely on employer-sponsored retiree health coverage and otherwise would have to obtain retiree health coverage in the private individual marketplace at substantial personal expense.

The proposed exemption has no reporting requirements. A major concern regarding the inequitable impact of regulation on small firms is that reporting and accompanying record keeping requirements can be as costly to smaller firms as large ones. The absence of reporting requirements eliminates this concern.

It is not likely that the proposed regulation will disrupt the efficient functioning of the economy and private market forces. Until recently, when structuring retiree health benefits, 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. The

proposed regulation permits the practice of unrestricted coordination of retiree health benefits with Medicare eligibility to continue.

Under other proposals considered by the Commission, many employers would have been forced to discontinue retiree health coverage if they could not afford the required actuarial analysis. It is clear that small and medium-sized employers, and those unable to hire sophisticated employee benefit professionals, would be most affected by a complicated rule. Larger employers who maintain multiple plans for different categories of employees also would face significant expense complying with alternative proposals. Even for employers with only one plan, the variability in health claims data from year to year can be great. As a result, calculating retiree health benefit expenses under alternative proposals considered by the Commission would have been cost prohibitive for many employers.

#### List of Subjects

##### 29 CFR Part 1625

Advertising, Aged, Employee benefit plans, Equal employment opportunity, Retirement.

##### 29 CFR Part 1627

Aged, Equal employment opportunity, Reporting and recordkeeping requirements.

For the Commission.

**Cari M. Dominguez,**  
*Chair.*

For the reasons discussed in the preamble, the Equal Employment Opportunity Commission proposes to amend 29 CFR chapter XIV as follows:

#### **PART 1627—RECORDS TO BE MADE OR KEPT RELATING TO AGE: NOTICES TO BE POSTED**

1. Revise the heading of Part 1627 to read as set forth above.

2. The authority citation for 29 CFR Part 1627 shall continue to read as follows:

**Authority:** Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 11, 52 Stat. 1066, 29 U.S.C. 211; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

3. In § 1627.1, remove paragraph (b) and redesignate paragraph (c) as new paragraph (b).

4. In Part 1627, redesignate Subpart C and sections 1627.15 and 1627.16 as Subpart C of Part 1625 and sections 1625.30 and 1625.31, respectively.

#### **PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT**

5. The authority citation for 29 CFR Part 1625 is revised to read as follows:

**Authority:** 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10–68; Secretary's Order No. 11–68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

6. In newly redesignated Subpart C of Part 1625, revise the heading of newly redesignated § 1625.31 and the first sentence of paragraph (a) to read as follows:

##### **§ 1625.31 Special employment programs.**

(a) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1625.30(b) of this part, it has been found necessary and proper in the public interest to exempt from all prohibitions of the Act all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the employment of, persons with special employment problems, including employment activities and programs under the Manpower Development and Training Act of 1962, Public Law No. 87–415, 76 Stat. 23 (1962), as amended, and the Economic Opportunity Act of 1964, Public Law No. 88–452, 78 Stat. 508 (1964), as amended, for persons among the long-term unemployed, handicapped, members of minority groups, older workers, or youth. \* \* \*

7. Add section 1625.32 to Subpart C of Part 1625 to read as follows:

##### **§ 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 or not the type, amount or value of those benefits are 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,

of William J. Scanlon, Director of Health Care Services, GAO).

<sup>35</sup> U.S. General Accounting Office, "Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion," GAO Doc. No. GAO-01-374, at 1 (May 2001).