

## **EEOC RULE PERMITS ELIMINATION OF RETIREE HEALTH COVERAGE UPON MEDICARE ELIGIBILITY**

An Equal Employment Opportunity Commission (“EEOC”) final rule (the “Rule”) provides the following exemption from the provisions of the Age Discrimination in Employment Act (“ADEA”):

Some 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. Pursuant to the authority contained in section 9 of the [ADEA], and in accordance with the procedures provided therein . . . , it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the ADEA such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

The Rule permits the “elimination” of retiree health benefits with respect to participants “eligible” for Medicare coverage. The ADEA exemption for such retiree benefit “coordination” also applies to dependent and/or spousal health benefits that are included as part of the health benefits provided for retired participants. Accordingly, the elimination of retiree health benefits for participants age 65 and over (as well as ancillary coverage for dependents and spouses) is permissible under the ADEA by virtue of the ADEA exemption provided by the EEOC’s Rule set out above.

The EEOC Rule has been attacked by AARP (formerly the “American Association of Retired Persons”) in litigation pending in the U.S. Court of Appeals for the Third Circuit. AARP prevailed in the district court, which held that the above ADEA exemption for health benefit provisions “coordinating” with Medicare coverage is invalid under the ADEA. Although the district court decision in the AARP litigation, or even an unfavorable decision of the Third Circuit in the future, is not binding in other areas of the country, employers should carefully consider their options before taking action in reliance on the Rule. The issue of the Rule’s validity (which is at issue in the AARP litigation) may ultimately be resolved by the U.S. Supreme Court, but any such resolution will take several years. In the meantime, employers may want to consider cutting back or eliminating retiree coverage for those Medicare eligible retirees who can now elect additional Medicare “Part D” prescription drug coverage.

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