

# PUBLICATION

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## New EEOC Regulation Exempts from ADEA Coverage Retiree Health Plans that Coordinate With Medicare Benefits

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On December 26, 2007, the Equal Employment Opportunity Commission (EEOC) issued a new regulation permitting employers to maintain or adopt retiree health plans that reduce and otherwise coordinate their coverage with Medicare without violating the Age Discrimination in Employment Act (ADEA). The regulation, which is drafted in the form of an exemption, is located at 29 C.F.R. § 1625.32, and reads in pertinent part as follows:

Exemption. 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 Act, and in accordance with the procedures provided therein and in Sec. 1625.30(b) of this part, it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan.

In practical terms, this regulation reflects a reversal of the EEOC's prior position on the issue of retiree health plan coordination with Medicare. That prior position essentially adopted the decision of the United States Court of Appeals for the Third Circuit in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), in which the Third Circuit concluded that an employer would be permitted to coordinate retiree health plans with Medicare only in the event that the employer could demonstrate either: (1) the benefits received by retirees from Medicare were equivalent to those being received by retirees who were still too young to qualify for Medicare; or (2) the employer was expending the same amount funding health coverage for both Medicare-eligible and Medicare-ineligible retirees. The adoption of that position undermined the reliance of many employers on the legislative history of Older Workers Benefit Protection Act of 1990, which states that the practice of eliminating, reducing or altering employer-sponsored retiree health benefits with Medicare eligibility is lawful under the ADEA.

Given that there is generally no requirement for employers to adopt or maintain retiree health plans, the *Erie County* decision and the EEOC's adoption of its precepts placed employers in an unenviable position with respect to those plans. At the time of that decision, provision of retiree health benefits was becoming increasingly expensive as the cost of medical care rose. As a result of *Erie County*, employers were effectively prohibited from setting-off a portion of those costs against Medicare benefits, causing the maintenance of retiree health plans to become ever more expensive still. Furthermore, employers were also required to meet the heavy burden of establishing compliance with the *Erie County* "equivalency test" under pain of being found in violation of the ADEA. Accordingly, numerous employers, already reticent of maintaining retiree health plans, abolished those plans altogether. Many retirees then found themselves without health coverage during the period between retirement and the time they became eligible for Medicare benefits.

In an attempt to reverse the trend toward reduction of retiree health plans, the EEOC adopted its new regulatory exemption from the ADEA for retiree health plans that coordinate or otherwise reduce benefits for retirees who become qualified for Medicare. The regulation indicates that the exemption is to be interpreted narrowly, so as to apply only to the reduction of health benefits to retirees who become qualified for benefits

under either Medicare or a similar state health plan. As explained in the summary materials issued by the EEOC in conjunction with the new regulation, "[i]ndividuals who are eligible for and/or receive Medicare or comparable state health benefits, but who are not retired, are not affected by this rule."

The EEOC's new regulatory exemption is being lauded as a victory for both employers and employees, although the *Erie County* decision remains on the books in the Third Circuit. Employers now have the support of the EEOC in adopting retiree health plans, which can operate as a tool for recruitment of senior, experienced employees, and as a method for provision of care to their retired employees. At the same time, employees now enjoy increased odds that private retiree health benefits will be waiting for them at the close of their careers.