

Employee Relations

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Employee Benefits

Popular Retiree Benefit Plan Designs Are Upheld Under the Age Discrimination Act; Challenges Still May Occur

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Employers struggling to find fair ways to provide retirees with health benefits have used a variety of designs that accommodate both cost concerns and the needs of retirees. Most employers who offer retiree benefits generally provide such benefits until the retiree is eligible for Medicare, and sometimes may provide benefits to the extent they are not covered by Medicare. Another often-used approach for employers who can no longer afford to provide retiree medical benefits to all retirees is to limit benefits to “older” retirees, for example, persons who retire at or after age 60.

These designs were challenged in two separate lawsuits. In both cases, the designs appear to have survived due to judicial or agency action, and the Equal Employment Opportunity Commission (EEOC) has or will be adjusting its regulations to reflect those decisions.

The ADEA and “Reverse Discrimination”

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against an individual with respect to “compensation, terms, conditions or privileges of employment” due to a

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participant's age. The class of persons protected by ADEA are those who are 40 and older—younger persons have no right to sue under ADEA.

But “younger-older workers”—certain workers over 40—have tried to use ADEA to prohibit employers from providing benefits disproportionately or exclusively to employees older than a particular age. This would include, for example, a plan that provides retiree medical benefits only for persons who are age 60 and above.

This issue arose in 1997 when a collective bargaining agreement between General Dynamics and the United Auto Workers eliminated the company's obligation to provide retiree health benefits except for current workers who were at least 50 years old. Initially, the EEOC, the agency charged with enforcing the ADEA, and the Sixth Circuit Court of Appeals, took the position that these types of “reverse discrimination” suits were permitted based on the plain meaning of the statute. This would have had an extraordinary effect on many plans that provide benefits only for older retirees. This position was reversed by a divided US Supreme Court in *General Dynamics Land Systems, Inc. v. Cline*.¹ The Supreme Court's majority decision was based on the legislative history of the ADEA, which, in its view, was designed to protect “a relatively old worker from discrimination that works to the advantage of the relatively young.” The Court's majority argued too that the 40-year old threshold defining a protected class under ADEA made sense as providing “protection against preference for their juniors, not as defining a class that might be threatened by favoritism towards seniors.” It went on to note that “prejudice suffered by a 40-year old is not typically owing to youth. . . . The enemy of 40 is 30, not 50.”

The EEOC has now issued final regulations eliminating language that prohibited discrimination against relatively younger individuals who were over 40 and protected by ADEA. The introductory portion of the regulation makes it clear that favoring an older individual over a younger individual is not unlawful discrimination under the ADEA. This statement was first contained in the EEOC's proposed regulations issued in 2006, which reflected the Supreme Court decision. The final introductory portion of the regulation reads as follows:

It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old. However, the ADEA does not require employers to prefer older individuals and does not affect applicable state, municipal, or local laws that prohibit such procedures.”²

The last sentence of this regulation was added for two reasons. First, the sentence (as well as the Preamble to the final regulations) emphasized that the ADEA does not create *new* rights for older workers against

their relatively younger counterparts. Second, it contains an important reminder that state or local laws could provide “younger-older” workers with more protection.

Retiree Medical Benefits Coordinated with Medicare

Another popular design was also called into question by a lawsuit under the ADEA—benefit plans that provide retirees benefits but only until the retirees are Medicare eligible (or only to the extent Medicare would not cover costs).

This popular design was threatened in 2000 when the U.S. Court of Appeals for the Third Circuit held in *Erie County Retirees' Ass'n v. County of Erie*,³ that the ADEA prohibited reducing employer-provided health care coverage for those who are Medicare eligible because those older individuals' employer-provided coverage would be less than coverage provided younger non-Medicare eligible retirees. Such an interpretation astonished employers, many of whom instituted and budgeted for retiree medical plans with the express purpose of providing “stopgap benefits” until Medicare took over.

In response to suggestions that this decision would shut down retiree medical plans, the American Association of Retired Persons (AARP) and other commentators suggested extraordinary and generally unrealistic methods of complying with the position in *Erie*, such as performing an actuarial analysis of benefits provided to satisfy the ADEA's “equal benefit” requirement. Most employers did not adopt these suggestions. Combined with other trends, such as increased projected retiree medical costs and accounting changes mandating that the future value of these costs be reflected currently, many employers instead cut benefits for the younger workers (if they were contractually able to do so), or reviewed ways to shut down retiree medical plans altogether.

Recognizing that it was not in the best interest of retirees to encourage employers to reduce or eliminate benefits, the EEOC used its regulatory power to issue a proposed regulation in 2003 that provided an exception under the ADEA allowing employers to coordinate retiree medical benefits with Medicare.

Before the regulation could be finalized, however, the AARP obtained an injunction preventing the EEOC from finalizing the regulation, or applying it by other means. The EEOC was successful in removing the injunction in 2005, and the EEOC's regulation was upheld by the Third Circuit in July 2007. The Third Circuit's decision affirmed the EEOC's authority to issue this exemption under the ADEA and approved the exemption as within the scope of the ADEA. The court recognized that a prohibition on Medicare coordination, combined with rising health care costs, likely resulted or could result in decreased sponsorship of such programs and that it was in the public interest to preserve employer-sponsored retiree health benefits.⁴

It was anticipated that the EEOC would issue a final regulation once the injunction was lifted. However, the AARP, after losing another appeal to continue the injunction, has indicated that it plans to file an appeal on this issue with the Supreme Court.

Too Little Too Late?

The courts' and the EEOC's response to the two lawsuits attempting to provide protection under ADEA reflected a practical consideration that such "protection" in the long-run, would result in a loss of benefits to employees, because employee medical benefits were (unless promised by contract) *voluntary*. As a result, both the courts and the EEOC were willing to allow a practical analysis to trump a very literal reading of the law.

Nonetheless, while these two developments may provide a measure of comfort to employers with such plan designs, they may have come too late for many. Rising health care costs have caused many employers to limit or even eliminate retiree medical plans, at least for future employees. The EEOC regulation on reverse discrimination may provide some comfort for employers who may decide to grandfather older employees in their benefit plans. However, the history of these developments also strongly serves to illustrate the adage that "no good deed goes unpunished."

Notes

1. 540 U.S. 581 (2004).
2. 29 C.F.R. § 1625.2.
3. 202 F.3d 113 (3d Cir. 2000).
4. See *AARP v. EEOC*, No. 03-4594 (3d Cir. 2007).

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