



Electronic Dispatch

Employee Benefits Law Action Memo

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[Go to BS&K Employee Benefits Home Page](#)

GOOD NEWS FOR EMPLOYERS THAT COORDINATE RETIREE HEALTH BENEFITS WITH MEDICARE

After a number of years of uncertainty, the U.S. Court of Appeals for the Third Circuit recently upheld a proposed Equal Employment Opportunity Commission (EEOC) regulation that would allow employers to coordinate employer-provided retiree health benefits with Medicare, without concern that the practice impermissibly discriminates on the basis of age in violation of the Age Discrimination in Employment Act (ADEA).

Background and Case History

Many employers that provide retiree medical benefits also coordinate those benefits with Medicare. For example, an employer may provide an eligible retiree with only a Medicare supplemental plan after the retiree is eligible to enroll for Medicare coverage, rather than continuing to provide the retiree with the same coverage provided to non-Medicare eligible retirees. Some employers discontinue employer-provided coverage altogether when retirees become eligible for Medicare.

In 2000, the U.S. Court of Appeals for the Third Circuit ruled (in *Erie County Retirees Association v. County of Erie*) that such coordination with Medicare violated the ADEA. Since then, employers have been concerned that any coordination of retiree health coverage with Medicare violates the ADEA. Some employers have terminated all retiree health coverage for all retirees, rather than risk exposure to a claim that the employer must provide Medicare-eligible retirees with the same (more expensive) coverage that the employer provides to younger retirees (who are not yet eligible for Medicare).

In 2004, the EEOC issued a proposed regulation that provides, in part, that “the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program” would be exempt from the ADEA. The U.S. Court of Appeals for the Third Circuit, however, decided (in early 2005) that the EEOC’s proposed regulation was “contrary to law and violate[d] the clear intent of Congress in passing and amending the [ADEA]”. The court permanently enjoined (i.e., prevented) the EEOC from issuing or implementing the final rule. That injunction has been in place ever since.

Latest Decision

On June 4, 2007, the U.S. Court of Appeals for the Third Circuit reversed its position. Specifically, the court held that the ADEA “clearly and unambiguously” gives the EEOC the authority to issue exemptions to ADEA’s restrictions on age discrimination, so long as those exemptions are “reasonable” and “necessary and proper in the public interest.” The court determined that EEOC met those tests, noting that the EEOC had determined that the number of employer-sponsored retiree health programs was decreasing as a result of the *Erie* decision and that employers were generally not required to maintain any retiree health benefits, nor continue them once established. (*American Association of Retired Persons et al. vs. Equal Employment Opportunity Commission*, No. 05-4594 (3d Cir. June 4, 2007).) The EEOC may now finalize and implement the proposed exemption.

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Limited Good News

Employers may now modify employer-provided retiree health benefits when a retiree becomes eligible for Medicare, without concern that the practice impermissibly discriminates on the basis of age in violation of the ADEA. Note, however, that an employer may have contractually obligated itself to continue retiree health benefits at a certain level pursuant to plan documents and other communications with employees. Consequently, the decision to modify retiree benefits should not be made lightly.

If you have any questions about this memorandum, please contact Amelia M. Klein (518-533-3217, aklein@bsk.com) or any of the other members of our Employee Benefits Practice Group listed below.

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Amendment And Restatement Reminders

Sponsors of qualified retirement plans are reminded that the next cycle of plan restatements for changes made by the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") ends on January 31, 2008. This deadline applies to sponsors of individually-designed plans, if the plan sponsor's Federal employer identification number ("EIN") ends with a 2 or a 7. By January 31, 2008, individually-designed plans will have to be restated and submitted to the Internal Revenue Service for a current determination letter. It's not too early to start the restatement process.

Plan sponsors, regardless of EIN, also are reminded that interim (off-cycle) amendments also may be required. For example, amendments to reflect the final regulations under Internal Revenue Code Section 401(k) generally must be adopted by the due date for the sponsor's 2006 tax return (with extensions). Also, a plan sponsor that wants to implement discretionary changes (e.g., changes in hardship withdrawal safe harbor events) generally must make appropriate plan amendments by the last day of the plan year during which the discretionary change is implemented. The failure to adopt a required off-cycle amendment could result in substantial monetary penalties being imposed on the plan sponsor by the Internal Revenue Service.