

EEOC Rule On Medicare Stirs Controversy

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Thursday, Jan 03, 2008 --- As the cost of health insurance continues to climb, the Equal Employment Opportunity Commission has enacted a controversial rule exempting employers from the Age Discrimination in Employment Act in coordinating employees' health benefits with Medicare.

The rule means employers will not face ADEA consequences if they reduce or eliminate the health benefits of retirees who become eligible for Medicare or comparable state-sponsored health benefit. This also applies to coverage for spouses and dependents of retirees.

Previously, employers were required to provide the same health benefits, both in type and value, to both Medicare recipients and younger retirees. Under this model some employers provided little or no benefits to ensure that all retirees received equal treatment while minimizing costs, some proponents of the EEOC rule say.

The EEOC rule allows employers to save money on retirees with Medicare benefits, and may encourage some employers to preserve programs for younger retirees in the face of ever-increasing health care costs, said Steve Friedman, chair of the Employee Benefits Practice Group and attorney at Littler Mendelson PC.

"We see this as something that's not only good for employers, but also employees because there are no rules requiring employers to give retirees any" benefits, Friedman said.

It is "a reasonable response by EEOC in an attempt to encourage greater availability of health care," said Michael Palmer, an attorney with Joseph, Herzfeld, Hester & Kirschenbaum LLP in New York. The rule "will result in more people having health benefits before age 65."

On the other side of the issue is the American Association of Retired Persons, an advocacy group for individuals over the age of 50, which has argued that about 12 million Medicare beneficiaries receive supplemental benefits from their former employers, and the rule would put those benefits at risk. The organization has petitioned the Supreme Court to review the case.

"People in their 70s and older are no longer in a position to seek employment to make up for lost coverage," Laurie McCann, a senior attorney with the AARP, said. It could be prohibitively expensive for those individuals to seek their own health coverage to replace the lost benefits, she added.

Opponents such as the AARP have also argued that because Medicare eligibility is based on age, it is discriminatory to reduce or take away health benefits when an employee reaches that age. McCann also said the EEOC “overstepped its bounds” in publishing the rule.

“If the law needs to be changed, that’s the job of Congress, not the EEOC,” McCann said.

But Friedman said the EEOC has always had power to draft regulations, and the appeals court that gave them the go-ahead after the AARP fought back considered the rule within the scope of the EEOC.

“It’s a bit ironic that the AARP is taking a position that could lead to less retiree medical care rather than more retiree medical care being dispensed,” Friedman said.

The issue came to the forefront in 2000 when an appeals court ruled that employers must give retirees eligible for Medicare the same health benefits as younger retirees to avoid age discrimination. The U.S. Court of Appeals for the Third Circuit made this ruling in *Erie County Retirees Association v. County of Erie*, prompting a series of concerns that led to the EEOC rule.

The EEOC voted to approve an exemption from ADEA for the Medicare eligibility practice in 2004, after determining that the law seemed to encourage businesses to reduce or completely eliminate retiree benefits.

A judge granted an injunction in 2005, which was lifted in July when the U.S. Court of Appeals for the Third Circuit rejected the AARP’s challenge.

Since the *Erie* decision, some employers might simply not give health benefits to any retirees as a way of assuring equal treatment, or would give benefits to both on top of the Medicare benefits. Palmer argues the system is more equal when younger retirees receive employers’ benefits comparable to Medicare, and those eligible for Medicare use only that program for health care.

But Palmer also conceded that the provision about spouses and dependents could be a concern, depending on how much in benefits they were receiving. At the same time, the rule may mean that more individuals, including dependents of retirees under 65, will receive more.

Companies want to be able to “dangle lucrative benefits to younger retirees and then take them away once Medicare kicks in,” McCann said.

Though Friedman views it as a positive development, he said the EEOC rule may not be enough to keep retiree health benefit programs afloat.

“There’s still a trend even in light of this ruling for employers to cut or eliminate retiree health care programs,” he said. “I’m not sure that there’s

going to be much let-up.”

The rule went into effect with the EEOC publication last week, though some employers may wait to act on it until the Supreme Court decides whether or not to review it, McCann said.

--Additional reporting by Anne Urda.