

## CLIENT ACTION BULLETIN

March 28, 2008

CAB 08-10

**Coordinating Retiree Health Benefits with Medicare**

**SUMMARY** Employers now have certainty that they may rely on the Equal Employment Opportunity Commission's (EEOC) final rule allowing retiree health plans to be coordinated with Medicare for Medicare-eligible retirees, with the U.S. Supreme Court declining to review the decision reached by an appellate court (*AARP v. Equal Employment Opportunity Commission* (No. 07-662, *cert. denied* March 24, 2008)). In so doing, the Court removed any remaining concerns for employers that want to design a retiree health plan that provides different coverage for age-65 retirees than for younger retirees without running afoul of the Age Discrimination in Employment Act (ADEA).

The EEOC's final rule, published on December 26, 2007, permits employers to create, adopt, or maintain a wide range of retiree health plan designs, as well as to reduce or terminate benefits for Medicare-eligible retirees. The rule also applies to retiree health plans that coordinate with a state program that is comparable to Medicare. The new rule, however, does not allow the coordination of benefits with state Medicaid coverage, nor does it apply to the health benefits of current employees at age 65 or older.

**DISCUSSION** **Background**

Coordinating retiree health benefits with Medicare was a common practice before 2000, when the the U.S. Court of Appeals for the Third Circuit ruled in *Erie County Retirees Association v. County of Erie* that the county would be in violation of the ADEA by offering different health benefits based on Medicare eligibility unless the county could demonstrate compliance with the ADEA's "equal benefit" or "equal cost" test. In response, the EEOC changed its enforcement policy, requiring retiree health plans to treat pre-Medicare age retirees and Medicare-age retirees the same, either by providing them with equal health benefits or by spending equal amounts on each group's coverage.

After Erie County and other employers began reducing all retirees' health benefits in response, the EEOC reversed course. It issued a proposed rule in July 2003, and then the recent final rule, carving out an exception (as permitted under the ADEA) to allow for differing retiree health benefits.

The EEOC observed that without the exemption, employers were resorting to cutting back on health benefits for all retirees in order to achieve a mandated parity among retirees. The EEOC also noted that employers that provide retiree health benefits have a legitimate interest in providing extra benefits for early retirees because these benefits protect early retirees until they become eligible for Medicare benefits.

The AARP took the EEOC to court in an effort to block the implementation of the proposed and final rules. The Third Circuit affirmed the district court's ultimate decision in favor of the EEOC, leading to the AARP filing its petition for the Supreme Court review.

**The EEOC's Final Rule**

Under the EEOC's narrow exemption from the ADEA, a retiree health plan is permitted to alter, reduce, or even eliminate healthcare benefits that are provided to retired participants when the individual becomes eligible for Medicare health benefits. The employer's coordination of benefits is not dependent on the retiree actually enrolling in Medicare.

The exemption from the ADEA's age nondiscrimination rules applies only to retiree health plans and not to other conditions of employment or benefits. No other aspect of ADEA coverage, such as the application of the age nondiscrimination rules to employer-provided disability benefits, is affected by the EEOC exemption.

The EEOC's final rule also applies to spousal and dependent benefits that are included as part of the employer's retiree health plan. According to the final rule, reductions in a Medicare-eligible retiree's dependent or spousal benefits do not have to be similar to those made to the retiree's own healthcare benefits. This means employers can reduce or eliminate health coverage for a retiree's dependents whether or not the retiree's health benefits are reduced or eliminated.

### Plan Coordination Options

Employers contemplating retiree health plan designs that are coordinated with Medicare have various options, including:

- A *Medicare bridge plan*, which provides retirees healthcare coverage from the time they retire until they become eligible for Medicare.
- A *Medicare wrap-around plan*, which provides retirees with additional coverage for out-of-pocket expenses, including the cost of coinsurance and deductibles.
- A *Medicare carve-out plan*, which generally reduces the benefits available under the insurance contract by the amount payable by Medicare.

### ACTION

With no more litigation pending against the EEOC's final rule, employers may want to revisit their retiree health benefit policies.

- If employers have not already adopted a Medicare bridge plan, wrap-around plan, or carve-out plan, they may want to consider the relative merits of these and other possible retiree health benefit designs.
- If employers make any changes in accordance with the EEOC's final rule, they will need to update the written materials used to communicate with employees (and/or their retirees) about the retiree health plan.
- Employers also should consider updating their administrative systems to track retirees as they become eligible for Medicare.

For more information about the EEOC's final rule on retiree health benefits and Medicare, or for assistance implementing it, please contact your Milliman consultant.