## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Parts 1625 and 1627

**RIN 3046–AA72**

### Age Discrimination in Employment Act; Retiree Health Benefits

**AGENCY:** U.S. Equal Employment Opportunity Commission

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission is publishing this final rule so that employers may create, adopt, and maintain a wide range of retiree health plan designs, such as Medicare bridge plans and Medicare wrap-around plans, without violating the Age Discrimination in Employment Act of 1967 (ADEA). To address concerns that the ADEA may be construed to create an incentive for employers to eliminate or reduce retiree health benefits, EEOC is creating a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program.[1] The rule does not otherwise affect an employer's ability to offer health or other employment benefits to retirees, consistent with the law.

**DATES:** Effective December 26, 2007.

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**SUPPLEMENTARY INFORMATION:** Employer-sponsored retiree health benefits provide a much-needed source of health coverage for older Americans at a time when their health care needs are greatest. Without employer-sponsored retiree health benefits, many retirees are forced to go without health benefits between the time they retire and the time they become eligible for Medicare. Older retirees also rely on employer-sponsored retiree health benefits to cover medical costs that are not covered by Medicare.

Employers are not legally obligated to provide retiree health benefits, and many do not. Moreover, over the past several years, the number of employers who offer such benefits has begun to decline. According to an independent study by the United States General Accounting Office (GAO), about one-third of large employers and less than 10% of small employers offered their retirees health benefits in 2000, compared to about 70% of employers in the 1980s.[2] Of those employers that do offer coverage, many ''have reduced the terms of coverage by tightening eligibility requirements, increasing the share of premiums retirees pay for health benefits, or increasing copayments and deductibles—thus contributing to a gradual erosion of benefits.'' [3]

Rising health care costs, larger numbers of workers nearing retirement age, and mandated changes in the way employers must account for the long-term costs of providing retiree health coverage have been substantial factors contributing to the erosion of this valuable employment benefit. However, the Equal Employment Opportunity Commission (Commission or EEOC) believes that concern about the potential application of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* (ADEA or Act) to employer-sponsored retiree health benefits also has adversely affected the availability of this benefit. A wide range of stakeholders, including labor organizations, benefits consultants, state and local governments, and private employers, agree that ADEA concerns have created an additional incentive to reduce or eliminate employer-sponsored retiree health benefits.

[1] The EEOC recognizes that eligibility for Medicare and comparable state health benefits is not necessarily limited to retirees. As explained below, this rule only concerns application of the Age Discrimination in Employment Act to employer-sponsored retiree health benefits for individuals who also happen to be eligible to participate in Medicare or a comparable state health benefit. Individuals who are eligible for and/or receive Medicare or comparable state health benefits, but who are not retired, are not affected by this rule.

[2] U.S. GENERAL ACCOUNTING OFFICE, ''Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion,'' GAO Doc. No. GAO–01–374 (May 2001).

[3] *Id.,* at 6.

In August 2000, the United States Court of Appeals for the Third Circuit became the first federal court of appeals to examine the relationship between the ADEA and employer-provided retiree health benefits. The Third Circuit held that an employer violated the ADEA if it reduced or eliminated retiree health benefits when retirees became eligible for Medicare, unless the employer could show either that the benefits available to Medicare-eligible retirees were equivalent to the benefits provided to retirees not yet eligible for Medicare or that it was expending the same costs for both groups of retirees.[4] The Commission subsequently adopted this ruling as its national enforcement policy.[5] Before the Third Circuit's decision, many employers had relied on legislative history to the Older Workers Benefit Protection Act of 1990, Public Law No. 101–433, 104 Stat. 978 (1990) (OWBPA), that states that the practice of eliminating, reducing, or altering employer-sponsored retiree health benefits with Medicare eligibility is lawful under the ADEA.[6]

After the Commission implemented the Third Circuit's rule, labor organizations, benefits experts, state and municipal governments, and employers informed us that our actions were further eroding employer-sponsored retiree health benefits by creating an additional incentive for employers to reduce, or eliminate altogether, health benefits for retirees. Under the Commission policy in effect prior to August 2001 (see nn. 2 & 3), employers that chose to provide retiree health benefits had to prove either (1) that the benefits available to Medicare-eligible retirees were the same as the benefits provided to retirees not yet eligible for Medicare or (2) that they were expending the same costs for both groups of retirees. Making such a showing requires complex comparisons of multiple objective and subjective variables, including types of plans, levels and types of coverage, deductibles, geographical areas covered, and level of provider choice offered by each plan. Employers could avoid the problem by simply eliminating retiree health benefits entirely, since no law requires that employers provide retiree health benefits. Alternatively, employers could reduce the coverage they provided to those retirees who were not yet eligible for Medicare, leaving these retirees with fewer benefits. Unions, in particular, argued that the Commission's prior policy made it increasingly difficult to negotiate for the future provision of employer-sponsored retiree health benefits. The prior policy also had a particularly harsh impact on public school employees, who often retire early and rely on employer-provided retiree health benefits until they become eligible for Medicare.

These comments prompted the Commission to study the relationship between the ADEA and employer-sponsored retiree health benefits. On July 14, 2003, EEOC published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** to address these concerns.[7] In its NPRM, the Commission proposed to create a narrow exemption from the prohibitions of the ADEA for the practice of coordinating retiree health benefits with eligibility for Medicare or a comparable State health benefits program. The Commission now responds to public comments submitted in response to its NPRM and issues a final rule, adopting the NPRM exemption as modified.

The final rule permits employers and labor organizations to offer retirees a wide range of health plan designs that incorporate Medicare or comparable State health benefit programs without violating the ADEA. For example, in order to ensure that all retirees have access to some health care coverage, the ADEA will not prohibit employers and unions from providing retiree health coverage only to those retirees who are not yet eligible for Medicare. They also may supplement a retiree's Medicare coverage without having to demonstrate that the coverage is identical to that of non-Medicare eligible retirees. Thus, for example, employers providing prescription drug benefits to Medicare-eligible retirees under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108–173, 117 Stat. 2066 (2003), need not be concerned about whether the drug benefits provided to Medicare-eligible retirees differ from those provided to retirees not yet eligible for Medicare.

The final rule concerns only the ADEA. It does not affect any non-ADEA obligation that employers may have to provide health benefits under Medicare or any other law. For example, this rule does not affect employers' obligation to use Medicare as a secondary payer, when required by Medicare law.

In promulgating this rule, the Commission recognizes that the issues surrounding health care coverage, especially for retirees, are complex and that retiree health benefits are highly valued by older Americans. Although employers are under no legal obligation to offer retiree health benefits, some employers choose to do so and thereby provide retired workers with access to affordable health coverage at a time when private health insurance coverage might be otherwise cost prohibitive. Because the Commission has determined that its prior policy created an incentive for employers to reduce or eliminate retiree health benefits, the agency has concluded the public interest is best served by an ADEA policy that permits employers greater flexibility to offer these valuable benefits. The final rule is not intended to encourage employers to eliminate any retiree health benefits they may currently provide.

**Overview of Public Comments**

The Commission received forty-four organizational comments in response to the NPRM. Twenty-seven commenters expressed support for the proposed exemption, including sixteen organizations that requested no revisions to the proposed rule. The Commission also received approximately 30,000 letters from individual citizens. Most of these individual comments were a form letter expressing concern that if the practice of coordinating retiree health benefits with eligibility for Medicare or comparable State health benefits programs is exempted from ADEA coverage, employers might reduce or even

[4] *Erie County Retirees Ass'n v. County of Erie,* 220 F.3d 193 (3d Cir. 2000). The Commission submitted an *amicus curiae* brief in *Erie County,* asserting, based on the plain language of the ADEA, that (1) retirees are covered by the ADEA and (2) employer reliance on Medicare eligibility in making distinctions in employee benefits violated the ADEA, unless the employer satisfied one of the Act's specified defenses or exemptions.

[5] In its October 2000 Compliance Manual Chapter on ''Employee Benefits,'' the Commission explicitly adopted the position taken by the Third Circuit in *Erie County* as its national enforcement policy. When the Commission announced in August 2001 that it wished to further study the relationship between the ADEA and employer-sponsored retiree health plans, the Commission unanimously voted to rescind those portions of its Compliance Manual that discussed the *Erie County* decision.

[6] Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990). In addition, the Conference Report for the recently enacted Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108–173, 117 Stat. 2066 (2003) also provides that ''the conferees reviewed the ADEA and its legislative history and believe the legislative history clearly articulates the intent of Congress that employers should not be prevented from providing voluntary benefits to retirees only until they become eligible to participate in the Medicare program.'' H.R. Conf. Rep. No. 108–391, at 365 (2003).

[7] The preamble to the Commission's NPRM provides detailed information about the Commission's study, including a comprehensive analysis of why the Commission believes that concern about the application of the ADEA to retiree health benefits is contributing to the erosion of this important benefit. *See* 68 FR 41542–41549 (July 14, 2003), available at *http://edocket.access.gpo.gov/2003/03–17738.htm.*

eliminate the health benefits of Medicare-eligible retirees.

**Scope of the Exemption**

Two organizational commenters questioned whether the language in Section 1625.32(b) clearly defined the scope of the proposed exemption. One of these two commenters requested that the Commission clearly state that, under the rule, an employer-sponsored health plan that alters, reduces, or eliminates health care benefits based upon the receipt of health benefits under Medicare or a comparable State health benefits program is entirely exempt from coverage under the ADEA, even if a challenged practice is unrelated to the plan's interaction with Medicare (or comparable State health benefits program). The Commission declines to adopt this suggestion because it is wholly inconsistent with the intended scope of the rule. The rule only exempts the narrow practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program. A comparable state health benefits program refers to plans that were created to provide primary health benefits for state and local government employees who were not covered by Medicare and that, like Medicare, base eligibility on age.

ADEA coverage of any other aspect of an employer-sponsored retiree health plan, or of any other employer act, practice, or benefit of employment, including employer-sponsored health plans for current employees, is not affected by the rule. Additionally, as discussed below, the Commission will apply the exemption to the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program regardless of whether an individual participant actually receives such benefits.

Another organization argued that the phrase ''eligible for'' in Section 1625.32(b) was vague because it was unclear whether the rule requires that an individual retiree actually enroll in, rather than merely be eligible for, Medicare or a comparable State health benefits program before the exemption would apply. The effect and intent of the proposed rule was that the exemption would apply whether or not a particular retiree actually enrolls in Medicare or a comparable State health benefits program, as long as the retiree was eligible for such benefits. While we believe the phrase ''eligible for'' is plain on its face, we have added the phrase ''whether or not the participant actually enrolls in the other benefit program'' to Section 1625.32(b) to further clarify our intent.

This same commenter also questioned whether ''Medicaid offsets'' would be covered by the exemption, but did not further explain the type of employer-sponsored plan contemplated. Medicaid is the joint Federal-state program which provides primarily medical care to low-income Americans pursuant to Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.* Section 1396a(a)(25)(G) of that Title requires that each State Medicaid plan prohibit any health insurer, including an employer-sponsored group health plan, ''from taking into account that [an] individual is eligible for or is provided medical assistance'' under a State Medicaid plan when making enrollment or benefit payment decisions. In light of this specific prohibition under the Medicaid law, the Commission declines to apply its exemption to employer-sponsored group health plans that coordinate benefits with an individual's eligibility for or receipt of Medicaid.

**Coverage of Non-Health Retiree Benefits**

While expressing overall support for the proposed rule, two organizations requested that the Commission provide a definition of the term ''retiree health benefits'' in Section 1625.32(a) of the rule. Both commenters also requested that the Commission make clear that no inference is intended as to how the ADEA might apply to non-health retiree benefits, such as life insurance or disability programs.

Section 1625.32(c) of the rule provides that the exemption shall be narrowly construed. The only practice exempted by the rule is the coordination of employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program. No other aspects of ADEA coverage or benefits other than retiree health benefits are affected by the exemption. In order to further clarify the scope of the exemption, the Commission has added an additional statement to the rule explaining that the exemption only applies to retiree health benefits and not other non-health retiree benefits. The Commission also revised question and answer five in the Appendix to better reflect the scope of the exemption.

In light of these revisions, the Commission concludes that adding a definition of retiree health benefits is unnecessary. Section 1625.32 and the accompanying Appendix set forth the types of employer-sponsored health benefits that may be permissibly coordinated with eligibility for Medicare or a comparable State health benefits program pursuant to the exemption. Under Paragraph (b) of Section 1625.32, the exemption applies to any employee benefit plan that provides health benefits for retired workers that are coordinated with eligibility for Medicare or a comparable State health benefits program. The Appendix further makes clear that the exemption applies to employer-sponsored health benefits that are provided to a retired worker's spouse or dependents. The Commission does not believe that further clarification of the types of employer-sponsored retiree health benefits covered by the rule is needed.

**Coverage of Retirees**

Several commenters, although generally supportive of the proposed rule, expressed concern about the statement in the Appendix that the ADEA continues to apply to retirees to the same extent that it did prior to the issuance of the exemption. These commenters argued that the ADEA, as amended by OWBPA, only protects older workers, not retirees. It is the Commission's position, however, that all of the anti-discrimination statutes also protect former employees when they are subjected to discrimination arising from the former employment relationship.[8]

**Coverage of Existing Employer-Sponsored Retiree Health Benefit Plans**

Several commenters requested that EEOC clarify how the rule would apply to existing employer-sponsored retiree health benefit plans. Until the Third Circuit's ruling in *Erie County,* many employers designed coordinating retiree health benefit plans in reliance on statements in the legislative history to OWBPA that the practice of eliminating, reducing, or altering employer-sponsored retiree health benefits with Medicare eligibility is lawful under the ADEA. It is the Commission's intent to allow employers to continue the practice of coordinating retiree health benefits with Medicare eligibility with as little disruption as possible. The Commission does not believe that additional changes to the rule are required in order to achieve this result. The Appendix to the rule states that the Commission will apply the exemption to all retiree health benefits that coordinate with Medicare (or a

[8] *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (former employees covered under Title VII); *Passer* v. *American Chem. Soc'y,* 935 F.2d 322, 330 (D.C. Cir. 1991) (former employees covered under ADEA); *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 607 (3d Cir. 1998) (former employees covered under ADA), *cert. denied,* 525 U.S. 1093 (1999).

comparable State health benefits plan), whether or not those benefits are provided for in an existing or newly created employee benefit plan.

**The Commission's Exemption Authority**

The Commission received seventeen comments from advocacy organizations and other groups representing retirees that did not support the Commission's proposal. These commenters questioned the Commission's authority to issue an exemption for the practice of coordinating employer-sponsored retiree health benefits with Medicare eligibility. Many of these commenters also argued that an exemption is inconsistent with the primary purposes of the ADEA. Three of these organizational commenters also asserted that the Commission did not sufficiently support the need for an exemption to the Act. In addition, the Commission received approximately 30,000 letters from individual citizens (the majority of which were a form letter) expressing concern that employers might reduce or even eliminate the health benefits of Medicare-eligible retirees in response to the EEOC's proposal.

Section 9 of the ADEA provides that EEOC ''may establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest.'' Implicit in this authority is the recognition that the application of the ADEA could, in certain circumstances, foster unintended consequences that are not consistent with the purposes of the law and are not in the public interest. Such circumstances are rare. However, after carefully studying the issue and reviewing the public comments received in response to the NPRM, the Commission concludes that the practice of coordinating employer-sponsored retiree health benefits with Medicare eligibility presents a circumstance that warrants Commission exercise of its authority under Section 9.

The Commission does not agree that EEOC lacks the authority to enact such a rule. Section 9 confers broad discretion on the Commission to issue rules and regulations interpreting the ADEA and to establish reasonable exemptions from any or all prohibitions of the Act.[9] Nor is the Commission persuaded that the rule is inconsistent with the primary purposes of the ADEA. Given the continuing decline in the availability of employer-provided retiree health benefits, and the disincentive to provide such benefits created by the Third Circuit's ruling and the Commission's prior policy, this final rule reasonably addresses a problem confronting older Americans. The Commission is persuaded that, in order to comply with the Commission's prior policy, many employers would reduce the overall level of health benefits they offer to retirees or cease providing such benefits altogether, leaving many retirees without access to affordable health coverage. Indeed, the Commission has been presented with evidence that some public school districts already have reduced the health benefits they provide to retirees in response to the Commission's prior policy. Clearly, this result is inconsistent with the Act's primary purpose of protecting older workers.

Finally, the Commission believes it has provided the strong and affirmative showing required to justify an exemption from the Act. The Commission conducted a comprehensive study of the relationship between the ADEA and retiree health benefits before it published its NPRM. As part of that study, the Commission met with a wide range of interested parties, including employers, employee and retiree groups, labor unions, human resource consultants, benefits consultants, actuaries, and state and local government representatives. Labor unions, benefits experts, and public and private sector employers all agreed that the Commission's prior policy would have a deleterious effect on the provision of employer-sponsored retiree health benefits, especially given the numerous other factors negatively impacting the availability of such benefits.

Public comments filed in response to the Commission's NPRM only buttress this conclusion. Several organizations representing public school districts and employees noted that many school districts responded to the Commission's prior policy by reducing the overall level of retiree health coverage they were providing or by eliminating the benefit altogether. Moreover, this is what ultimately happened in *Erie County.* After the county made changes to its retiree health benefit plans to comply with the court's ruling, the net effect was a decrease in health benefits for retirees generally; older retirees received no better health benefits, while younger retirees were required to pay more for health benefits that offered fewer choices.

Various other proposals considered by the Commission did not adequately protect and preserve the important employer practice of providing health coverage for retirees. Many of the alternative proposals considered would have required complex calculations regarding the costs of retiree health care.[10] Given the number of variables involved in these calculations, including numerous subjective factors that are difficult to quantify, the Commission concludes that none of the alternatives considered would adequately address the incentive created by the Commission's prior policy to eliminate employer-sponsored retiree health coverage. It is the Commission's view that the ADEA should not present a barrier for employers and labor unions to provide the broadest possible health coverage for retirees. Accordingly, after reviewing all data, views, and arguments presented, EEOC is persuaded that a narrow exemption from the prohibitions of the ADEA for the practice of coordinating employer-sponsored retiree health benefits with Medicare eligibility is necessary and proper in the public interest.

**Litigation Regarding the Exemption**

AARP filed suit to enjoin publication and implementation of the exemption on Feb. 4, 2005, alleging, *inter alia,* that the exemption violated the ADEA and the Administrative Procedure Act. AARP argued that the rule was age discriminatory because it would allow employers to reduce the benefits of older retirees.[11]

The EEOC agreed not to publish the exemption rule until the district court ruled on AARP's challenges. Although the court initially ruled in favor of AARP on March 30, 2005, it subsequently reversed itself and entered summary judgment in favor of the EEOC on September 27, 2005, finding that the Commission did not exceed its authority in issuing this exemption, that the exemption was not arbitrary or capricious, and that the *Erie County* case did not render the exemption invalid. However, the court did continue its injunction prohibiting publication of the exemption until the Third Circuit could resolve AARP's promised appeal.

The Third Circuit resolved AARP's appeal on June 4, 2007, holding that the EEOC properly exercised its exemption power under Section 9 of the ADEA,

[9] *See, e.g., American Association of Retired Persons* v. *Equal Employment Opportunity Commission,* 823 F.2d 600, 604–605 (D.C. Cir. 1987) (EEOC has ''unusually broad discretion'' under Section 9).

[10] For a more detailed discussion of the alternatives considered by the EEOC, please refer to the ''Executive Order 12866'' portion of this preamble. *See also* 68 FR 41542–41549 (July 14, 2003) (Discussing the alternatives in the Retiree Health Notice of Proposed Rulemaking).

[11] Brief in Support of Complaint at 24–25, *AARP* v. *EEOC,* 383 F. Supp. 2d 705 (E.D. Pa. 2005) (No. 05–CV–509).

thereby affirming the district court's decision and lifting the injunction that prohibited publication of the final rule.[12] The court, noting the Commission's evidence that (1) health care costs continue to rise, (2) employers are not required to provide any retiree health care benefits, and (3) some employers chose to avoid ADEA discrimination by reducing retiree health benefits, specifically rejected AARP's argument that the EEOC exceeded its authority under the ADEA as follows:

> We recognize with some dismay that the proposed exemption may allow employers to reduce health benefits to retirees over the age of sixty-five while maintaining greater benefits for younger retirees. Under the circumstances, however, the EEOC has shown that [its] narrow exemption from the ADEA is a reasonable, necessary, and proper exercise of its section 9 authority, as over time it will likely benefit all retirees.[13]

AARP asked the Third Circuit to rehear the case *en banc*, but that request was denied on August 21, 2007. AARP then petitioned the Supreme Court for a stay of the Third Circuit's mandate pending AARP's writ of certiorari, but that request was denied on September 19, 2007. AARP filed its writ of certiorari asking the Supreme Court to review the Third Circuit's decision on November 20, 2007.

**Additional Revisions to the Rule**

The Commission made a minor editorial change to Section 1625.32(a)(3) by changing the word ''are'' to ''is.'' The change is not intended to alter the definition of a comparable State health benefit plan for purposes of the exemption. The Commission also simplified the language in question and answer three in the Appendix.

**Executive Order 12866**

This final rule has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation. This rule is considered a significant regulatory action, but not economically significant, under section 3(f)(4) of that Order and therefore was reviewed by the Office of Management and Budget (OMB). As discussed below, the rule exempts certain practices from the prohibitions of the ADEA in order to ensure that employers may offer retirees a wide range of health plan designs that coordinate with Medicare without violating the Act.

Labor organizations, employees, and employers favor coordinating retiree health plans with Medicare benefits as a way to provide affordable health coverage for older Americans.[14] The final rule benefits employers by allowing them to continue to coordinate retiree health benefits with Medicare. It will decrease, not increase, costs to covered employers by reducing the risks of liability for noncompliance with the statute.[15] Further, this rule also will benefit retirees by eliminating the incentive for employers to reduce or eliminate retiree health coverage in order to comply with the equal benefit/equal cost defense.[16] Thus, the rule should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State and local tribal governments or communities.

The ADEA applies to all employers with at least 20 employees. 29 U.S.C. § 630(b). The Act prohibits covered employers from discriminating against an employee or job applicant who is at least 40 years of age. 29 U.S.C. 623, 631. According to Census Bureau information, approximately 1,976,216 establishments employed 20 or more employees in 2000.[17]

The exemption would apply to all covered employers who provide health benefits to their retirees. In 2001, the GAO concluded that about one-third of large employers and less than 10% of small employers provided such benefits to current retirees.[18] According to the GAO, in 1999, such employer-sponsored health plans were relied on by 10 million retired individuals aged 55 and over as either their primary source of health coverage or as a supplement to Medicare coverage.[19]

After the Commission took the position that the practice of coordinating retiree health benefits with Medicare eligibility was unlawful unless an employer could meet the equal benefit/equal cost test set forth in Section 4(f)(2)(B)(i) of the ADEA, labor unions and employers expressed concern that the easiest way for an employer-sponsored retiree health plan to comply with the Commission's policy was to reduce or eliminate already existing retiree health benefit coverage. This result has become increasingly likely given the myriad other factors impacting the availability of employer-sponsored retiree health benefits.

In recent years, the cost of employee health care has consistently increased, making it difficult for employers to continue to provide retiree health benefits.[20] As explained in the NPRM, two widely-cited surveys of employer-sponsored health plans—(1) the Health Research and Educational Trust survey sponsored by The Henry J. Kaiser Family Foundation (Kaiser/HRET) and (2) the William M. Mercer, Incorporated survey (formerly produced by Foster Higgins) (Mercer/Foster Higgins)—estimate that premiums for employer-sponsored health insurance increased an average of about 11% in 2001.[21] These studies also identify how cost increases were expected to continue and how such ongoing premium increases are particularly difficult for small employers to cover and continue offering retiree health benefits.[22]

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[12] *AARP* v. *EEOC,* 489 F.3d 558, 2007 WL 1584385 (3d Cir., June 4, 2007). The Third Circuit confirmed that its decision lifted the district court's injunction in response to a motion for clarification. *Id.*, Case No. 05–4594 (3d Cir., August 31, 2007).

[13] *AARP* v. *EEOC*, 489 F.3d at 564–565.

[14] That view is reflected in public comments made by groups such as the American Federation of Teachers, the National Education Association, the Wisconsin Education Association Council, the Delaware State Education Association, the National Council on Teacher Retirement, the American Benefits Council, the American Association of Health Plans, the ERISA Industry Committee, the Equal Employment Advisory Council, the Minnesota School Boards Association, the National Rural Electric Cooperative Association, the Society for Human Resource Management, the U.S. Chamber of Commerce, the Washington Business Group on Health, and the Wisconsin Association of School Boards, among others.

[15] NPRM, 68 FR at 41548.

[16] *See id.* at 41546 (explaining that without the final rule, ''[t]his lack of regulatory protection may cause a class of people—retirees not yet 65—to be left without any health insurance. It also may contribute to the loss of valuable employer-sponsored coverage that supplements Medicare for retirees age 65 and over.'')

[17] CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, ''Statistics of U.S. Businesses'' (2000).

[18] Hearing Before the House Comm. on Education and the Workforce, 107th Cong.(2001) (statement of William J. Scanlon, Director of Health Care Services, GAO).

[19] U.S. GENERAL ACCOUNTING OFFICE, ''Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion,'' GAO Doc. No. GAO–01–374, at 1 (May 2001).

[20] NPRM, 68 Fed. at 41543.

[21] THE HENRY J. KAISER FAMILY FOUNDATION & HEALTH RESEARCH AND EDUCATIONAL TRUST, ''Employer Health Benefits, 2001 Annual Survey'' (Menlo Park, CA: The Henry J. Kaiser Family Foundation and Health Research and Educational Trust 2001); WILLIAM M. MERCER, ''Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans 2001'' (New York, NY: William M. Mercer, Inc. 2002). The 2001 Kaiswer/HRET study, conducted between January and May 2001, surveyed more than 2,500 randomly selected public and private companies in the United States. The 2001 Mercer/Foster Higgins study used a national probability sampling of public and private employers and the results represented about 600,000 employers.

[22] The NPRM explains that the 2001 Kaiser/HRET survey suggests that these changes would affect small employers, defined as those employing between 3–199 workers, at a greater rate than larger companies, THE HENRY J. KAISER FAMILY FOUNDATION & HEALTH RESEARCH AND EDUCATIONAL TRUST, ''Employer Health Benefits, 2001 Annual Survey'' (2001), and the 2002 Kaiser/HRET survey suggests that the number of small employers offering retiree health benefits has eroded. THE HENRY J. KAISER FAMILY FOUNDATION & HEALTH RESEARCH AND

Increased longevity and, thus, increased numbers of retirees, also will continue to mean larger and more frequent payments for health care services on behalf of retired workers.[23] ''The United States General Accounting Office (GAO) projects that, by 2030, the number of people age 65 or older will be double what it is today, while the number of individuals between the ages of 55 and 64 will increase 75 percent by 2020.'' [24] Further, ''it is well-established that utilization of health care services generally rises with age.'' [25] Thus, the demand for and cost of retiree health coverage is likely to grow significantly during a time that there will be comparatively fewer active workers to subsidize such benefits.[26]

Changes in accounting rules also have dramatically impacted the way employers account for retiree health benefit costs.[27] The Financial Accounting Standards Board, which is charged with establishing U.S. standards of financial accounting and reporting, promulgated new rules for retiree health accounting in 1990, referred to as Financial Accounting Standards Number 106 or FAS 106.[28]

FAS 106 requires employers to apportion the costs of retiree health over the working lifetime of employees and to report unfunded retiree health benefit liabilities in accordance with generally accepted accounting principles beginning with fiscal years after December 15, 1992. Because ''the recognition of these liabilities in financial statements dramatically impacts a company's calculation of its profits and losses,'' some companies have said that FAS 106 led to reductions in reported income, thus creating an incentive to reduce expenditures for employee benefits such as retiree health.[29]

''As a result of these increased costs and accounting changes, employers have actively examined ways to reduce health care costs, including by reducing, altering, or eliminating retiree health coverage.'' [30] As explained in the NPRM, studies revealed that employers already were less likely to offer retiree health benefits than in the past and that this trend was expected to continue.[31]

[Further, a]s the number of employers offering retiree health coverage declines, so has the incentive for employers to provide future retirees with such coverage. Unions report that meaningful negotiations about the future provisions of employer-sponsored retiree health benefits are becoming increasingly futile. Union representatives have informed EEOC that increasing numbers of employers have refused to include retiree health among the benefits to be provided to employees.[32]

In this environment, employers are not likely to increase any retiree's benefit in order to comply with the ADEA's equal benefit/equal cost defense. To the contrary, the equal benefit/equal cost rule creates an additional incentive for employers to reduce benefits.

In light of the other factors affecting an employer's decision to provide retiree health benefits, the Commission believes that the current regulatory framework of the ADEA does not provide a sufficient safe harbor to protect and preserve the important employer practice of providing health coverage for retirees.

This lack of regulatory protection may cause a class of people—retirees not yet 65—to be left without any health insurance. It also may contribute to the loss of valuable employer-sponsored coverage that supplements Medicare for retirees age 65 and over. Because almost 60% of retirees between the ages of 55 to 64 rely on employer-sponsored health coverage as their primary source of health coverage, and about one-third of retirees over age 65 rely on employer-provided retiree health plans to supplement Medicare, the Commission believes that such a result is contrary to the public interest and necessitates regulatory action.[33]

As detailed in the NPRM, the Commission examined a variety of ways to end this incentive towards further benefit erosion. These alternatives included various proposals that would have allowed employers to take the cost of Medicare into account when assessing whether they satisfied the equal cost test, or regulations that would require employers to adopt or maintain benefits programs that supplement Medicare in order to satisfy the equal benefits test. However, none of these alternatives reduced the risk to employers of noncompliance with the ADEA while providing them with the flexibility to continue providing coordinated retiree health benefits.

After extensive study, the Commission concluded that ''it does not appear that retiree health costs or benefits can be reasonably quantified in a regulation.'' [34]

Unlike valuation of costs associated with life insurance or long-term disability benefits, calculati[on of] retiree health costs is complex due to the multitude of variables, including types of plans, levels and types of coverage, deductibles, and geographical areas covered. In addition, the subjective nature of some health benefits, such as a greater choice in providers, makes any such valuation more complicated.

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EDUCATIONAL TRUST, ''Employer Health Benefits, 2002 Annual Survey'' (Menlo Park, CA: The Henry J. Kaiser Family Foundation and Health Research and Educational Trust 2002) (reporting that the number of small employers who offer retiree health benefits dropped 6% between 2000 and 2002).

[23] NPRM, 68 FR 41543.

[24] *Id.* (citing U.S. GENERAL ACCOUNTING OFFICE, ''Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion,'' GAO Doc. No. GAO–01–374, at 17 (May 2001)).

[25] NPRM, 68 FR 41543 (citing ANNA M. RAPPAPORT, ''Planning for Health Care Needs in Retirement,'' *in* FORECASTING RETIREMENT NEEDS AND RETIREMENT WEALTH 288, 288–294 (Olivia S. Mitchell *et al.* eds., University of Pennsylvania Press 2000)).

[26] NPRM, 68 FR 41543 (citing U.S. GENERAL ACCOUNTING OFFICE, ''Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion,'' GAO Doc. No. GAO–01–374, at 17–18 (May 2001)).

[27] NPRM, 68 FR 41543 (citing ANNA M. RAPPAPORT, ''FAS 106 and Strategies for Managing Retiree HealthBenefits,'' *in* COMPENSATION AND BENEFITS MANAGEMENT, 37 (Spring 2001); PAUL FRONSTIN, ''Retiree Health Benefits: Trends and Outlook,'' EBRI ISSUE BRIEF No. 236 (Employee Benefit Research Institute Aug. 2001)).

[28] NPRM, 68 FR at 41543.

[29] *Id.* at 41544 (quoting PAUL FRONSTIN, ''Retiree Health Benefits: Trends and Outlook,'' EBRI ISSUE BRIEF No. 236, at 3 (Employee Benefit Research Institute Aug. 2001)).

[30] NPRM, 68 FR at 41544 (noting that a 2001 survey found that both public and private employers considered controlling health care costs as a top business issue for the next two to three years. THAP! ET AL., ''Productive Workforce Survey: Report of Findings Private Employer/Public Agency'' (THAP!, Andersen and CalPERS Aug. 2001); *see also* ANNA M. RAPPAPORT, ''Postemployment Benefits: Retiree Health Challenges and Trends—2001 and Beyond,'' *in* COMPENSATION AND BENEFITS MANAGEMENT, 52, 56 (Autumn 2001) (''Companies seeking to reduce costs are closely examining retiree medical benefits.'')).

[31] The 2001 Mercer/Foster Higgins study showed a 17% decline between 1993 and 2001 in the number of employers with 500 or more workers offering retiree health benefits, William M. Mercer, ''Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans 2001'' (New York, NY: William M. Mercer, Inc. 2002), the 2002 Kaiser/HRET study found that only 34% of employers with at least 200 employees offered retiree health coverage in 2002, as opposed to 66% in 1998, The Henry J. Kaiser Family Foundation & Health Research and Educational Trust,'' ''Employer Health Benefits, 2002 Annual Survey'' (Menlo Park, CA: The Henry J. Kaiser Family Foundation and Health Research and Educational Trust 2002), and a study by Hewitt Associates LLC reached similar conclusions. Hewitt Associates LLC, ''Trends in Retiree Health Plans'' (Lincolnshire, IL: Hewitt Associates LLC 2001). The Kaiser study also forecast that this trend would continue.

[32] NPRM, 68 FR at 41544.

[33] NPRM, 68 FR at 41546–47 (citing Hearing Before the House Comm. on Education and the Workforce, 107th Cong. (2001) (statement of William J. Scanlon, Director of Health Care Services, GAO); THE HENRY J. KAISER FAMILY FOUNDATION ET AL., ''Erosion of Private Health Insurance Coverage For Retirees: Findings from the 2000 and 2001 Retiree Health and Prescription Drug Coverage Survey,'' at iv (Menlo Park, CA: The Henry J. Kaiser Family Foundation, Health and Research Educational Trust and The Commonwealth Fund April 2002); and additionally noting that ''[o]f the 56.8% of retirees covered by employer-sponsored health coverage in 1999, 36.3% were covered in their own name and 20.5% received health benefits through a spouse. PAUL FRONSTIN, ''Retiree Health Benefits: Trends and Outlook,'' EBRI ISSUE BRIEF No. 236, at 6–7 (Employee Benefit Research Institute Aug. 2001).'').

[34] NPRM, 68 FR at 41546.

Even allowing an employer to take into account the ''cost'' of Medicare is problematic because the government's cost[s in] provid[ing] Medicare services does not reflect what similar benefits would cost an employer in the marketplace. Nor can an employer's Medicare tax obligation, pursuant to the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101 *et seq.* (FICA), be considered the ''cost'' of any specific retiree's Medicare benefits inasmuch as most retirees have been employed by multiple employers over the course of their careers and employer FICA contributions are paid into a general Medicare fund that is not employee-specific. Additionally, the fact that employees themselves pay for a portion of the cost of Medicare further complicates cost valuation.

The Commission therefore believes that quantifying the cost to employers of post-Medicare retiree health benefits under any formulation of the equal cost test would not be practicable. This is particularly true for employers who maintain multiple plans for different categories of employees. Even for employers with only one plan, the variability in health claims data from year to year can be great. As a result, calculating retiree health benefit expenses would be cost prohibitive for many employers.[35]

This is particularly true for small and medium sized employers, and those unable to hire sophisticated employee benefit professionals.[36] ''As a result, repeatedly having to calculate retiree health benefit expenses under the alternative proposals considered by the Commission would have been cost prohibitive or otherwise impracticable for many employers.'' [37]

Thus, even if it were possible to capture the myriad of complexities involved in a retiree health cost analysis in a regulation, the likelihood is that far too many employers might simply reduce or eliminate existing retiree health benefit plans instead of attempting to comply with such a regulation. Further complicating compliance with many of the alternative proposals considered by the Commission is the fact that employers do not have the same flexibility in designing retiree health benefit programs as they do when designing other types of retirement benefit programs, such as cash-based retirement incentives. For example, providing supplemental health benefits to retirees who are eligible for Medicare may require that the employer obtain and administer a separate policy just for that coverage. Many employers are unable or unwilling to bear such a burden. Instead, if faced with such a choice, employers are more likely to simply eliminate retiree health coverage altogether—for retirees under and over age 65. Furthermore, future changes in the private health insurance market or in Medicare likely would necessitate further regulatory action were the Commission to adopt many of the alternative proposals considered. [Thus, t]he Commission does not believe that it is possible to apply the equal benefit/equal cost test, or a variant of that rule, to the rapidly changing landscape of retiree health care.[38]

In contrast, the Commission's final rule allows employers to offer a wide range of retiree health plan designs that coordinate with Medicare without violating the ADEA. The rule does not otherwise affect an employer's ability to offer health benefits to retirees, consistent with the law. ''This approach also benefits the significant number of [retirees] who rely on employer-sponsored retiree health coverage and would otherwise have to obtain retiree health coverage in the private individual marketplace at substantial personal expense.'' [39]

It is not likely that the final regulation will disrupt the efficient functioning of the economy and private market forces. Until recently, when structuring retiree health benefits, most employers relied on legislative history to the OWBPA stating that the practice of coordinating employer-sponsored retiree health benefits with Medicare eligibility is lawful under the ADEA. This final regulation permits the practice of unrestricted coordination of retiree health benefits with Medicare eligibility to continue.

### Paperwork Reduction Act

This final rule contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities, because it imposes no additional economic or reporting burdens on such firms. The rule—which exempts certain practices from regulation—will decrease, not increase, costs to covered employers by reducing the risks of liability for noncompliance with the statute. For this reason, a regulatory flexibility analysis is not required.

### List of Subjects in 29 CFR Part 1625 and 1627

Advertising, Aged, Employee benefit plans, Equal employment opportunity, Reporting and recordkeeping requirements, Retirement.

■ For the reasons discussed in the preamble, Chapter XIV of Title 29 of the Code of Federal Regulations is amended as follows:

## PART 1627—RECORDS TO BE MADE OR KEPT RELATING TO AGE: NOTICES TO BE POSTED

■ 1. Revise the heading of part 1627 to read as set forth above.

■ 2. The authority citation for 29 CFR part 1627 shall continue to read as follows:

**Authority:** Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 11, 52 Stat. 1066, 29 U.S.C. 211; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

■ 3. In § 1627.1, remove paragraph (b) and redesignate paragraph (c) as new paragraph (b).

■ 4. In part 1627, redesignate subpart C (consisting of §§ 1627.15 and 1627.16) as subpart C of Part 1625 (consisting of §§ 1625.30 and 1625.31), respectively.

## PART 1625—AGE DISCRIMINATION IN EMPLOYMENT ACT

■ 5. The authority citation for 29 CFR Part 1625 is revised to read as follows:

**Authority:** 81 Stat. 602; 29 U.S.C. 621; 5 U.S.C. 301; Secretary's Order No. 10–68; Secretary's Order No. 11–68; Sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 12, 29 U.S.C. 631, Pub. L. 99–592, 100 Stat. 3342; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

■ 6. In newly redesignated subpart C of part 1625, revise the heading of newly redesignated § 1625.31 and the first sentence of paragraph (a) to read as follows:

**§ 1625.31 Special employment programs.**

(a) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1625.30(b) of this part, it has been found necessary and proper in the public interest to exempt from all prohibitions of the Act all activities and programs under Federal contracts or grants, or carried out by the public employment services of the several States, designed exclusively to provide employment for, or to encourage the

[35] *Id.*

[36] *See id.* at 41548 (noting that ''[i]t is clear that small and medium-sized employers, and those unable to hire sophisticated employee benefit professionals, would be most affected by a complicated rule.'').

[37] NPRM, 68 FR at 41548.

[38] *Id.* at 41546.

[39] NPRM, 68 FR at 41548. *See id.* at 41544 (discussing how those who lose coverage have limited options, such as temporary coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1161 *et seq.* (COBRA) or coverage in the private individual insurance market). COBRA coverage is very expensive because, while it allows the employee to remain in the employer's insurance plan, it requires the employee to pay the entire premium. 68 FR 41544. Coverage in the private health insurance often provides limited benefits, or is prohibitively expensive. *Id.* (citing U.S. General Accounting Office, ''Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion,'' GAO Doc. No. GAO–01–374, at 20–22 (May 2001)).

employment of, persons with special employment problems, including employment activities and programs under the Manpower Development and Training Act of 1962, Pub. L. No. 87–415, 76 Stat. 23 (1962), as amended, and the Economic Opportunity Act of 1964, Pub. L. No. 88–452, 78 Stat. 508 (1964), as amended, for persons among the long-term unemployed, handicapped, members of minority groups, older workers, or youth. * * *

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■ 7. Add section 1625.32 to Subpart C of part 1625 to read as follows:

**§ 1625.32 Coordination of retiree health benefits with Medicare and State health benefits.**

*(a) Definitions.*

(1) *Employee benefit plan* means an employee benefit plan as defined in 29 U.S.C. 1002(3).

(2) *Medicare* means the health insurance program available pursuant to Title XVIII of the Social Security Act, 42 U.S.C. 1395 *et seq.*

(3) *Comparable State health benefit plan* means a State-sponsored health benefit plan that, like Medicare, provides retired participants who have attained a minimum age with health benefits, whether or not the type, amount or value of those benefits is equivalent to the type, amount or value of the health benefits provided under Medicare.

(b) *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 § 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.

(c) *Scope of Exemption.* This exemption shall be narrowly construed. No other aspects of ADEA coverage or employment benefits other than those specified in paragraph (b) of this section are affected by the exemption. Thus, for example, the exemption does not apply to the use of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section. Nor does it apply to the use of the age of eligibility for Medicare or a comparable State health benefit plan in connection with any act, practice or benefit of employment not specified in paragraph (b) of this section.

8. In Subpart C of part 1625, add an Appendix to newly added § 1625.32 as follows:

**Appendix to § 1625.32—Questions and Answers Regarding Coordination of Retiree Health Benefits With Medicare and State Health Benefits**

Q1. Why is the Commission issuing an exemption from the Act?

A1. The Commission recognizes that while employers are under no legal obligation to offer retiree health benefits, some employers choose to do so in order to maintain a competitive advantage in the marketplace—using these and other benefits to attract and retain the best talent available to work for their organizations. Further, retiree health benefits clearly benefit workers, allowing such individuals to acquire affordable health insurance coverage at a time when private health insurance coverage might otherwise be cost prohibitive. The Commission believes that it is in the best interest of both employers and employees for the Commission to pursue a policy that permits employers to offer these benefits to the greatest extent possible.

Q2. Does the exemption mean that the Act no longer applies to retirees?

A2. No. Only the practice of coordinating retiree health benefits with Medicare (or a comparable State health benefit plan) as specified in paragraph (b) of this section is exempt from the Act. In all other contexts, the Act continues to apply to retirees to the same extent that it did prior to the issuance of this section.

Q3. May an employer offer a ''carve-out plan'' for retirees who are eligible for Medicare or a comparable State health plan?

A3. Yes. A ''carve-out plan'' reduces the benefits available under an employee benefit plan by the amount payable by Medicare or a comparable State health plan. Employers may continue to offer such ''carve-out plans''and make Medicare or a comparable State health plan the primary payer of health benefits for those retirees eligible for Medicare or the comparable State health plan.

Q4. Does the exemption also apply to dependent and/or spousal health benefits that are included as part of the health benefits provided for retired participants?

A4. Yes. Because dependent and/or spousal health benefits are benefits provided to the retired participant, the exemption applies to these benefits, just as it does to the health benefits for the retired participant. However, dependent and/or spousal benefits need not be identical to the health benefits provided for retired participants. Consequently, dependent and/or spousal benefits may be altered, reduced or eliminated pursuant to the exemption whether or not the health benefits provided for retired participants are similarly altered, reduced or eliminated.

Q5. Does the exemption address how the ADEA may apply to other acts, practices or employment benefits not specified in the rule?

A5. No. The exemption only applies to the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefit program. No other aspects of ADEA coverage or employment benefits other than retiree health benefits are affected by the exemption.

Q6. Does the exemption apply to existing, as well as to newly created, employee benefit plans?

A6. Yes. The exemption applies to all retiree health benefits that coordinate with Medicare (or a comparable State health benefit plan) as specified in paragraph (b) of this section, whether those benefits are provided for in an existing or newly created employee benefit plan.

Q7. Does the exemption apply to health benefits that are provided to current employees who are at or over the age of Medicare eligibility (or the age of eligibility for a comparable State health benefit plan)?

A7. No. The exemption applies only to retiree health benefits, not to health benefits that are provided to current employees. Thus, health benefits for current employees must be provided in a manner that comports with the requirements of the Act. Moreover, under the laws governing the Medicare program, an employer must offer to current employees who are at or over the age of Medicare eligibility the same health benefits, under the same conditions, that it offers to any current employee under the age of Medicare eligibility.

Dated: December 17, 2007.

For the Commission.

**Naomi C. Earp,**

*Chair.*

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