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Third Circuit Rules on the Side of the EEOC in Retiree Health Case

Last month the US Court of Appeals for the Third Circuit ruled in favor of an EEOC regulation governing the Age Discrimination in Employment Act (ADEA). In *AARP v. Equal Employment Opportunity Commission* the court said that the EEOC “reasonably exercised” its exemption authority under the ADEA when the agency proposed regulations permitting the coordination of retiree healthcare benefits with Medicare eligibility.

Background

The EEOC proposed its regulation in 2003 to exempt from the ADEA 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.

The EEOC had proposed that particular regulation in response to *Erie County Retirees Association v. County of Erie*, 220 F.3d 193 (3d Cir. 2000). In *Erie County*, the Third Circuit court ruled that a retiree medical plan discriminated in favor of younger retirees and therefore violated the ADEA. The Supreme Court later declined to hear this case, allowing the Third Circuit’s decision to stand as the rule in that jurisdiction. (Note: the court that heard *Erie County* is the same court that has now ruled in favor of the EEOC.)

In *Erie County*, the plan in question required retirees who were eligible for Medicare to accept a coordinated plan provided by a combination of an HMO and Medicare. Younger retirees had coverage under a point-of-service plan so they could choose

between traditional indemnity and HMO coverage at the time of service. In *Erie County* the Court held that, since younger retirees were being treated differently than older retirees, unless the employer could prove that the plan met the equal benefit or equal cost test, the plan violated ADEA. (Note: Other courts have rejected the Third Circuit's analysis, arguing, among other things, that ADEA limits its protections to active employees.)



EEOC Rule

The EEOC regulations were intended to help level the field of health benefits. Specifically, the EEOC proposed an exemption to the general ADEA rule as applied to employer-sponsored retiree health plans. The exemption would permit coordinating employer-provided retiree health coverage with eligibility for Medicare or state-sponsored retiree health benefits. The EEOC acknowledged that it took this step in light of 1) rising healthcare costs, 2) the fact that employers are not required to provide healthcare at all, and 3) the practical burden of demonstrating compliance with the ADEA's equal benefit/equal cost rule when coordinating benefits with Medicare.

The EEOC's exemption to the general ADEA rule was intended to allow employer-provided retiree health coverage to coordinate with eligibility for Medicare or state-sponsored retiree health benefits. The EEOC determined that this shows due regard for the purposes of ADEA and permits employers to offer a valuable benefit to early retirees who might not be able to afford the

benefits while still providing a valuable benefit to retirees who are eligible for Medicare.

AARP Challenge

Publication of the final regulation was blocked when the AARP challenged the EEOC's authority to issue the exemption. (For details please see the August 2003 issue of *FOCUS on Benefits*.)

In last month's decision, the Third Circuit held that the ADEA clearly and unambiguously grants to the EEOC the authority to provide narrow exemptions from the ADEA. The court stated, "Because [*the ADEA statute*] expressly grants the EEOC the power to implement such exemptions, there is no question that a limited exemption shown by the agency to be reasonable, necessary and proper falls within the agency's authority under the statute."

The decision lifts the injunction on the implementation of the proposed EEOC regulation, clearing the way for publication of a final regulation. It is not yet known whether AARP will appeal the decision to the US Supreme Court. The Third Circuit is comprised of Delaware, New Jersey, Pennsylvania and the US Virgin Islands.

US Health Insurance Statistics

New data published by Reuters shows that more than 44 million people in the US were without health insurance in 2005. Some experts believe that the numbers may grow larger as medical costs continue to surge. Higher medical costs tend to increase the number of uninsured as the larger expense forces employers to scale back worker benefits and causes health insurers to cut coverage and more carefully scrutinize health status factors when selecting customers (to the extent permitted under applicable law). Meanwhile, US healthcare spending hit \$2 trillion in 2005 – far beyond that of any other industrialized nation.

US population: 300 million

Estimated number of US residents without insurance:

2005: 44.8 million

2004: 43.5 million

US states with highest percentage of uninsured:

1. Texas
2. New Mexico
3. Florida
4. Oklahoma
5. California

Despite the large number of uninsured, how does US healthcare spending stack up?

Per capita health spending in 2004:

- | | |
|---------------|---------|
| 1. US: | \$6,102 |
| 2. Canada: | \$3,165 |
| 3. Germany: | \$3,005 |
| 4. Australia: | \$2,876 |
| 5. Britain: | \$2,546 |

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IRS: More HSA Guidance

The IRS recently published proposed rules that govern employer contributions (other than those made through a cafeteria plan) to employees' health savings accounts (HSAs). (Note: Many employers will not be affected by these proposed regulations, because the employers either do not contribute to employees' HSAs or they make HSA contributions through a section 125 plan.) For employers that are affected by these regulations, the new rules offer guidance on accelerated contributions and will also implement certain notice requirements.

Notice Requirement

Under the proposed rules, employers must issue a special notice to workers who have not established an HSA by December 31 or who have failed to inform their employer that they have an HSA.

The new notice is intended to inform employees that they may be entitled to receive an employer contribution to their HSA if they establish an account and notify the employer on a timely basis. The notice must be distributed to all employees by January



15 of the following calendar year and state that each eligible employee who, by the last day of February, both establishes an HSA and notifies the employer by the end of February that he or she has established the HSA, will receive a comparable contribution to the HSA. The proposed regulations provide sample language that employers may adopt as a model for developing a notice that is tailored to the employer's program. Until final regulations are issued, if an employee has not established an HSA by December 31, the employer is not required to make a comparable contribution to the employee's HSA for that calendar year.

Accelerated Contributions

The new guidance is also intended to help workers by allowing employers to speed up HSA contributions. Under the proposed rules, an employer may, without violating the comparability requirements, generally accelerate part or all of its contributions for the entire year to the HSA of employees who have, during the calendar year, incurred qualified medical expenses exceeding the employer's cumulative HSA contributions at that time.

The IRS did not specify an effective date for these rules except to note that they do not officially go into effect until the date the final regulations are published in the *Federal Register*. Meanwhile, taxpayers may rely on the regulations for guidance and may therefore elect to treat the rules as though they are currently in effect. The IRS has asked for public comment on the rules and will accept comments through August 30, 2007.

Study: Fitness Program Slashes Claims

The industry publication *National Underwriter* reports interesting new findings about apparent health plan cost

control being achieved through workforce wellness incentives. According to the article, "Exercise Incentive Study Appears As Clubs Push For Tax Bills," medical expenses for health plan members who qualified for fitness center incentive payments were 33 percent lower than expenses for comparable plan members who received no such incentives. Researchers at Medica Insurance Company have reported those findings together with a summary of other results from a recent study of the effects of exercise on health insurance claims.



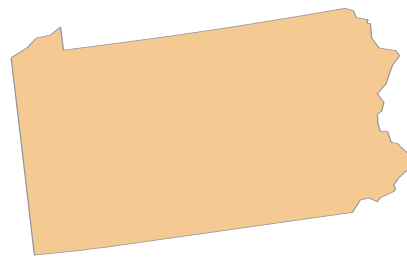
The researchers analyzed claims for more than 3000 participants in Medica's Fit Choices program. The program offers a \$20 monthly credit toward dues for members who exercise at a fitness center at least eight days per month. The researchers indicated that they used statistically valid measures to compare groups with similar demographics, health status, and healthcare consumption habits. But that differed based on receipt of the exercise incentives.

After two years, the average claim cost for the recipients of the exercise incentives was about one-third lower than the average for members for the control group. Prescription drug claims for the recipients of the exercise incentives dropped about nine percent, physician claims were 13 percent lower and facility claims were almost two-thirds lower. Control group members were about twice as likely to visit the emergency room.

It is important to note that despite the relatively large sampling featured in the study, some experts believe other factors are likely working to skew these results. (While the study apparently considered the probability that the healthiest

members of the workforce will be drawn to such a program, we wonder whether that factor might still have had some greater impact.) Although the dramatic size of the purported savings is encouraging, employers should still approach such findings with caution.

State Update: Universal Healthcare



In the first quarter of 2007, California Governor Arnold Schwarzenegger (R) unveiled his sweeping plan for universal coverage, as did Pennsylvania Governor

Edward Rendell (D). Rendell's healthcare proposal, "Prescription for Pennsylvania," is embodied in House Bill 700. The legislation includes establishment of the "Cover All Pennsylvanians Program, Group and Individual Health Insurance Reform," which expands the scope of practice for certain healthcare professionals and increases patient safety. The legislation is currently in committee and has been the subject of several public hearings.

As mentioned above, earlier this year Schwarzenegger was the first governor to set forth his proposal, but it has not yet been written into any actual legislation. According to

Kaisernetwork.org, Schwarzenegger's plan will not be introduced as legislation; legislators will wait to introduce the proposal in "negotiations later this legislative session."



There are other health insurance bills pending in various California legislature committees. For example, SB 48 requires that all working Californians and their dependents must have coverage, that employers must "pay or play," and that eligibility be expanded for public health insurance programs.

(Note: "Pay or Play" statutes have been struck down repeatedly by the courts in a number of different states.) SB 840 proposes a single-payer healthcare system that covers

all Californians, a government-administered system that would replace private health insurers, and that employers in California pay into the system.

Mandatory Electronic Filing of Form 5500: Delay

Last summer the Department of Labor published a final rule mandating electronic filing of the annual Form 5500 for plan years beginning on or after January 1, 2008. More recently, however, industry publisher Bureau of National Affairs, Inc. (BNA) has reported in its *Pension and Benefits Daily* that a prominent Department of Labor (DOL) representative indicated that a delay is in the works for that rule.



Speaking at a DOL/ASPPA (American Society of Pension Professionals & Actuaries) conference, Joe Canary (a chief in the DOL's Employee Benefits Security Administration (EBSA) Office of Regulations and Interpretations) announced that the electronic filing requirement has been postponed. It will, instead, be effective for the Form 5500 for plan years beginning on or after January 1, 2009. For most plan sponsors, the 2009 Form 5500 will be due in 2010. Canary noted that there will be follow-up guidance for issues such as filings for short 2009 plan years and for direct filing entities.

The BNA is also reporting that use of the revised Schedule C for Form 5500 (which should be released sometime this year) will also not be necessary until the Form 5500 for plan years beginning on or after January 1, 2009 is due. Revisions to

Schedule C will require a more detailed accounting of fees and expenses paid to entities that provide services to an employee benefit plan.

Employers Struggle to Entice Employees to Save for Retirement

The Congressional Record Service recently reported the results of a survey that it began back in 2004. The survey, *Retirement Savings: How Much Will Workers Have When They Retire?* found that less than one-third of all US households with at least one wage earner contributed to an IRA. Additionally, less than half of all US households with at least one wage earner contributed to an employer-sponsored retirement savings plan.

Even more alarming than the low participation figures are the statistics on the actual amount saved for retirement among those employees who choose to contribute to retirement accounts. Within households with married couples where the head of the household was 35 or younger, the average 2004 balance in all household retirement accounts was \$19,000. Within unmarried households of the same age, the average 2004 retirement savings balance was \$7,000. By contrast, within households with married couples where the head of household was between 45 and 54 years old, the average 2004 balance in all household retirement accounts was \$103,200, while within unmarried households of the same age, the average 2004 retirement savings balance was \$32,000.

Even more alarming than the low participation figures are the statistics on the actual amount saved for retirement among those employees who choose to contribute to retirement accounts.

In view of these statistics, it is safe to assume that many retirees will face serious challenges making ends meet. They may need to retire later than they hoped, take a part-time job during retirement or adjust their standard of living in order to stretch their retirement assets.

The report issued by the Congressional Record Service examined the utilization of employer-sponsored retirement plans from 1980 to 2003 and noted that, with the shift from defined benefit plans to defined contribution plans, employees are still not recognizing their own responsibility for their retirement. Other studies have found that encouraging employees to save for retirement is not a problem confined to young or low-wage earners. In fact, one such survey indicates that nearly ten percent of individuals earning more than \$100,000 annually do not participate in retirement savings plans.



Although recent legislative changes have encouraged employers to adopt automatic enrollment in their retirement plans, the Congressional Record Service report also suggested additional legislative options that might encourage retirement plan savings:

- Allowing greater use of payroll deductions for individual retirement accounts
- Making the Retirement Savings Tax Credit refundable
- Exempting amounts in retirement savings plans from testing for certain federal aid programs
- Granting employers tax credits that would compensate for the cost of maintaining certain retirement savings plans
- Requiring employers to offer defined contribution plans that give retiring workers the opportunity to purchase employer-sponsored annuities similar to those required of defined benefit plans

2007 Willis Wellness Survey

Willis is pleased to announce the launch of our 2007 Wellness Survey. Our survey examines whether companies are offering wellness programs and, if so, which benefits and services are included. We also look at how organizations measure program success and which elements are most important to implementing a winning wellness program. The Willis survey questionnaire will be sent to *FOCUS on Benefit* subscribers in the next few days. (Note that the survey will be sent to only one representative of your company even if multiple employees subscribe.)

If you receive a questionnaire, please take a few minutes to complete it. We are interested in your response even if you do not currently offer a wellness program. Willis will send you a complimentary electronic copy of the survey report in appreciation of your effort.



HIPAA and Privacy

Thanks to one of our Southern California readers for bringing us a HIPAA (Health Insurance Portability and Accountability Act of 1996) privacy question with a clear-cut answer! The reader's CFO had noticed that claims amounts for their self-funded plan were higher than normal. Being diligent, the CFO checked out the reason. It appeared that there was one large claim that was causing the unusually high costs. The CFO asked a logical question: Who is the claimant?

Luckily, the HR manager knew that this question posed a HIPAA privacy issue. She explained to the CFO that the claimant was a dependent, but she did not have any more specific information, because the reports she received did not include more specific identifying information. The CFO replied, "You're a designated employee who can receive protected health information (PHI); can't you find out who it is?" The HR manager knew that she should **not** get the information for the CFO. Here are some of the reasons for her decision.

• **The CFO is not a designated employee.** HIPAA rules state that to receive PHI an employer must commit that only designated employees will have access to the PHI. The designated employees need to be identified in the plan document by name or title. Reports that state aggregate claims information usually are not protected. The identity of an individual claimant is protected and cannot be disclosed to anyone other than a designated employee.



• **An inquiry by an executive is not a permissible purpose.** Even if the CFO were a designated employee, HIPAA allows use of protected information by designated employees only for **permissible purposes**. In this case, neither the CFO nor the HR manager had a purpose for obtaining the claimant's identity that was related to plan administration.

• **The "minimum necessary" usually does not include names.** Assuming that the CFO thought there was a business reason for asking for the claimant's name – the name would still be protected, because it was not needed to predict funding requirements or other related actions.

• **Protected health information can not be used for employment purposes.** When there is no clear plan administrative reason for using the information, some might argue that the real purpose for obtaining the information is to determine whether or not to take employment action based on it.

• **The claimant can sue.** The plan's HIPAA privacy obligations are imposed on the employer by including those obligations in the plan document. Under ERISA, individual plan participants and beneficiaries can sue to enforce the terms of the plan, including the privacy provisions, against the employer.

Key Contacts

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410 527 1200

Ft. Worth, TX
817 335 2115

Naples, FL
239 659 4500

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408 436 7000

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