September 9, 2003

Frances M. Hart, Executive Officer
Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street, N.W.
10th floor
Washington, DC  20507


Dear Ms. Hart:

The Equal Employment Advisory Council (EEAC) is pleased to submit these comments on the notice of proposed rulemaking (NPRM) by the Equal Employment Opportunity Commission (EEOC or Commission), published in the Federal Register at 68 Fed. Reg. 41542 on July 14, 2003, to amend its regulations to exempt from all prohibitions of the Age Discrimination in Employment Act of 1967 (ADEA) the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a comparable state-sponsored retiree health benefits program.

As detailed below, EEAC strongly supports the proposed amendment. We believe EEOC unquestionably has the authority to establish this exemption from the ADEA’s prohibitions, and that it clearly serves the public interest to do so. Indeed, we urge the Commission to go forward and finalize the proposed amendment to its regulations even if, in the meantime, Congress enacts currently-pending legislation that would prospectively exempt the coordination of employer-sponsored retiree health benefits with Medicare and comparable state health benefit plans from the prohibitions of the ADEA. See, e.g., “Prescription Drug and Medicare Improvement Act of 2003,” S. 1, 108th Cong., § 631 2003.

Statement of Interest

EEAC is the nation’s largest nonprofit association of private-sector employers dedicated exclusively to the advancement of practical and effective programs to eliminate workplace discrimination. Founded in 1976, EEAC now comprises more than 330 of the nation’s largest and most progressive companies, collectively employing more than 20 million workers in the
U.S. alone. All of EEAC’s members are employers subject to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (ADEA). As such, they have a direct and continuing interest in the issue addressed in EEOC’s NPRM.

The Commission Has Clear Authority To Create the Exemption

In Section 9 of the ADEA, Congress granted the EEOC broad authority to “establish such reasonable exemptions to and from any and all provisions of [the Act] as it may find necessary and proper in the public interest.” 29 U.S.C. § 628. The sole limitation on this delegation of authority is that such exemptions must be “reasonable.” Id. For the reasons detailed by the Commission in its NPRM, and further amplified below, the exemption proposed in this instance is eminently reasonable. In fact, the exemption is absolutely necessary to ensure that ADEA concerns do not cause more and more employers to reduce or eliminate retiree health benefits — an effect Congress plainly did not intend the ADEA to have.

The Proposed Exemption Clearly Serves the Public Interest

EEAC commends the Commission for its in-depth study of the relationship between the ADEA and employer-sponsored retiree health benefit plans, and for its well-reasoned analysis of the problems posed by an interpretation of the ADEA that prohibits employers from coordinating such plans with Medicare and comparable state-sponsored programs. We believe the Commission’s careful analysis, coupled with the detailed factual record developed by the Commission’s internal Retiree Health Benefits Task Force and summarized in the NPRM, makes unassailable the conclusion that the proposed ADEA exemption is both reasonable and necessary.

The first-hand experience of EEAC’s member companies bears out the conclusions of the many scholarly studies and reports cited in the NPRM, which found that rising costs of health care, together with increases in longevity and changes in accounting rules, have placed employers under ever-increasing pressure to reduce expenditures for benefits such as retiree health care. Additional, strong factual support for this conclusion can be found in a study by the Employment Policy Foundation (EPF), available on-line at http://www.epf.org/research/newsletters/2003/hb20030501.pdf, which projects that if current trends continue, the employer share of health benefit costs could increase by over 236 percent, from $3,262 per employee in March 2002 to over $10,946 per employee by the year 2010.1

An issue brief prepared by the Employee Benefits Research Institute (EBRI) also points out that it is likely that employers will continue to make changes to retiree health benefits in response to legal and regulatory developments, as well as predicted medical cost inflation. See EBRI Issue Brief No. 236, “Retiree Health Benefits: Trends and Outlook” (Aug. 2001), at 20. And “[w]hile these changes in retirement health benefits are not being widely felt by today’s

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By establishing clearly that the ADEA permits employers to coordinate retiree health benefits with Medicare and comparable state-sponsored programs, EEOC’s proposed ADEA exemption will help to prevent this rude awakening for those now approaching retirement. The exemption will help to counteract the trends discussed above and encourage more employers to provide valuable benefits to early retirees who otherwise might not be able to afford health insurance, while also providing supplemental health insurance to retirees who are eligible for Medicare. Thus, the proposed exemption clearly will serve the public interest.

The Proposed Exemption Is Fully Consistent With the Purpose of the ADEA

Congress plainly did not intend to create a disincentive for employers to continue offering retiree health benefits when it enacted the ADEA in 1967 and amended it in 1990 via the Older Workers Benefit Protection Act (OWBPA). Yet, for the reasons recognized in the NPRM and elaborated above, that is precisely the effect of the existing rule that treats coordination of employer-sponsored health care benefits with Medicare and comparable state-sponsored programs as a violation of the ADEA. In removing this unintended disincentive, the proposed exemption is fully consistent with, and advances the purpose of, the ADEA.

The purpose of the ADEA is simply to prohibit employers from treating individuals 40 years of age and older differently than younger individuals because of age. See Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Thus, employment actions that are motivated entirely by factors other than age do not present the problem to which the ADEA is addressed, “even if the motivating factor is correlated with age.” Id. at 611. In Hazen Paper, the Supreme Court recognized that “age and years of service are analytically distinct ... and thus it is incorrect to say that a decision based on years of service is necessarily ‘age based.’” Id. By the same irrefutable logic, age and Medicare eligibility are analytically distinct, and thus it is incorrect to say that a decision based on Medicare eligibility is necessarily “age based.”

In seeking to coordinate retiree health benefits with Medicare and comparable state programs, employers are not motivated by the age of individual retirees, as such, but rather by the fact that attainment of eligibility for government-sponsored health benefits fundamentally changes a retiree’s overall circumstances and needs with regard to employer-sponsored retiree health benefits. A retiree who is eligible for Medicare simply is not similarly-situated, for these purposes, to one who is not yet Medicare-eligible. Thus, a difference in an employer’s treatment of two retirees because of a difference in their Medicare-eligibility status is not a difference in treatment because of age. It is a difference in treatment based on a manifestly-relevant difference in their status, created not by the employer but by the federal government itself. The only age-based difference in treatment involved in this situation is the decision by Congress to base Medicare eligibility on attainment of the age of 65.

The U.S. Court of Appeals for the Third Circuit fundamentally misapprehended this point in Erie County Retirees Ass’n v. County of Erie, 220 F.3d 193 (3d Cir. 2000). The court
erroneously distinguished *Hazen Paper* on the ground that Medicare eligibility is not merely correlated with age, but is “a direct proxy for age,” because it “follow[s] ineluctably upon attaining age 65.” *Id.* at 211. But the appeals court’s premise is demonstrably incorrect. Congress could change the age of eligibility for Medicare if it chose to do so, but no legislative body can change the age of an individual. Only time can do that. Thus, Medicare-eligibility and age are not identical, inseparable or analytically indistinguishable.

If Congress were to raise the age of eligibility for Medicare to 67, for instance, an employer with a Medicare-coordinated retiree health benefit plan consistent with the proposed regulation would be required to treat retirees aged 65 and 66 the same as retirees younger than 65 with respect to health care benefits, because they all would be similarly-situated for these purposes, in that none would yet be eligible to receive benefits through Medicare. As this example illustrates, age in itself does not ineluctably determine the level of benefits individuals stand to receive under such employer-sponsored plans; rather, eligibility for government-sponsored health care benefits does.

In sum, the proposed exemption will allow employers to accord dissimilar treatment with regard to employer-sponsored health care benefits to retirees who are dissimilarly situated in terms of Medicare eligibility. Yet the ADEA will continue to require employers to accord similar treatment, without regard to age, to all individuals who are similarly-situated. Thus, the proposed amendment addresses a serious, ongoing problem associated with rising health care costs and the aging of the workforce in a manner that is fully consistent with the underlying purpose of the ADEA.

The EEOC Should Adopt the Proposed Exemption Without Regard to the Possibility That Congress Might Enact a Prospective “Fix” for the Retiree Health Care Coordination Problem

As of this writing, congressional conferees are working to resolve differences between respective prescription drug and Medicare improvement bills passed earlier this year by the Senate and the House of Representatives. The Senate-passed version of this legislation, S.1, contains a provision stating that “[a]n employee benefit plan ... shall not be treated as violating [the ADEA] solely because the plan provides medical benefits to retired participants who are not eligible for medical benefits under [Medicare] or under a plan maintained by a State or an agency thereof, but does not provide medical benefits, or the same medical benefits, to retired participants who are so eligible.”

The effect of this provision, if included in the final legislation and ultimately enacted into law, would appear to be similar to that of the proposed amendment to the Commission’s ADEA regulations, except that it appears that the legislative provision, as currently drafted, may be only prospective in effect. In contrast, the NPRM makes clear that the regulatory exemption the Commission has proposed is intended to apply to existing, as well as newly created, employer-provided retiree health benefit plans.
We believe it is essential that a solution be adopted that applies to existing retiree health benefit plans, as well as plans adopted by employers in the future. Only in this way can the controversy over the legality of all such plans be finally resolved and the existing disincentives to employers to offer retiree health care benefits be effectively removed. Such a comprehensive solution is needed in order to accord fair treatment to, and settle the expectations of, employers who have established coordinated retiree health benefit programs since 1990 in good faith reliance on the “Statement of Managers” of the OWBPA legislation, quoted at length in the NPRM, which assured that this practice would not result in liability under the ADEA.

Conclusion

EEAC commends the Commission for proposing this essential amendment to its regulations, and respectfully urges the Commission, for the reasons detailed in its NPRM and in these comments, to go forward and finalize the proposed exemption whether or not Congress adopts a so-called legislative “fix” for this problem. We appreciate this opportunity to express our views.

Sincerely,

Jeffrey A. Norris
President