

**EMPLOYERS MAY BE ABLE TO PAY LESSER RETIREMENT BENEFITS
TO THOSE ELIGIBLE FOR MEDICARE**

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In AARP v. EEOC, 2005 WL 723991 (E.D. Pa. March 30, 2005) a federal court struck down regulations from the Equal Employment Opportunity Commission (EEOC), which would have allowed employers to pay lesser post-retirement healthcare benefits to retirees who qualified for Medicare, as contrary to the Third Circuit's ruling in Erie County Retiree Assoc. v. County of Erie, 220 F.3d 193 (3rd Cir. 2000). Now, just six months later, the same court has vacated its prior order, and upheld the regulations but also elected to keep an injunction in place pending further appeal. AARP v. EEOC, 2005 WL 2373863 (E.D. Pa 9/27/05).

In the Erie decision, the Court of Appeals held that retiree health plans that are reduced or eliminated on the basis of age or Medicare-eligibility violate the ADEA. In a typical plan, such as the one in Erie, the employer offers a "Medicare bridge" to retirees, i.e., the employer provides health insurance coverage until the retiree is eligible for Medicare (age 65). Other plans typically reduce retiree health benefits to Medicare-eligible retirees such that the total of the employer-provided medical benefits and the retiree's Medicare benefits is less than the medical benefits that the retiree received before becoming Medicare eligible. The Third Circuit held that the ADEA is violated if a benefit reduction is triggered by age or a "proxy" for age, and that Medicare-eligibility is a proxy for age.

After the Erie decision, however, the EEOC discovered rather quickly that employers were reacting to the ruling by seeking to discontinue the practice of offering post retirement health care benefits altogether. (Providing those benefits is not required by law, although the elimination of such a benefit may have legal implications including constitutional and bargaining ramifications.) Because of this, the EEOC issued regulations allowing employers to pay lesser benefits to retirees who qualified for Medicare. That change led to the challenge in AARP v. EEOC. In March, the District Court for the Eastern District of Pennsylvania determined that the EEOC did not have the authority to "regulate" a different result given that the Third Circuit had decided the Erie case based upon the statutory language of the ADEA. Most recently, the District Court vacated that prior order and held that the EEOC does have the authority to issue the regulations since the ADEA has a gap as to its application to retirees. Despite this turn around, the Court maintained the injunction against enforcement of the regulations pending an appeal to the Third Circuit Court of Appeals.

This issue will continue to be a "hot potato," as this case is almost certainly headed for the Supreme Court.