No. 2:05-cv-00509-AB

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARP, *et al.*

Plaintiffs,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant.

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, HR POLICY ASSOCIATION, AMERICA'S HEALTH INSURANCE PLANS, AMERICAN BENEFITS COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE ERISA INDUSTRY COMMITTEE, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF DEFENDANT

Ann Elizabeth Reesman
Daniel V. Yager
MCGUINESS NORRIS &
WILLIAMS, LLP
1015 Fifteenth Street, N.W., Ste. 1200
Washington, DC 20005
(202) 789-8600

EQUAL EMPLOYMENT ADVISORY COUNCIL
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8650

HR POLICY ASSOCIATION
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8670

AMERICA'S HEALTH INSURANCE PLANS
601 Pennsylvania Avenue, N.W.
South Building, Suite 500
Washington, D.C. 20004
(202) 778-3250

AMERICAN BENEFITS COUNCIL
1212 New York Ave., N.W.
Suite 1250
Washington, D.C. 20005
(202) 289-6700

THE CHAMBER OF COMMERCE
OF THE UNITED STATES
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

THE ERISA INDUSTRY COMMITTEE
1400 L Street, N.W.
Suite 350
Washington, D.C. 20005
(202) 789-1400

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-5500

SOCIETY FOR HUMAN RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314
(703) 535-6061

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The Equal Employment Advisory Counsel, HR Policy Association, America's Health Insurance Plans, American Benefits Council, The Chamber of Commerce of the United States, The ERISA Industry Committee, National Rural Electric Cooperative Association, and the Society for Human Resource Management respectfully submit this brief as *amici curiae*. The brief urges this Court to deny the Plaintiff's Motion for Ex Parte and Temporary Restraining Order, Preliminary Injunction, And Stay of the Effective Date of Agency Regulations, and thus supports the position of Defendant, U.S. Equal Employment Opportunity Commission.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership now includes more than 330 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

HR Policy Association (HR Policy) is an organization of the senior human resource executives of more than 240 of the nation's largest private sector employers, collectively employing nearly 13 million Americans, more than 12 percent of the private workforce. HR Policy's principal mission is to ensure that laws and policies affecting employment relations are sound, practical, and responsive to the realities of the modern workplace. All of HR Policy's

member companies provide health care benefits to employees, and a substantial number provide benefits to retirees. HR Policy is very concerned about the increasing numbers of uninsured Americans and is actively pursing private sector solutions to this problem. In terms of public policy solutions, HR Policy views the EEOC rule as a critical element in keeping the problem from growing worse.

America's Health Insurance Plans (AHIP) is the national association representing the private health plan and insurer community. AHIP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to its members. AHIP represents nearly 1,300 member companies that administer or insure benefits, including health, pharmaceutical, long-term care, disability, and supplemental coverage, to more than 200 million Americans. AHIP's members, health insurers and plans, work in partnership with employers to provide affordable health benefits for Americans during employment and after their retirement.

The American Benefits Council (ABC) is a broad-based, nonprofit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. ABC's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation, representing an underlying membership of over three million businesses and

organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

The ERISA Industry Committee (ERIC) is a nonprofit organization representing America's largest private employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one state, and many have employees in all fifty states. ERIC frequently participates as *amicus* in cases with the potential for far-reaching effect on employee benefit plan design or administration.

The National Rural Electric Cooperative Association (NRECA) is a not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives that serve over 36 million Americans in 47 states. NRECA provides medical, dental, life, accidental death and dismemberment (AD&D), accident and sickness, and long-term disability programs for over 120,000 current employees and their families, including over 7,000 retirees. NRECA is the primary source of health insurance for the Cooperative community.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 190,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in

developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters and members in more than 100 countries.

Amici's members are employers, representatives of employers, or health insurers and plans that work in partnership with employers that are subject to the Age Discrimination In Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other labor and employment statutes and regulations. *Amici's* members, therefore, have a direct and ongoing interest in the issues presented in this case.

Employers provide critically needed health care coverage to millions of retirees and their families nationwide. Of the employers who voluntarily extend group health insurance coverage to retirees, many take Medicare eligibility into consideration when designing their plans. The practice of "coordinating" retiree health benefits with Medicare is a long-standing practice that generally takes the form of a full-coverage "bridge" to Medicare for early retirees or benefits that supplement Medicare when a retiree reaches Medicare's eligibility age.

Such plans were widely regarded as legal under the ADEA until 2000 when the Court of Appeals for the Third Circuit ruled to the contrary. The EEOC was in the final stages of promulgating a narrow exemption to the ADEA, which would have recognized that employers could continue offering Medicare-coordinated retiree health benefits, when AARP filed the instant action. Publication of this exemption is extremely important to every employer covered by the ADEA nationwide, and their employees, because without it many employers will have no choice but to cut back or eliminate retiree health benefits in order to come into compliance with the decision because of the prohibitive costs of expanding health care benefits to Medicare-eligible retirees.

Amici seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of our experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers and health plans and insurers.

STATEMENT OF THE CASE

Employer-sponsored retiree health care plans provide critically needed health care coverage to some 10 million retirees and their families. *See* U.S. General Accounting Office, *Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion*, GAO-01-374 (May 2001), at 1 (hereinafter "GAO Report").[1] Employers are not required by any law to provide retiree health benefits, but some do in order to attract and retain good employees, as well as to reward those employees for years of dedicated service.

Of the employers who voluntarily extend group health insurance coverage to retirees, many take Medicare eligibility into consideration when designing their retiree health plans. The practice of "coordinating" retiree health benefits with Medicare is a long-standing practice that generally takes one of two forms. Coverage serves either as a "bridge" benefit available to early retirees that terminates once the retiree reaches Medicare's eligibility age or, for those who are age 65 or older, as a supplement to Medicare benefits. Usually pre-Medicare retirees continue in the same employer plan as active employees. Retiree health plans that supplement Medicare for retirees age 65 and older typically provide benefits not covered by Medicare or provide financial assistance with premiums, deductibles or co-payments. Either way, these plans meet distinctly

[1] *Available at* http://www.gao.gov/new.items/d01374.pdf

different retiree health care needs and are not intended to provide the same benefits to early retirees as they do to post-65 retirees.

Employer-sponsored retiree health benefit plans are widely regarded by older workers as an extremely valuable benefit of employment. Such plans provide a "bridge" to Medicare for early retirees who otherwise would be left without health care coverage and would have to pay for it themselves at much higher rates. Likewise, supplemental health care coverage for retirees age 65 and older allows older retirees to secure important health-related goods and services not covered by Medicare. Employer-sponsored health benefits have been the primary source of prescription drug coverage for retirees over the age of 65, for example, and employer plans generally offer more generous drug benefits than those envisioned under the new Medicare Modernization Act. The Henry J. Kaiser Family Found. & Hewitt Assocs. LLC, *Current Trends and Future Outlook for Retiree Health Benefits* (Dec. 2004), at xi, 27 (hereinafter "2004 Kaiser/Hewitt Survey"). For many retirees, purchasing comparable coverage in the private marketplace simply would be cost-prohibitive.

For many years, private employers, State and local governments and labor unions widely believed that Medicare-coordinated retiree health plans were legal under the Age Discrimination in Employment Act (ADEA), and with good reason. The legislative history of the Older Workers Benefits Protection Act (OWBPA), which amended the ADEA to cover employee benefits, made clear that the law's sponsors intended to allow employers to coordinate retiree health benefits with Medicare without running afoul of the ADEA. For years, employers and labor unions relied on this legislative history in developing and negotiating plan designs.

It was not until 2000, that the legality of coordinating retiree health benefits with Medicare was suddenly called into question. That year, the Court of Appeals for the Third

Circuit, in *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001), ruled that because workers automatically qualify for Medicare upon reaching age 65, Medicare eligibility "is a direct proxy for age." *Id.* at 211. Therefore, the court ruled, an employer who coordinates its retiree health benefits with Medicare violates the ADEA if the result is that the employer provides lesser benefits to older Medicare-eligible retirees than to younger retirees. *Id.* at 216.

In the court's view, the only way an employer could justify providing different benefits to Medicare-eligible retirees would be to meet the "equal benefit or equal cost" safe harbor established in EEOC's regulations. *Id.* To do so, the employer would have to show either (1) that the benefits it provided its over-65 retirees (factoring in Medicare) were equal to or better than those offered to their younger counterparts or (2) that it spent the same amount buying health insurance for each retiree, *without* considering the value of the Medicare benefit. *Id.*

The Equal Employment Opportunity Commission (EEOC), which is responsible both for enforcing the ADEA and developing ADEA policy, participated as *amicus curiae* in the *Erie County* case and urged the court to adopt this interpretation of the law. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of the Appellants.[2] The EEOC then adopted the *Erie County* decision as its national enforcement policy, effectively extending the impact of the decision nationwide. U.S. Equal Employment Opportunity Commission, *Employee Benefits,* EEOC Comp. Man. No. 915.003 (Oct. 3, 2000).[3] Around this same time, the EEOC also launched an aggressive law enforcement effort aimed at bringing employers into compliance with the *Erie County* decision. Using its authority to conduct

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[2] *Available at* 2000 WL 33983611.
[3] *Available* at http://www.eeoc.gov/policy/docs/benefits.html

"directed" age investigations, which are initiated by the agency directly without a charge from an individual complainant, the EEOC proceeded to file hundreds of charges against employers and labor unions that had agreed to offer retirees Medicare-coordinated plans through the collective bargaining process. Many of these charges were brought against public school districts that operate on fixed budgets. Jennie Tunkieicz, *EEOC's Retirement Review Worries Racine Schools: Monetary Damages, An End To Longtime Teachers' Benefit Are Among Options*, Milwaukee Sentinel Journal (Sept. 17, 2000); Brian Bakst, *Schools Owe Retirees Millions, Agency Contends*, St. Paul Pioneer Press (Aug. 11, 2000).

This series of events led to disastrous results. Because employers could come into compliance with *Erie County* only by increasing benefits for retirees over the age of 65, by reducing benefits for retirees under the age of 65, or by eliminating benefits for *all* retirees, the *Erie County* decision created a strong incentive for employers trying to cope with spiraling health care costs to simply cut back on retiree health benefits. Indeed, this is exactly what happened in *Erie County* after the Third Circuit sent the case back to the trial court level for a determination of whether the County could satisfy the "equal cost or equal benefit" safe harbor. *Erie County Retirees Ass'n*, 220 F.3d at 217. The trial court ruled that the County could not meet the "equal benefit" safe harbor because over-65 retirees had to pay monthly Medicare premiums of $43.80, while under-65 retirees paid the insurance company a premium of only $12 per month. *Erie County Retirees Ass'n v. County of Erie*, 140 F. Supp.2d 466, 477 (W.D. Pa. 2001). Nor could it meet the "equal cost" requirement, since the over-65 plan cost the county less. *Id.* Two years later when the County came into compliance with the new *Erie County* rule, the result was not better benefits for retirees over the age of 65. *Erie County Retirees Ass'n v. County of Erie*, 192 F. Supp.2d 369 (W.D. Pa. 2002). Rather, the County reduced the level of

health benefits offered to pre-65 retirees with no increase in coverage for the Medicare-eligible plaintiffs, notwithstanding expectations that a favorable decision would result in their receiving better benefits.

By 2001, experts in the field of employee benefits were pointing to the *Erie County* decision as a major contributing factor in the further decline of employer-sponsored retiree health benefits nationwide. GAO Report at 16-17. After hearing from organized labor, state and local governments, employers, benefits experts and others about the damaging consequences of *Erie County*, the EEOC decided to reexamine its national enforcement policy and strategy. In August of 2001, a bi-partisan Commission unanimously voted to rescind the section of the agency's enforcement guidance adopting the *Erie County* decision. U.S. Equal Employment Opportunity Commission, *Rescission of Section IV(B) of EEOC Compliance Manual Chapter on "Employee Benefits"*, EEOC Compl. Man., No. 915.003 (Aug. 20, 2001).[4] The Commission also announced that it would "study further the relationship between certain employer practices regarding the provision of retiree health benefits and the Age Discrimination in Employment Act." *Id.* (footnote omitted).

In July 2003, after a careful look into both the legislative history of the OWBPA and the practical effects of the *Erie County* policy, the agency published a Notice of Proposed Rulemaking (NPRM) in the Federal Register proposing an exemption to the ADEA for retiree health benefits that are altered, reduced or eliminated when the participant becomes eligible for Medicare health benefits or benefits under a comparable State plan. 68 Fed. Reg. 41,542 (July 14, 2003). In proposing the exemption, the agency acknowledged that employers have no obligation to provide any retiree health care coverage at all and recognized that employers caught

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[4] *Available at* http://www.eeoc.gov/policy/docs/benefits-rescind.html

between potential ADEA liability and the cost of providing *additional* benefits to avoid ADEA compliance issues may simply choose the easier option of discontinuing the benefits entirely. *Id.* The EEOC also found that the application of the "equal cost, equal benefit" safe harbor in the context of retiree health "would not be practicable." *Id.* at 41546.

The EEOC's proposed exemption is a narrow one. It applies only in the context of retiree health benefits and does not extend to benefits offered to current employees who also happen to be Medicare-eligible. *Id.* at 41547. Significantly, the exemption will eliminate the strong incentive the *Erie County* decision created for employers to reduce or eliminate retiree health benefits and thus promises to help preserve this valuable benefit for future retirees. In April of 2004, the EEOC finalized the proposed rule and was apparently on the verge of publishing it in the Federal Register when the AARP filed the instant lawsuit.

SUMMARY OF ARGUMENT

Congress 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 Benefits Protection Act (OWBPA). Yet, this has been the practical effect of the *Erie County* decision, which treats the coordination of employer-sponsored retiree health care benefits with Medicare as a violation of the ADEA. 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, and by tying the hands of employers with respect to their ability to control those costs, *Erie County* has only added to the pressure to reduce costs by cutting or eliminating benefits.

The EEOC has clear authority under Section 9 of the ADEA to issue the exemption. The ADEA gives the EEOC broad authority to establish reasonable exemptions to the law that are

necessary and in the public interest. It is both necessary and in the public interest for the EEOC to remove any incentives for employers to reduce or eliminate retiree health benefits resulting from the *Erie County* decision. By publishing the exemption, employers will no longer be incented to reduce or eliminate retiree health benefits in order to come into compliance with the law and further erosion of these important benefits may be avoided.

The exemption is also manifestly within the scope of the EEOC's authority, and the agency is not inappropriately influencing health care policy by issuing it. It is wholly within the EEOC's purview to decide how benefit-related policies and practices, including retirement benefits, interact with the ADEA. The fact that the agency's rulemaking activities in this regard may have an effect in other policy areas does not limit the agency's authority. Moreover, it is inherently contradictory to say, as AARP has, that the agency has the authority to declare that a certain practice is illegal, but does not have authority to rule that the contrary is true.

Significantly, publication of the exemption will restore the legal certainty employers need to continue providing retiree health benefits. Inconsistency and instability in the federal employment laws undermine employer efforts to establish uniform, company-wide policies and employee benefit plans. The inability to establish such plans, coupled with an increased likelihood that employers will face legal challenges to plans that take Medicare into account in the future, only exacerbate pressure to eliminate retiree health benefits altogether.

Finally, AARP's claims that individuals who are currently in retirement (including the six individual plaintiffs in this case) will immediately lose health coverage upon publication of the exemption is contradicted by current research and experience. Recent employer surveys show that, the vast majority of companies have no plans to eliminate or significantly reduce retiree health benefits in direct response to the exemption. Additionally, companies trying to control

health care costs typically make changes to plans offered to *future* retirees, while grandfathering benefits for current retirees and older workers near retirement.

Consequently, while publication of the exemption is not likely to result in any adverse consequences to the individual plaintiffs in this case, it will remove a disincentive for employers to continue offering health benefits to retirees in the future. It is in the best interest of the public, therefore, that the EEOC be allowed to proceed with the exemption.

By removing this unintended disincentive, the EEOC's narrow exemption is fully consistent both with the legislative history of the OWBPA, as well as the statute itself. The legislative history of the OWBPA makes clear that the law's sponsors meant to allow employers to continue the long-standing practice of coordinating retiree health benefits with Medicare without running afoul of the ADEA. The EEOC's exemption simply restores the state of the law to what Congress had originally intended. The exemption is also in perfect harmony with the statute itself. While the purpose of the ADEA is to prohibit employers from treating older workers over the age of 40 differently because of their age, decisions that are motivated by factors other than age are permissible, even where the motivating factor correlates with age. When employers coordinate retiree health benefits with Medicare, they are motivated not by the age of the individual retirees, but by the fact that those retirees are now eligible for government-sponsored health benefits. Accordingly, the coordination of retiree health benefits with Medicare is in keeping with the law.

ARGUMENT

I. THE EEOC HAS CLEAR AUTHORITY UNDER SECTION 9 OF THE ADEA TO ISSUE THE EXEMPTION, WHICH IS NEEDED TO HELP PRESERVE IMPORTANT EMPLOYER-SPONSORED BENEFITS FOR RETIREES

A. The ADEA Gives The EEOC Broad Authority To Establish Reasonable Exemptions To The Law That Are Necessary And In The Public Interest

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.* The exemption proposed in this instance is eminently reasonable. In fact, the exemption is absolutely necessary to ensure that ADEA-based concerns do not cause more and more employers to reduce or eliminate health benefits for retirees — an effect Congress plainly did not intend the ADEA to have.

The EEOC conducted an in-depth study of the relationship between the ADEA and employer-sponsored retiree health benefit plans and developed a well-reasoned analysis of the problems posed by an interpretation of the ADEA that prohibits employers from coordinating such plans with Medicare. This careful analysis, coupled with the detailed factual record developed by the EEOC's internal Retiree Health Benefits Task Force, makes unassailable the conclusion that the proposed ADEA exemption is both reasonable and necessary.

B. In Light Of The Cost Pressures On Employers Today, It Is Both Necessary And In The Public Interest For The EEOC To Publish An Exemption That Will Stem Further Erosion Of Employer-Sponsored Health Benefits For Retirees

Although employer-sponsored retiree health plans provide critically needed benefits to millions of retirees, the continued availability of such plans is highly uncertain. The first-hand

experience of the employer *amicis'* member companies bears out the conclusions of the many scholarly studies and reports cited in the EEOC's Notice of Proposed Rulemaking, 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 coverage. Additionally, strong factual support for this conclusion can be found in a study by the Employment Policy Foundation (EPF), 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. Employment Policy Found., *Employer's Share of Health Benefit Costs Could Top $10,000 per Employee by Decade's End* (May 1, 2003).[5]

Likewise, a 2004 nationwide survey of more than 300 large employers found that the cost of providing retiree health benefits increased by an estimated 12.7 percent on average between 2003 and 2004 alone. 2004 Kaiser/Hewitt Survey at 9. Together, these employers provided health benefits to approximately 4.9 million retirees and their family members at an expected cost of $17.4 billion in 2004. *Id.* at vi and 9.

As health care costs continue to spiral out of control, some employers have had to raise retiree contributions to premiums and the amounts of the insured's' deductibles and co-payments. *Id.* at 17-21. Of the companies surveyed in the Kaiser-Hewitt study, for example, 79% increased retiree contributions to premiums in the last year, while another 45% increased cost-sharing requirements for retirees in the past year. *Id.* at 35. Other employers have had to impose more stringent eligibility requirements, such as raising years-of-service requirements.

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[5] *Available at* http://www.epf.org/research/newsletters/2003/hb20030501.pdf

GAO Report at 6. Still others have dramatically cut back – or eliminated altogether – health benefits for future retirees. 2004 Kaiser/Hewitt Survey at 11.

In fact, the number of employers who offer retiree health benefits is dwindling. While the percentage of employers offering retiree health benefits in 1988 was 66%, that number dropped to just 36% by 2004. *Id.* at v. Unfortunately, for many employers "the most effective way . . . to eliminate the costs associated with . . . retiree health benefit programs is to shut them down." Watson Wyatt Research Report, *Retiree Health Benefits: Time to Resuscitate?* (2002),[6] at 13 (finding that more than 20% of employers surveyed in 2001 completely eliminated retiree health benefits for new hires) (hereinafter "Watson Wyatt Report"). Indeed, of the more than 300 employers who participated in the 2004 Kaiser/Hewitt Survey, 11% said that their companies are either likely or somewhat likely to terminate coverage for future retirees in 2005. 2004 Kaiser/Hewitt Survey at 41.

The problem with the *Erie County* decision is that, given the rapidly escalating costs of health care, it leaves employers with few options other than to restructure and reduce the benefits provided to retirees, thereby creating yet another incentive for employers to abandon retiree health benefits. As discussed earlier in this brief, an employer can only come into compliance with *Erie County* in one of three ways. The employer can: 1) increase benefits for retirees over the age of 65; 2) reduce benefits for retirees under the age of 65; or 3) simply terminate benefits for *all* retirees. In view of the cost pressures on employers, few employers are able to *raise* the benefit levels for post-65 retirees. Their only alternative, then, is to reduce or eliminate benefits.

The *Erie County* case itself serves as an excellent illustration of how the policy can play out. When *Erie County* was settled, rather than raise the level of benefits offered to Medicare-

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[6] *Available at* http://www.watsonwyatt.com/research/resrender.asp?id=w-559&page=1

eligible retirees, the County simply downgraded its health plan for pre-Medicare retirees. Therefore, the post-65 retiree plaintiffs were no better off as a result of the *Erie County* lawsuit, while pre-65 retirees ended up with a much less generous health benefits package than they had before. Of course, the *Erie County* retirees could be considered "fortunate" in that they did not lose their health benefits completely.

Those hardest hit by the *Erie County* policy are older workers who are not yet eligible for Medicare and wish to retire, as well as future generations of retirees of all ages. Many employers offer retiree health benefits to pre-65 retirees as an effective way to "bridge" the gap between retirement and eligibility for Medicare. Employers typically continue these retirees in the same employer plan as active employees. Without employer-sponsored health benefits, most of these individuals would experience great difficulty obtaining health insurance coverage and many plans available to them may be prohibitively expensive. GAO Report at 4, 19-24.

This situation only further exacerbates a much larger, looming national crisis – the growing ranks of the uninsured. People who are retired but not yet eligible for Medicare make up a large segment of the uninsured population in this country. In fact, more than *1 million retirees* under age 65 had no health insurance coverage for the entire year in 2002. HR Policy Assn, *Leadership Action Plan On The Uninsured* (2004), at 74. This problem will only worsen in time. With the aging of the baby-boom generation, both the number and proportion of Americans potentially affected by reductions in employer-sponsored benefits is increasing. GAO Report at 17.

Accordingly, the EEOC correctly concluded that prohibiting employers from coordinating retiree health plans with Medicare would be contrary to the interest of older workers because it would result in a significant decrease, not enhancement, of health care

coverage they would receive in retirement. Further supporting the agency's conclusion, experts in the field of employee benefits now widely regard the *Erie County* decision as a major factor in the continuing decline of employer-sponsored retiree health benefits. A 2001 report by the Employee Benefit Research Institute (EBRI), for example, concluded that in the wake of the *Erie County* decision, "it is unlikely that employers will increase the level of health benefits for Medicare-eligible retirees" and predicted that employers "are likely to cut back on benefits for early retirees or . . . [eliminate] retiree health benefits altogether." Paul Fronstin, *Retiree Health Benefits: Trends and Outlook*, EBRI Issue Brief No. 236 (Aug. 2001), at 14 (hereinafter "EBRI Issue Brief"). Likewise, the report published by the General Accounting Office that same year identified the *Erie County* decision as one of several factors possibly contributing to the continued erosion of employer-sponsored health benefits for retirees. GAO Report at 16-17.

The EEOC's exemption is a significant step toward improving an otherwise adverse policy environment that operates to limit the availability of retiree health benefits. By establishing clearly that the ADEA permits employers to coordinate retiree health benefits with Medicare, the EEOC's ADEA exemption is necessary and proper in the public interest to help counteract the disturbing trends discussed above and preserve this valuable benefit of employment.

C. Publication Of The Exemption Is Manifestly Within The Scope Of EEOC's Authority

According to AARP, the EEOC would exceed its authority by issuing the exemption because the exemption is "intended to influence health care policy." AARP Complaint at 17. AARP's contention in this regard is wholly without merit.

Publication of the exemption is manifestly within the scope of EEOC's authority. EEOC is charged with enforcing and interpreting the ADEA as amended by the OWBPA, which among other things, extended the ADEA to cover employee benefits. It is, therefore, entirely within the agency's purview to decide how benefit-related policies and practices, including those related to retirement benefits, interact with the ADEA.

The fact that the agency's rulemaking activities may have ripple effects in other policy arenas in no way diminishes the agency's right and responsibility to promulgate rules construing the ADEA. In fact, the ADEA itself requires that the public interest be considered when the EEOC establishes an exemption; obviously, the availability of health care coverage is a matter of keen public interest. To its credit, the EEOC recognizes that employer-sponsored health coverage during a worker's retirement years is a very valuable and important benefit of employment. As the agency responsible for protecting the employment of older workers and "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment," the EEOC has taken appropriate steps to help preserve those benefits. 29 U.S.C. § 621. Thus, AARP is simply wrong when it tries to taint the EEOC's actions as an impermissible action intended to affect health care policy.

Moreover, it should be noted that AARP's position here is inherently contradictory. On the one hand, AARP argues that the EEOC *does* have authority (apparently without running the risk of impermissibly meddling in health care policy) to conclude that Medicare-coordinated retiree health plans are illegal. For AARP to then argue on the other hand that the EEOC *does not* have authority to take the contrary position is entirely illogical. AARP cannot have it both ways.

The fact is, no matter how the agency resolves this issue, there will be serious implications for retirees, employers, and the availability of health insurance benefits generally. To suggest that the agency can simply "step out" of the debate, by abandoning the exemption, is at the very least naive.

This is especially true here where the agency was to no small degree responsible for changing the legal landscape by advocating for and then adopting the *Erie County* decision in the first place. Before *Erie County*, Medicare-coordinated retiree health benefit plans were widely regarded by employers, labor unions and benefits experts as legal under the ADEA, and with good reason. The legislative history said they were. If it is AARP's position that the only way the EEOC can avoid impermissibly straying into the health care arena is to maintain the "status quo," and it appears that it is, then a return to the status quo would require issuing the exemption.

II. THE PUBLIC INTEREST IS NOT SERVED BY DELAYING PUBLICATION OF THE EXEMPTION, AS DELAYS WILL ONLY CAUSE MORE AND MORE OLDER WORKERS TO LOSE HEALTH BENEFITS IN RETIREMENT

Amici are concerned that for every day AARP succeeds in delaying the publication of the EEOC's exemption, more and more retirees will stand to lose important employer-sponsored health benefits. The ramifications of the *Erie County* decision are still being felt not just in the Third Circuit, but nationwide. Employer *amici's* member companies conduct business in multiple states across the nation, and they seek to establish uniform, company-wide policies and employee benefit plans that are consistent with the federal employment nondiscrimination laws. This effort is undermined if there is inconsistency and instability in the federal employment laws that apply to employees located at different geographic locations.

Simply put, employers cannot develop retirement programs for their workers across the country if they face age discrimination claims challenging Medicare-coordinated health plans by

employees who work at sites located in the Third Circuit. Moreover, because the Third Circuit is the first federal appeals court to address this question, employers who offer Medicare-coordinated health benefits to retirees are vulnerable to suit elsewhere in the country at this time as well. The increased likelihood that employers will face lawsuits under the ADEA over differences in benefit plans only exacerbates the pressure to control cost by eliminating these programs altogether.

Even if the employer ultimately prevails, mounting a defense to an ADEA lawsuit can be prohibitively expensive. Under *Erie County*, an employer can defend itself only by showing compliance with the equal cost/equal benefit safe harbor, which would require highly factual benefit calculations involving complex issues, such as the comparability and relative "value" of managed care and "point-of-service" benefits like those involved in the *Erie County* case. Even assuming that an employer could make such a showing, evaluating benefit plans would be cost-prohibitive and, as the EEOC correctly concluded, would "not be practicable." NPRM, 68 Fed. Reg. at 41,546.

Even if employers were willing to incur such costs, few employers would then risk the cost of having to defend against a discrimination charge or lawsuit challenging the employer's calculations. Moreover, each time there is a change in the cost or characteristics of one or more of the employer's health plans, calculations would have to be done all over again, with each plan change subject to challenge. Accordingly, the more cost-effective and rational response to an employer faced with the current state of the law is to either reduce the level of coverage for pre-65 retirees or eliminate coverage for all retirees.

While the EEOC's decision to rescind its enforcement guidance was a positive first step toward fixing these problems, it is not enough. With no regulatory protection and a federal

appellate decision holding that certain Medicare-coordinated retiree health plans are illegal, employers are still vulnerable to suit, not just in the Third Circuit, but all across the country. The publication of the EEOC's exemption will restore the legal certainty employers need to continue providing these important benefits.

III. PURELY SPECULATIVE AND UNWARRANTED CONCERNS ABOUT POSSIBLE HARM TO THE INDIVIDUAL PLAINTIFFS IN THIS CASE SHOULD NOT DELAY THIS IMPORTANT RULEMAKING

AARP argues that publication of the EEOC's exemption will prompt employers nationwide to immediately reduce or eliminate health care coverage for Medicare-eligible retirees, thereby causing irreparable harm to the six individual plaintiffs in this case, all of whom are currently in retirement. AARP Memorandum at 33. AARP's claims, in addition to being entirely speculative, are simply overblown. In fact, current research suggests that the opposite is true and that the individual plaintiffs will likely experience *no change* in their health plans as a result of the exemption's publication.

More specifically, the employers surveyed by *Kaiser/Hewitt* were specifically asked whether publication of the EEOC's exemption would lead them to make changes to their retiree health benefit plans. The overwhelming response of these employers was that it would not. In fact, the vast majority of surveyed employers (92%) said that they would make absolutely "*no changes* to their retiree health plans as a direct result of the rule." 2004 Kaiser/Hewitt Survey at 43 (emphasis added). Only 1% of the companies surveyed said that they would eliminate retiree health benefits for Medicare-eligible retirees. *Id.*

Moreover, first-hand experience of the employer *amicis'* member companies suggests that companies trying to get a handle on health care costs typically alter health benefits offered to *future* retirees — not persons who are *currently* in retirement, like the individual plaintiffs in this

case. Many employers cutting back on retiree health benefits grandfather benefits for current retirees, as well as for older workers who are near retirement. Watson Wyatt Report at 13-14. Indeed, as one report found, while some "plans implemented before the mid-1980s expressly stated or implied that health benefits were guaranteed for life . . . many employers that had not made such commitments to current retirees [are] still reluctant to eliminate their plans." *Id.* at 14 (footnote omitted). The Governmental Accountability Office made a similar finding recently, observing that employers "generally avoided making changes for current retirees rather than for future retirees, who may be in a position to make other arrangements." U.S. Government Accountability Office, *Retiree Health Benefits: Options for Employment-Based Prescription Drug Benefits Under The Medicare Modernization Act*, GAO-05-205 (Feb. 2005), at 26.

These conclusions are supported by the 2004 Kaiser/Hewitt survey, which reported that while 11% of employers thought it either very or somewhat likely that they would terminate coverage for future retirees, only a very small number of employers (1%) predicted that they would eliminate health benefits for current retirees. 2004 Kaiser/Hewitt Report at 41. In fact, Kaiser/Hewitt concluded that there is "virtually no interest in terminating subsidized benefits for current retirees in 2005." *Id.* at xvi. *See also* EBRI Issue Brief, at 19-20 ("[T]he changes that employers have made to retiree health benefits have not yet had a huge impact on *current* retirees. . . . The changes that employers have made to retiree health benefits will likely have a greater impact on *future* retirees").

AARP's grossly exaggerated claims concerning employer intentions if the exemption is published have had the unfortunate affect of lulling many people (including many of AARP's own members) into the false belief that by blocking publication, employers will then be prohibited from cutting back or eliminating health benefits for retirees in the future. AARP

seems to operate under the incorrect assumption that employers otherwise would be legally required to provide health benefits to retirees, and threatens that if the challenged exemption is published, employers "will be free to eliminate health care benefits without fear of liability under the ADEA." AARP Memorandum at 33.

AARP misses the point. In fact, employers *are* free to eliminate retiree health benefits at *any* time — without fear of liability under any law, including the ADEA. Employers are under absolutely no legal obligation to provide health benefits to retirees. And it is this important fact that drives the need for this exemption. If companies are not given the flexibility they need to control the cost of health care, they will not offer health insurance benefits to retirees if they cannot afford to do so.

The unfortunate irony in this case is that if AARP succeeds in blocking the publication of the exemption, many of its members who have not yet retired, as well as future generations of AARP members, will likely lose these important benefits, while at the same time, the many thousands of other AARP members who are currently enjoying their retirement, including the individual plaintiffs in this case, very likely would have experienced no change to their own benefits if the exemption had been published.

This would be an injustice indeed, and *amici* are quite at a loss as to explain why AARP would want to visit such an injustice upon its own membership. Nonetheless, we ask this court to put back on track this important rulemaking effort by the EEOC, which will restore the state of the law to that originally contemplated by Congress and help protect and preserve this important employee benefit for retirees both now and in the future.

IV. THE EEOC'S EXEMPTION IS CONSISTENT WITH BOTH THE LEGISLATIVE HISTORY OF THE ADEA AND THE STATUTE ITSELF AND SIMPLY RESTORES THE STATE OF THE LAW TO WHAT CONGRESS HAD ORIGINALLY INTENDED

Amici recognize that this court cannot overrule the Third Circuit's decision in *Erie County*, and emphasize that the court need not do so in order to allow the EEOC exemption to go forward. Section 9 of the ADEA clearly authorizes the EEOC to exempt from the ADEA's prohibitions the type of practice *Erie County* held unlawful in the absence of such an exemption. The EEOC exemption thus does not itself overrule *Erie County*, but merely makes it ineffectual. Nonetheless, by publishing the exemption, the EEOC will restore the state of the law to what Congress originally had intended.

A. The Legislative History of the OWBPA Unequivocally Shows That Congress Never Intended To Prohibit Employers From Coordinating Retiree Health Plans With Medicare

The AARP's Memorandum of Points and Authorities contains an extensive discussion of the OWBPA's legislative history. Remarkably, nowhere in that discussion does AARP explain – or even mention – the unequivocal language in OWBPA's legislative history specifically authorizing employers to coordinate retiree health benefits with Medicare without violating the ADEA.

Congress enacted the OWBPA in part to extend ADEA coverage to employee benefits. Pub. L. No. 101-433, 104 Stat. 978 (1990). After the Senate Labor and Human Resources Committee reported its version of the OWBPA (S. 1511), however, concerns were raised that the bill could cause the long-standing practice of coordinating retiree health benefits with Medicare to be considered age discriminatory. When the bill was debated on the Senate floor, Senator Charles Grassley observed that companies provide health insurance coverage for retirees, but often cease such insurance coverage when the retiree becomes eligible for Medicare, and asked

whether such programs would violate the proposed law. 136 Cong. Rec. S13,297 (daily ed. Sept. 18, 1990).

The concerns of Senator Grassley and others were later addressed when the Senate voted to pass a substitute version of the bill. Significantly, the substitute version used the term "worker" in the equal cost, equal benefit safe harbor, rather than the term "individual." 136 Cong. Rec. S13,599 (daily ed. Sept. 24, 1990). The legislative history shows that Congress made this change in order to allow the coordination of retiree health benefits with Medicare. As Senator Hatch, one of the managers, explained with respect to the substitute, "Many employers continue health benefits for persons who retire before they are eligible for Medicare and/or continue certain benefits that are supplemental to Medicare . . . this compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages." *Id.* He further explained:

> It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate benefits.
> . . .
>
> If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?

136 Cong. Rec. S13,600 (daily ed. Sept. 24, 1990).

To settle any lingering controversy, though, the "Statement of Managers," which accompanied the final substitute version of the bill, was explicit on this point, stating:

> Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming

> eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree.

136 Cong. Rec. S13,597 (daily ed. Sept. 24, 1990). When the final substitute version of S. 1511 was presented in the House of Representatives, the Managers on the House side specifically adopted and incorporated into the record the Statement of the Senate Managers, including the Senate Manager's statement that employers were permitted to provide different benefits to Medicare-eligible retirees. 136 Cong. Rec. H8,620 (daily ed. Oct. 2, 1990). Representative William Goodling introduced into the record a summary of the improvements in the final version of the bill, including a clarification that "employers are not required to provide equivalent retiree health coverage to Medicare eligible and pre-Medicare eligible retirees." 136 Cong. Rec. H8,621 (daily ed. Oct. 2, 1990).

In an apparent attempt to "re-write" the OWBPA's legislative history, AARP's Memorandum of Points and Authorities focuses on the history of the "equal cost and equal benefit" safe harbor, but without any reference whatsoever to these critical changes made by Congress to specifically exempt from the safe harbor the practice of coordinating retiree health plans with Medicare. AARP's "version" of these historical events is entirely inaccurate, even misleading. The legislative history confirms that the OWBPA was never intended to interfere with the practice of coordinating retiree health benefits with Medicare eligibility.

B. The EEOC's 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 OWBPA. Yet, that is precisely the effect of the *Erie County* decision, which treats the coordination of employer-sponsored health care benefits with Medicare as a violation of the ADEA. In removing this unintended disincentive, the 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 from 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.

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. Also an individual can qualify for Medicare for other reasons as well, such as disability. As these examples illustrate, 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.

The EEOC's 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.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council, HR Policy Association, America's Health Insurance Plans, American Benefits Council, The Chamber of Commerce of the United States, The ERISA Industry Committee, National Rural Electric Cooperative Association, and The Society for Human Resource Management, respectfully request that the plaintiff's motion be denied.

Respectfully submitted,

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Ann Elizabeth Reesman
Daniel V. Yager
McGuiness Norris & Williams, LLP
1015 Fifteenth St., NW
Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amici Curiae*

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CERTIFICATE OF SERVICE

I, Ann Elizabeth Reesman, hereby certify that on February 21, 2005 one copy of the Brief *Amici Curiae* of the Equal Employment Advisory Council, HR Policy Association, America's Health Insurance Plans, American Benefits Council, the Chamber of Commerce of the United States, the Erisa Industry Committee, National Rural Electric Cooperative Association, and the Society for Human Resource Management In Support of Defendant was mailed first-class, postage prepaid to the following parties:

Christopher G. Mackaronis
Michael J. Schrier
BELL BOYD & LLOYD PLLC
1615 L Street N.W.
Suite 1200
Washington, DC 20036
(202) 466-6300

Laurie A. McCann
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Stephen G. Console
CONSOLE LAW OFFICE LLC
1528 Walnut Street, Suite 600
Philadelphia, PA 19102
(215) 545-7676

Joan K. Garner
U.S. ATTORNEY'S OFFICE
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106
(215) 861-8306

____

Ann Elizabeth Reesman
Daniel V. Yager
McGUINESS NORRIS & WILLIAMS, LLP
1015 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amici Curiae*