September 12, 2003

Frances M. Hart, Executive Officer
Office of the Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507

Re: Proposed Rule Exempting Retiree Health Benefits From The Age Discrimination In Employment Act

Dear Ms. Hart:

On behalf of the Chamber of Commerce of the United States of America (“the Chamber”), we submit these comments in response to the Notice of Proposed Rulemaking (“Proposed Rule”) published in the Federal Register on July 14, 2003. The Proposed Rule would provide an exemption “from the prohibitions of the Age Discrimination in Employment Act of 1967 for the practice of altering, reducing, or eliminating retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program.”

The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, and in every industry sector and geographical region. Many of the Chamber’s members provide their retirees with health benefits and, consequently, the Chamber has significant interest in the Proposed Rule.

In short, the Chamber applauds the Equal Employment Opportunity Commission (“EEOC”) for proposing a rule which would clarify that employers do not violate the Age Discrimination in Employment Act (“ADEA”) by altering, reducing, or eliminating retiree health benefits when retirees become eligible for Medicare or a State-sponsored retiree health benefits program. The Chamber disagrees, however, with one major assumption of the Proposed Rule—that retirees are covered by the ADEA. Nevertheless, as discussed more fully herein, the Chamber believes the Proposed Rule is both appropriate and necessary, although the EEOC should make clear that the rule applies retroactively.
The ADEA Does Not Apply To Retirees

The Chamber believes that, based upon the ADEA’s legislative history and the goals of the ADEA, Congress did not intend that retirees be treated as “individuals” within the meaning of section 623(a) of the ADEA. The language of the statute and its legislative history make clear that the term “individual” is meant to include only active employees. In addition, the Older Workers Benefits Protection Act (“OWBPA”), which amended the ADEA and contains the provisions at issue here, specifically refers to “older workers.” The term “worker” clearly does not include retirees. This is also consistent with the legislative history of the OWBPA, which, as noted in the preamble to the Proposed Rule, specifically states that retiree health plans providing different benefits for Medicare-eligible retirees are not prohibited by the OWBPA. Because interpreting the term “individual” to include a retiree directly conflicts with this legislative history, the Chamber believes this interpretation is incorrect and that the term “individual” does not include retirees.

The Exemption In The Proposed Rule Is Appropriate

Nevertheless, until the Supreme Court finally resolves the issue of whether retirees are covered by the ADEA, or until Congress clarifies the issue through legislation, the Chamber believes it is appropriate for the EEOC to issue the Proposed Rule to make clear that employers may provide health benefits to retirees who are eligible for Medicare or a State-sponsored retiree health benefits program that differ from the benefits offered to retirees that are not eligible for such programs. The Chamber strongly agrees with the policy reasons behind the Proposed Rule and believes these reasons fully support its final adoption.

Pursuant to section 628 of the ADEA, the EEOC “may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.” The Chamber believes there is ample justification for such an exemption here to prevent the discouragement and elimination of retiree health plans.

As noted in the preamble to the Proposed Rule, employers are not required to provide retiree health benefits to their employees. Yet, because these plans are valuable to individual employees, their families and the public at large, employers who can afford to offer them should be encouraged to do so, and the government certainly should not discourage the creation and maintenance of such plans by subjecting them to overly burdensome regulation. As the EEOC recognizes, however, applying the ADEA to retiree health plans would do just that. This is particularly true in the current climate where the rising health care costs have already led to a reduction in employer-provided retiree health plans. Thus, exempting such retiree health plans from the prohibitions of the ADEA is “necessary and proper in the public interest,” and properly within the EEOC’s power under section 628 of the ADEA. The consequence of failing to make this exemption is a likely reduction of health benefits for retirees.
The Proposed Rule Should Be Retroactively Applied

The Chamber believes the Proposed Rule must be changed so that it retroactively applies to all retiree health plans. Although agencies may implement retroactive rules only in limited circumstances, this is one of those limited circumstances.

The Supreme Court has generally stated that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (emphasis added). However, in a decision addressing the general propositions regarding retroactivity set forth in Bowen, the Court noted that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.” Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) (quoting Cohens v. Virginia, 6 Wheat. 264, 399 (1821)). The Court went on to explain that retroactivity is generally disfavored because “individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). The Court noted, however, that retroactive provisions “often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.” Id. at 267-68. The Chamber believes retroactively applying the exemption would serve a legitimate purpose of correcting the misinterpretation of the ADEA by the Third Circuit in Erie County Retirees Ass’n v. County of Erie, 220 F.3d 193 (3d Cir. 2000) and clarifying confusion caused by that decision.

As noted in the preamble to the Proposed Rule, prior to the Erie decision, employers generally and reasonably believed the ADEA did not prohibit them from altering, reducing, or eliminating retiree health benefits when retirees became eligible for Medicare or a State-sponsored retiree health benefits program. This belief was based on the legislative history of the OWBPA, which specifically stated that retiree health plans providing different benefits for Medicare-eligible retirees are not prohibited by the OWBPA, and the fact that there were no court cases or guidance to the contrary. Accordingly, employers structured their retiree health plans based on this belief. Thus, when the Third Circuit decided in Erie that the ADEA prohibited such practices, this was tantamount to a change in the law to employers operating within the Third Circuit and left employers operating in other regions unsure as what conduct was legal. The exemption in the Proposed Rule merely reverses the effect of Erie—which is a misinterpretation of the law—and, by making that exemption retroactive, the EEOC would put employers in the position they believed they were in prior to Erie, which would be consistent with the concerns set forth by the Supreme Court in Landgraf.

Moreover, the EEOC has had the authority to issue an exemption such as the one proposed since the enactment of the ADEA, but there was seemingly no need for such an exemption prior to
Erie because of the widespread belief that retirees were not subject to the ADEA. The need for the exemption arose only following a surprising court decision interpreting the law in an unanticipated manner and directly contrary to the OWBPA’s legislative history. Even though Erie is the only federal appellate court decision to take the position that the ADEA prohibits the actions protected by the exemption, it may well be followed by other courts. See, e.g., Lawrence v. Town of Irondequoit, 246 F. Supp. 2d 150, 161 n.3 (W.D.N.Y. 2002) (citing to Erie in rejecting argument that the OWBPA does not apply to retirees). Thus, absent retroactive application of the exemption, employers with retiree medical plans that currently conform to the exemption’s terms—and who are thus engaged in conduct that the EEOC considers appropriate and salutary—will nevertheless remain exposed to potential claims for periods prior to the exemption’s effective date. The Chamber, therefore, believes that applying the exemption retroactively would be the fairest and most appropriate course of action and that retroactive application would be in line with the Supreme Court’s holdings in Bowen and Landgraf.

We appreciate the Commission’s consideration of these comments and respectfully request an opportunity to discuss them in greater depth.

Respectfully submitted,

[Signature]

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