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ACCESS TO ADEQUATE HEALTH INSURANCE: HOW DOES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RECENT RULE AFFECT RETIREE HEALTH BENEFITS?

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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ACCESS TO ADEQUATE HEALTH INSURANCE: HOW DOES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RECENT RULE AFFECT RETIREE HEALTH BENEFITS?

MONDAY, MAY 17, 2004

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, DC.

The committee convened, pursuant to notice, at 2:01 p.m., in room SD–628, Dirksen Senate Office Building, Hon. John Breaux, presiding.

Present: Senator Breaux.

OPENING STATEMENT OF SENATOR JOHN BREAUX, RANKING MEMBER

Senator BREAUX. The committee will please come to order. Good afternoon everyone. I would like to first take this opportunity to thank our witnesses who are going to be with us this afternoon. I would also like to thank Chairman Craig for his support for our hearing.

We are going to hear a number of different but all equally valuable viewpoints during this afternoon's hearing. The committee considered it important to hold this hearing for a number of reasons. As most of you already know, the Equal Employment Opportunity Commission, or the EEOC, recently proposed a final rule stating that it would not be a violation of the Age Discrimination in Employment Act for employers to offer varied financial benefits to their retirees based on their age and/or their Medicare eligibility. There has been some controversy about the rule and its potential effects, and our purpose today is to lay out both sides of the issue and to have a productive debate and discussion about the best possible outcome.

Employer-sponsored health coverage for retirees is far from being uniform in this country. Some employers offer coverage only to early retirees who have not yet become Medicare eligible. Others may offer varying levels of coverage to retirees, sometimes based on whether they have enrolled in Medicare.

According to the Kaiser Family Foundation, who we will hear from today, more than three million retirees age 55 to 64 are covered by employer-sponsored health plans. Additionally, of seniors over 65 who are covered by Medicare, about one-third also have an employer-sponsored plan which supplements their Medicare coverage. However, the percentage of large employers offering retiree

health benefits has dropped, falling from 66 percent in 1998 to 38 percent in 2003, and the majority of the firms still offering coverage have shifted some of the cost of the coverage on to their retirees by increasing premiums, reducing benefits, or increasing cost sharing.

In order to preserve existing employer-sponsored retiree health benefits, the recently passed Medicare Prescription Drug Improvement and Modernization Act included generous subsidies to those employers who continue to offer health benefits to their retirees. We hope that this will give employers the help that they need to keep offering those much-needed benefits to seniors.

It is within the context of this retiree health coverage landscape that we must consider the EEOC's recent rule. Today, I hope to hear from our witnesses how the rule could affect the different groups of retirees. For example, would it have more of an effect on the younger, pre-65 retirees, or on Medicare-eligible retirees, or might it affect both groups? Should we also consider what the implications are for retiree health coverage in the absence of an EEOC rule?

I want to again thank all the witnesses. I would also just like to make a note. My own father had just recently received a letter from his former employer announcing their plans to change their contributions toward the premium coverage to their retired employees, increasing the percentage of cost to their existing retirees from the current 80 percent government contribution to a 20 percent employee contribution, which is what it is now, and that will become 70–30, reducing the company's contribution by 10 percent. For future employees, they have eliminated completely the employer's contribution to the retirees' health plan.

I point that out for new employees, starting in April of this year, which has now started, of course, they will still be eligible for their retiree medical coverage, but they will have to pay for the full cost of the premium, 100 percent. So it goes from 80–20 to zero-100, and that is not atypical of what is happening, and this is a very large, very strong corporation that is taking that step, and that is just one example. You might imagine the number of questions I got from my own father about why this was happening. He thought I might have something to do with it.

So I want to thank all of our witnesses and we will invite up our first witness this afternoon. We are pleased to have her with us, and that is Leslie Silverman with EEOC. She is a Commissioner, and we are delighted to receive your statement.

STATEMENT OF LESLIE E. SILVERMAN, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC

Ms. SILVERMAN. Good afternoon, Mr. Chairman. I am Leslie Silverman, Commissioner of the Equal Employment Opportunity Commission. Our Chair, Cari Dominguez, could not be here today and asked that I come in her stead. I am here to discuss the Commission's final draft rule to permit employers to continue coordinating the retiree health benefits that they provide with Medicare eligibility without fear of violating the Age Discrimination in Employment Act, the ADEA.

Mr. Chairman, the EEOC is truly delighted that you have convened this hearing. Our recent action has received a lot of attention in the media. Unfortunately, headlines and sound bites cannot capture the history or breadth of this complex issue. Indeed, some of the stories have gone so far as to suggest that the Commission is fostering age discrimination.

At the Commission, we are proud of our efforts to protect the rights of older Americans against age discrimination in employment. Just last year, we obtained more than $106 million for victims of age bias. Given the Commission's commitment to fighting age discrimination, it is troubling to be misunderstood on this issue.

So on behalf of the Commission, I appreciate the opportunity to clarify our draft final rule. This rule and the events that gave rise to it can only be understood by explaining the economic and legal conditions that prompted the Commission's action.

Retiree health benefits are critically important. However, no Federal law requires employers to provide retirees with health benefits, and the fact is, fewer and fewer employers do. Since the Medicare system was first created, the majority of employers providing coverage have structured their retiree health benefits around those available under Medicare, and the reality is that for many years now, employer plans have distinguished between retirees who are pre- and post-65. Some employers offer benefits that bridge the gap between the time the employees retire and become eligible for Medicare. Others continue to provide health benefits to retirees after they reach age 65 to supplement Medicare benefits.

In 2000, a Federal court decision called this longstanding and common practice into question. In the case of *Erie County Retirees Association* v. *County of Erie,* a group of Medicare-eligible retirees sued their former employer, Erie County. They alleged that by providing health benefits to them that were less than those it provided to retirees who were not yet eligible for Medicare, the county was discriminating against them based on their age.

Initially, the Commission was supportive of the retirees' claims. The Third Circuit Court of Appeals agreed. It ruled that coordinating retiree health benefits with Medicare eligibility violates the ADEA unless the county could satisfy the statute's equal cost-equal benefit defense. The county could not.

Directed by the court to come into compliance with its ruling, the county sought to equalize the retiree health benefits it was providing. Ultimately, Erie County did so, not by improving benefits for its Medicare-eligible retirees, but by requiring its younger retirees to pay more for health benefits that provided fewer choices.

The *Erie County* decision marked the first time that an appellate court had held that the longstanding practice of coordinating retiree health benefits with Medicare eligibility violated the ADEA. Shortly thereafter, the Commission adopted the *Erie County* ruling as its national enforcement policy.

The court's ruling and the Commission's adoption of it were widely condemned. Our stakeholders told us that the *Erie County* rule would not protect or improve benefits for Medicare-eligible retirees, but instead would cause a reduction in retiree health benefits, just as it had done for Erie County's retirees. A GAO report

also concluded that many employers were eliminating retiree health benefits. Although it cited cost, changing demographics, and changed accounting rules as the main reasons, it also said that the *Erie County* decision might provide an additional incentive.

In light of the criticism and the GAO report, the Commission decided to revisit the *Erie County* issue and further study the relationship between the ADEA and retiree health benefits. The Commission met with a wide range of stakeholders, including employers, retiree representatives, labor unions, and benefit consultants. We were told that most existing employer-provided retiree health benefits did not comply with the *Erie County* rule.

To address the problem, the Commission explored many different approaches. Most of these alternatives focused on modifying the equal cost-equal benefit test in some way to ensure that the majority of existing retiree health plans would pass muster. However, the Commission concluded that the complex and frequent calculations and comparisons would be extraordinarily burdensome for employers, especially small employers, and for unions and municipal governments that wish to provide their retirees with health benefits.

We recognized that creating a solution that was too burdensome or too expensive to comply with would result in more employers dropping these important benefits. The Commission also had significant concerns that any modification of the equal cost-equal benefit test could extend to areas beyond retiree health benefits and dilute the Age Act's protections. Therefore, we concluded that a narrow exemption from the prohibitions of ADEA was the most effective way to assure that the Age Act did not inadvertently cause further erosion of retiree health benefits and that its protections otherwise remained intact.

In Section 9 of the ADEA, Congress gave the Commission the authority to establish reasonable exemptions from the law to address unintended consequences when necessary and proper in the public interest. While this authority has been exercised on only the rarest of occasions, the ability to grant an exemption when it is needed is an important responsibility that the Commission cannot shirk or ignore.

In this instance, the Commission has crafted an exemption that is narrowly tailored to apply only to the coordination of employer-sponsored retiree health plans with Medicare and similar State plans. We have done so to maintain the status quo. Our action does not require any cut in benefits and it is not intended to encourage employers to alter the benefits they are providing in any way.

Now, in response to our Notice of Proposed Rulemaking, the majority of the organizational comments we received expressed support for the exemption. Several of these organizations confirmed that the *Erie County* case was responsible for further erosion of retiree health benefits. Unions said that the *Erie County* case was already impacting their ability to negotiate for health benefits for future retirees and even impeding efforts to negotiate the renewal of benefits for current retirees. Employer groups said that if the Commission did not act, the threat of potential ADEA liability would likely force their members to cut or discontinue retiree health benefits.

The most detailed comments in opposition to the proposed rule came from AARP and its individual members. The great majority were a form letter. Since AARP is here today to explain their position on our rule, there is no need for me to further elaborate here.

The Commission concluded that the evidence supported the need for an exemption. The rule's supporters had produced evidence that the *Erie County* rule had and would continue to have the unintended consequence of diminishing employer-provided retiree health benefits, while its opponents produced no evidence to the contrary.

The draft final rule had the bipartisan support of four of the five Commissioners. However, because one of my fellow Commissioners was unable to attend our Commission meeting, the Commission approved the draft final rule by a vote of three-to-one.

In conclusion, the Commission believes that it has acted appropriately for the benefit of all retirees. We recognize that the action we are taking has caused concern and uncertainty among older Americans. But we believe that this is due to misunderstanding. Several news reports and commentaries have erroneously reported that we are acting to establish a new retiree health benefit system that takes into account Medicare eligibility. That system already exists.

Initially, the Commission believed that the *Erie County* rule would protect health benefits for retirees. In practice, however, that rule threatens to have the opposite effect. It encourages employers to curtail or eliminate retiree health benefits and it makes it all the more difficult for any employer to begin offering them. This is contrary to the public policy of encouraging health benefits for retirees and it is contrary to the spirit of the ADEA.

The Commission cannot compel employers to provide health benefits for their retirees, nor can it control the spiraling cost of health care or the way businesses must account for those costs on their balance sheets. But the Commission can ensure that the law it enforces does not serve as an additional disincentive, leading to further decline of retiree health benefits.

After grappling with the issue for 3 years, the Commission has concluded that the establishment of a narrow exemption from the ADEA is the only way we can end the disincentive created by the *Erie County* decision.

Mr. Chairman, EEOC remains committed to the vigorous enforcement of the ADEA. I thank you for the committee's time and attention to this important matter.

Senator BREAUX. Thank you very much, Ms. Silverman, for your statement on behalf of the EEOC.

[The prepared statement of Ms. Silverman follows:]

STATEMENT OF
LESLIE E. SILVERMAN
COMMISSIONER
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

BEFORE THE
SPECIAL COMMITTEE ON AGING
U.S. SENATE

CONCERNING
TREATMENT OF RETIREE HEALTH BENEFITS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Good afternoon Mr. Chairman and members of the Committee. I am Leslie Silverman, Commissioner of the Equal Employment Opportunity Commission (EEOC or Commission). Our Chair, Cari M. Dominguez, could not be here today and asked that I come in her stead. I am here to discuss the Commission's decision to permit employers to remain in compliance with the Age Discrimination in Employment Act (ADEA) when they coordinate the retiree health benefits they provide with Medicare eligibility.

I am pleased that you have convened this hearing to discuss this important issue. The Commission's draft final rule has received a lot of attention in the media recently and some of the stories have suggested that the Commission is fostering age discrimination. The Commission is proud of our efforts to protect the rights of older Americans against age discrimination in employment. We have scored many victories over the years that have served to level the playing field for older workers and retirees. Just last year, the Commission obtained one of the largest settlements in our history on behalf of 1,700 retired public safety officers who had been subjected to age discrimination in the disability retirement benefits they received from the California Public Employees' Retirement System. In light of our commitment to fighting age discrimination, the Commission is concerned that our position on the treatment of retiree health benefits under the ADEA has been misunderstood.

On behalf of the Commission, I appreciate the opportunity to clarify the Commission's draft final rule. As you know, the rule provides a narrow exemption from ADEA prohibitions for the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable state health plan. The draft final rule, and the events that gave rise to it, can only be understood against the backdrop of the fact that employers have no legal obligation to provide any health benefits to retirees.

Let me begin by explaining the history of the draft final rule, including the economic and legal conditions that prompted the Commission's action. This background explains why the Commission concluded that it should promulgate an ADEA exemption for the practice of coordinating retiree health benefits with Medicare.

A PYRRHIC VICTORY - THE *ERIE COUNTY* DECISION

In the case of *Erie County Retirees Ass'n v. County of Erie*, a group of Medicare-eligible retirees sued their former employer, alleging that by providing health benefits to them that were less than those it provided to retirees not yet eligible for Medicare, the county was discriminating against them based on their age. These retirees, all age 65 and over, alleged that they had been given fewer choices of health care and had to pay higher premiums than the non-Medicare-eligible retirees who were all under age 65 and that this violated the ADEA.

The employer in *Erie County* provided health benefits for employees and retirees. Retirees were offered one of two plans depending upon whether or not they were Medicare eligible. If the employee retired before reaching Medicare eligibility, the employer provided a "bridge" style health benefit until the employee became eligible, usually at age 65. The bridge plan was a hybrid point-of-service and HMO plan, so named because it bridges the period between the individual's retirement and the individual's eligibility for Medicare. Once a retiree became eligible for Medicare, he or she was converted to a plan that took Medicare benefits into account. Those retirees had to pay the premium for Medicare Part B, which was more than the premium paid by the non-Medicare eligible retirees. The health benefits for Medicare-eligible retirees were provided through an HMO that had lower deductibles and co-payments, but more restrictions on choice of provider than the bridge plan.

The district court agreed with the retirees that, because Medicare eligibility depends on age, providing different retiree benefits based on Medicare eligibility was age discriminatory. However, it also held that retirees are not covered by the ADEA. The retirees appealed.

In January 2000, the Commission filed an *amicus curiae* brief in the retirees' appeal, arguing, consistent with previous Commission positions, that 1) the ADEA does cover retirees and 2) treating people differently based on a criterion – in this case, Medicare eligibility – that is itself based on age constitutes age discrimination. The Third Circuit Court of Appeals agreed with the Commission and found that coordinating retiree health benefits with Medicare eligibility violates the ADEA unless the employer could satisfy the statute's "equal cost/equal benefit" defense. To do this the employer, Erie County, would have to prove that the health benefits it provided to Medicare-eligible retirees were equal to the benefits provided to retirees not yet eligible for Medicare, or that it was expending the same cost on health benefits for each group of retirees.

The Third Circuit remanded the case to the district court to consider whether the defense could be established. On remand, the district court concluded that the county had failed to establish the defense. It found that Medicare-eligible retirees paid more for less generous benefits than did the younger retirees.
Directed by the court to come into compliance with the equal cost/equal benefit test, Erie County ultimately equalized the retiree health benefits it offered -- not by improving the benefits for its

Medicare-eligible retirees -- but by requiring younger retirees to pay more for health benefits that provided fewer choices.

IMMEDIATE CRITICISM OF *ERIE COUNTY*

The *Erie County* decision marked the first time that an appellate court held that the long-standing practice of coordinating retiree health benefits with Medicare eligibility violated the ADEA. Just two months after the Third Circuit issued this historic decision, in October 2000, the Commission adopted the *Erie County* ruling as its national enforcement policy. Pursuant to this enforcement policy, the Commission also filed charges against school districts and unions in the Midwest with retiree bridge plans that were not in compliance with the *Erie County* rule.

The Commission's adoption of the *Erie County* rule was widely condemned, particularly by teachers, unions, and school boards. In addition, the Commission heard from members of the Senate and House of Representatives from both parties who voiced concerns about the policy, or sought to gather further information on behalf of constituents.

Unions contended that the rule not only threatened current retiree health benefits, but made it increasingly difficult to negotiate for the provision of benefits for future retirees. Other critics argued that because employers – particularly school districts and other public employers – lacked the resources to provide health benefits to retirees indefinitely, the Commission's new position would force employers to eliminate retiree health benefits entirely, or to provide fewer benefits to retirees under age 65 who lack access to Medicare benefits. In other words, the Commission heard over and over again that the *Erie County* rule would not protect or improve benefits for Medicare-eligible retirees, but, instead, would ultimately cause a reduction in retiree health benefits. As noted earlier, these fears were realized by the plaintiffs in *Erie County*.

In May 2001, the General Accounting Office (GAO) issued a report to the Senate Committee on Health, Education, Labor and Pensions, entitled, "Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion." The report concluded that many employers were eliminating health benefits for retirees. Although it cited cost, changing demographics, and changed accounting rules as the primary reasons for the declining coverage, it also said that the *Erie County* ruling might provide an additional incentive for employers to eliminate retiree health benefits.

In light of the criticism and the GAO report, in August 2001 the Commission decided to revisit the *Erie County* issue and further study the relationship between the ADEA and retiree health benefits. For the next several months, Commission staff met with a wide range of stakeholders to discuss the impact of the *Erie County* rule. All of the stakeholders, including employers, retiree representatives, labor unions, and benefit consultants told us that most existing employer provided retiree health benefit plans did not comply with the *Erie County* rule.

ALTERNATIVES EXPLORED

After an in-depth examination of this problem, the Commission determined that it was in the public interest for it to act to end the *Erie County* rule's incentive for employers to reduce or eliminate retiree health benefits. The Commission explored various ways to do this.

In particular, it focused on whether a variant of the equal cost/equal benefit test could be utilized for employer-provided retiree health plans. For example, the Commission considered modifying the equal cost/equal benefit test to ensure that most existing retiree health plans would meet the equal benefits standard. However, any such showing would require that employers make complex comparisons between multiple objective and subjective variables, including the types of plans offered, the levels and types of coverage provided in each plan, the Medicare premium assessed for each gender in each geographical area, and the deductibles and co-pays charged in each plan. Because fees and benefits change from year to year, all of these calculations would need to be made, with any necessary resulting plan adjustments, on an annual basis. Such calculations, the Commission concluded, would be extraordinarily burdensome for employers, unions and municipal governments that wished to provide their retirees with health benefits.

Similarly, the Commission found that it would be extremely difficult to quantify the "costs" of providing retiree health benefits. In fact, health benefits for retirees under the age of 65 are uniformly more costly for employers because the employer is the sole source of the benefit. The Commission considered whether the costs of Medicare premiums paid during workers' careers might somehow be factored in for purposes of establishing equal cost, but could not develop a fair and workable way to make the calculation. Medicare fees paid by employers are paid into a general fund, rather than into individual employee accounts. Moreover, by the time they reach retirement, most employees have previously worked for other employers that have also contributed Medicare fees on their behalf. Further complicating the matter, any such calculation would have to factor in the employee's portion of costs. Employees contribute to the cost of Medicare through FICA taxes that are also paid to the general fund and are tied to the employee's compensation. In addition, employees pay a portion of their own health-care costs under Medicare and their claims may vary greatly from year to year. Such calculations would be even further complicated for employers who have multiple employer-sponsored plans with different benefits and would be insurmountably complex for small employers.

Even assuming that a formula could be devised that would allow employers to prove that they were providing equivalent benefits or expending equivalent costs, the Commission feared that employers would rather lower or eliminate benefits, as done by the employer in *Erie County*, than perform the complex calculations necessary to ensure they are offering an equal benefit or paying the same cost. The Commission also had significant concerns that any attempt to modify the equal benefit/equal cost rule for purposes of coordinating retiree health benefits with Medicare would carry over to areas beyond retiree health benefits, thereby diluting the Act's protections.

Given all of these difficult problems and concerns, the Commission rejected the idea of attempting to redefine the equal cost/equal benefit defense. It concluded that a narrow exemption

from the prohibitions of the ADEA was the most effective way to assure that the Act did not cause further erosion of retiree health benefits and that its protections otherwise remained intact.

PROPOSED RULE

Given that many factors are eroding health care coverage, the Commission concluded that it should eliminate any contribution the ADEA might be making to the problem. Therefore, on July 14, 2003, the EEOC issued a Notice of Proposed Rulemaking (NPRM) proposing that the ADEA would not apply to the practice of coordinating retiree health benefits with eligibility for Medicare.

EXEMPTION AUTHORITY

The exemption was promulgated under the Commission's broad authority in Section 9 of the ADEA, 29 U.S.C. § 628, which provides that 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."

On its face, the exemption language makes clear that Congress believed that there would be instances in which applying the ADEA's prohibition against age discrimination would have unintended results that would be contrary to the public interest. Accordingly, it vested the enforcement agency with authority to correct such problems.

In this circumstance, applying the Act's prohibitions to the practice of coordinating retiree health benefits with Medicare was having the unintended consequence of encouraging employers to end or limit their retiree health benefits and, as such, was contrary to the public interest. Thus, the Commission concluded that a narrow exemption was necessary and proper in the public interest.

The Commission also determined that an exemption was consistent with the purposes of the ADEA. As the Commission stated in the preamble to the proposed rule, one of the Act's stated purposes is to "find ways of meeting problems arising from the impact of age on employment." Given the continuing decline in the availability of employer-provided retiree health benefits and the additional disincentive to provide such benefits created by the *Erie County* rule, the exemption reasonably addresses problems confronting older Americans.

The exemption in the proposed rule is narrowly tailored to apply only to the coordination of employer-sponsored retiree health plans with Medicare and similar state plans. In essence, it enables employers to continue to provide the types of retiree health benefits that are provided today without fear of violating the age discrimination law. It does not require any cut in benefits and is not intended to encourage employers who already offer bridge, supplemental or wrap-around plans to alter those benefits in any way.

COMMENTS ON THE PROPOSED RULE

The Commission received 44 organizational comments in response to the NPRM. Twenty-seven commenters expressed support for the proposed exemption, including 16 organizations that requested no revisions to the proposed rule. The Commission also received approximately 30,000 letters from individual citizens. Most of these individual comments were a form letter generally expressing concern about providing an exemption for the practice of coordinating retiree health benefits with eligibility for Medicare or a comparable state health benefits program.

Several of the organizations that supported the proposal commented that *Erie County* was responsible for further erosion of retiree health benefits. For example, the American Federation of Teachers, representing 1.2 million workers, said that many school districts and public employers offering retiree health benefits concluded that their benefit structures could be challenged under the *Erie County* rule, and, as a result, chose to end or reduce their benefits for all retirees. AFT explained, "[i]n the post-*Erie County* period[,] older workers faced the reality of working until they were much older or retiring without retiree health benefits." Several school districts, boards, and associations echoed the concerns of AFT. The National Education Association, which represents 2.7 million employees nationwide, further expressed concerns that "as long as education employers are subject to potential ADEA liability under the reasoning of the court in *Erie County*, many employees will lose their employer-provided retiree medical insurance benefits altogether."

The comments also showed that the problem created by the *Erie County* decision was not limited to professional educators. The Society for Human Resource Management, the nation's largest organization devoted to human resource management, with 175,000 members, commented that the Commission's earlier adoption of the *Erie County* rule caused "the organizations they represent to have grave concerns about the potential application of the ADEA to employer-sponsored retiree health benefits. . . . With no regulatory protection . . . many employers who had offered retiree health that changed when a retiree reached Medicare age opted to eliminate retiree health care coverage altogether." The National Rural Electric Cooperative Association informed the Commission that "without this clarification . . . many NRECA members will be forced to discontinue providing benefits to both pre- and post-Medicare[-]eligible retirees — effectively leaving most, if not all, of these more than 7,000 retirees with no health insurance until they become Medicare[-]eligible."

The most numerous and detailed comments in opposition to the proposed rule came from AARP and its individual members. Since AARP is here today to explain their position on our rule, there is no need for the Commission to elaborate further here.

DRAFT FINAL RULE

After considering the public comments, the Commission concluded that the evidence they presented supported the exemption. The rule's supporters produced evidence that the *Erie*

County rule has had, and would continue to have, the unintended consequence of diminishing employer-provided retiree health benefits. The rule's opponents, however, produced no contrary evidence. Thus, the majority of the Commissioners feared that, if the Commission failed to act, many more retirees would lose their benefits as a result of the *Erie County* policy. Accordingly, the Commission's draft final rule would exempt from the ADEA the practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare.

When the draft final rule was submitted to the Commission for a vote, four of the five Commissioners voted to approve it. The fifth Commissioner, Stuart Ishimaru, voted to put it on the Commission agenda, necessitating the convening of a public Commission meeting on the matter in accordance with the Sunshine Act. During that meeting, held on April 22, 2004, the rule and its history were formally presented to the Commissioners by the Commission's Office of Legal Counsel. Commissioners gave opening statements, asked questions of the presenting staff and fully deliberated before voting to approve the rule. The vote was 3-1, with Commissioner Ishimaru voting against the rule. Commissioner Paul Steven Miller, who had originally voted to approve the rule, was unable to be there that day. The Commissioners' statements and a complete transcript of the meeting proceedings are set forth on the Commission's web site at www.eeoc.gov.

Once the Commission approved the draft final rule, it was circulated to appropriate federal agencies for review, pursuant to Executive Order 12067. These agencies reviewed and commented on the proposed rule when the NPRM was circulated to them in July 2003. Under E.O. 12067, the agencies have 15 working days for review and comment.

If no changes are necessary after the interagency coordination process, EEOC will then submit the draft final rule for OMB review. OMB has up to 90 days to review the draft final rule before EEOC publishes it in the Federal Register. If either the interagency process or OMB review yields changes to the draft final rule, the Commissioners must vote again to adopt the amended rule.

CONCLUSION

The Commission believes it has acted appropriately for the benefit of retirees. The Commission recognizes that there has been concern and uncertainty among older Americans about the action we are taking. But we believe that this is due to misunderstanding. Several commentaries have erroneously reported that we are acting to establish a new retiree health benefit system that takes into account Medicare eligibility. That system already exists.

When it adopted the *Erie County* rule, the Commission believed that that rule would protect health benefits for retirees. In practice, however, that rule threatens to have the opposite effect – it encourages employers to curtail or eliminate retiree health benefits. The Commission views such a consequence as contrary to the public policy of encouraging health benefits for retirees, and contrary to the spirit of the ADEA.

The Commission cannot compel employers to provide health benefits for its retirees. It also cannot control the spiraling costs of health care, nor affect the way businesses must account for those costs on their balance sheets. However, the Commission can ensure that its rules do not serve as an additional incentive to decrease retiree health benefits. After studying the issue for three years, the Commission concluded that there was only one way it could end the negative incentive created by the *Erie County* decision. The Commission's new rule, providing a narrow exemption from ADEA prohibitions for the coordination of health benefits with Medicare, would remove this incentive.

Mr. Chairman, EEOC remains committed to the vigorous enforcement of the ADEA and to the protection of older workers and retirees.

I thank you for your and the Committee's time and attention to this important matter.

Senator BREAUX. It seems to me in looking at this and looking at the history of EEOC's involvement that after the *Erie County*, or during the *Erie County* consideration, apparently EEOC was aware of what was happening out there and then the EEOC came out and supported the decision?

Ms. SILVERMAN. That is correct. We actually filed a brief with the court in support of their decision.

Senator BREAUX. Then what happened? Did a light bulb go off somewhere and EEOC, after the decision was handed down, you said, "Oh my God, what have we wrought?"

Ms. SILVERMAN. We originally made it part of our enforcement policy, and then we started looking at the plans out there and what we got back was just lots and lots of comments from our stakeholders that this is the way the plans are offered and if you require us to change our plans, we are just not going to offer these benefits, and that this ruling is an anomaly and it is not the way that anybody had ever thought the age discrimination law ought to apply in this instance.

Senator BREAUX. Was it a question of having to figure out how to handle the clear intent of the law with the practical effect of carrying out that intent in this particular circumstance? I mean, it is pretty clear that EEOC stands for the proposition that you shouldn't discriminate based on age.

Ms. SILVERMAN. Correct.

Senator BREAUX. Here, you have a clear situation in the real world where there is discrimination on age based on the fact that when you reach a certain age, some other program is going to kick in. The EEOC premise, however, is that you can't do that. So I guess initially, you all said, "Well, you can't do that." We support the *Erie* case and we filed a brief in support of it, but then you found out that the results of that position really created a situation that was going to be worse for everybody?

Ms. SILVERMAN. That is correct. That is exactly what happened. We saw that the effect of a law that we are responsible for enforcing and that we believe strongly in was having unintended consequences, and those unintended consequences were going to result in less benefits for all retirees and that is why we decided to take this further action and use our Section 9 exemption authority.

Senator BREAUX. Let me give you an opportunity to elaborate further. I mean, how in this case does the allowance of discrimination based on age and this narrow area actually benefit the people that the EEOC is charged with protecting their rights of not being discriminated against based on age?

Ms. SILVERMAN. Well, the fact is that the coordination of benefits with Medicare has been going on for years, as we mentioned, since the Medicare law came into effect. What was happening, again, was the ADEA, if applied to the way that they were providing benefits, certainly most of the bridge plans out there would be per se illegal under the law; particularly those offered in the public sector. I think you will hear from schools, et cetera, that are dealing with this.

So what we saw was that this wasn't going to help anybody out there if we enforced the law. It was really going to hurt people and

it was going to hurt older people. So that is why we took the action that we did.

Senator BREAUX. EEOC, I think, was probably aware over the previous years that there was a difference based on age and the type of health care that was offered by employers for their retired workers before 65 eligibility age. Why hadn't EEOC ever challenged any of those plans over all of those years?

Ms. SILVERMAN. You know, I am not quite sure of the answer to that, but EEOC always had this position, from what I can tell, but there was a question at one point in time whether retirees were covered under the law. Slowly but surely, we got to the point of the Third Circuit decision, where it all came down to whether or not the Age Discrimination in Employment Act applies to retiree health benefits.

So I think if it had been called to EEOC's attention, they probably would have taken that position and probably did take that position before, that the ADEA covered retiree health benefits. I don't think the EEOC is saying now that the law doesn't cover retiree health benefits. But what we are saying is that we think this is a proper use of our exemption authority because it is necessary and proper and in the public interest.

Senator BREAUX. OK. Give me a statement, then. There are some who would argue that, well, if we applied the nondiscrimination based on age rule that it would somehow benefit in everybody getting better coverage for their health benefits. I take it that EEOC's position, and I would like you to elaborate, would be that in the absence of following the new position that EEOC has, that many of the employers will just, in fact, cut benefits for their retirees.

Ms. SILVERMAN. What we learned in studying the issue over 3 years is that we were told that the majority of the plans out there just simply don't comply to the letter of our law, which requires that if you offer these different benefits, it has got to be an equal cost-equal benefit. It has got to meet that test. Most of the plans out there don't meet the test certainly the bridge plans. Unless they are exactly duplicative of what is offered under Medicare, they don't meet that test. About 45 percent of employers that do offer the bridge benefits, or 45 percent of employers, what they do for younger retirees is they keep them on their current plan. So there was that issue to begin with.

Senator BREAUX. Does EEOC have an idea about what do you think will happen if your new position allowing the programs to go forward will actually produce?

Ms. SILVERMAN. First let us talk about what would happen if we didn't act. If we didn't act, there is this law looming out there. There are plans that are already illegal under the law as it is. So most employers that we are looking at would have to take an action, and what we thought and what we have been told is that they would probably cut their benefits for younger retirees, possibly cut all their retiree benefits to come into compliance. Nobody said, with escalating costs of retiree health benefits, that they were going to prop up the over-65 retirees. So given that threat, we thought it was in the best interest of all retirees to act in this instance.

Senator BREAUX. OK. With the action that you all have taken, what do you think the situation will be?

Ms. SILVERMAN. We hope that the Age Discrimination in Employment law won't—the application of it, with that not being a problem, it won't cause more employers to look at their plans and thus reduce their plans. We understand that retiree health benefits are on the decline. We just didn't want to add to that decline, and we think that by taking this action, we will not add to that decline.

Senator BREAUX. Can you give me EEOC's position on the allegation by some that says you don't really have any authority to do what you do?

Ms. SILVERMAN. I think if you look at the Age Discrimination in Employment Act, it did provide us authority in Section 9 to make an exemption from the law when we thought it was in the public interest, and we believe that this was in the public interest here. This is a very narrow exemption. So we thought that what we were doing was stopping the unintended consequences of the application of the Age Discrimination in Employment law to this common practice of coordinating retiree health benefits with Medicare eligibility.

Senator BREAUX. Would you all prefer having some direction from Congress that clearly spells that out?

Ms. SILVERMAN. We have been aware that Congress has been looking at this issue simultaneously, and we were perfectly comfortable with Congress acting. But, we never heard from Congress at any time during our rulemaking proceeding, which has been going on for 3 years, that what we were doing was incorrect or out of bounds or out of our authority.

Senator BREAUX. But your lawyers tell you they feel comfortable with the decision that you have taken based on existing laws?

Ms. SILVERMAN. Yes.

Senator BREAUX. OK, Ms. Silverman. Thank you so very much. We appreciate your being with us and testifying.

Ms. SILVERMAN. Thank you, Senator.

Senator BREAUX. Thank you.

Senator BREAUX. We would like to welcome up a panel now consisting of Dr. Patricia Neuman, who is vice president of the Kaiser Family Foundation; Dr. Erik Olsen, president-elect of AARP, the American Association of Retired Persons; Mr. Andrew Imparato, president and chief executive officer of the American Association of People with Disabilities; Mr. Bruce Meredith, general counsel, Office of General Counsel of the Wisconsin Education Association; and Mr. James Klein, who is president of the American Benefits Council.

I thank all of you for being with us. We would like to start, if we can, with Dr. Patricia Neuman with the Kaiser Family Foundation.

STATEMENT OF PATRICIA NEUMAN, VICE PRESIDENT, HENRY J. KAISER FAMILY FOUNDATION, WASHINGTON, DC

Dr. NEUMAN. Thank you, Mr. Chairman. I am very pleased to be here to testify on the state of retiree health coverage.

More than three million retirees between the ages of 55 and 64 rely on employer-sponsored benefit plans for their health coverage today. Without this coverage, many who are in their late 50's or early 60's, particularly those with health problems, would be hard pressed to find comparable and affordable coverage on their own.

Seniors, unlike early retirees, are fortunate to have Medicare as their primary source of health insurance. Still, many, roughly 11 million seniors, rely on employer plans to fill in the gaps in Medicare's benefit package.

Over the past 15 years, the share of employers offering retiree health benefits has declined dramatically, from 66 percent in 1988 to 38 percent last year. This decline is a function of the rising number of employers terminating coverage as well as fewer newer companies offering retiree health benefits. Sustained double-digit increases in retiree health costs are a major factor in this decline. The total cost of retiree health benefits increased by nearly 14 percent between 2002 and 2003.

Against this backdrop of rising costs and eroding coverage, two recent events are being monitored for their potential impact on retiree health benefits. The first is the new Medicare drug law, and the second is the proposed final rule adopted by the EEOC which others are discussing today.

Employers have implemented a number of strategies to curb their costs in response to rising health care costs and to changes in accounting rules adopted by the Financial Accounting Standards Board in the early 1990's. Notably, the survey that we conducted with Hewitt Associates, the Kaiser/Hewitt Survey on Retiree Health Benefits, found that nearly half of all firms offering retiree health benefits have placed caps on their financial liability for these obligations. Among firms with caps, nearly half have already hit their cap and another third say they are likely to hit their cap in the next one to 3 years. Often, these caps result in a shift in financial obligation from the employer to the retiree.

To understand more about how employers respond to cost pressures, our survey asked employers to report changes made in the past year and changes they are likely to make in the next one to 3 years. However, it is very important to note that this survey was conducted prior to the enactment of the Medicare drug law, so the findings from our survey do not reflect employers' reaction to the new legislation.

Our survey suggests that current retirees appear to be shielded from outright terminations in coverage. However, the news is far less promising for current workers. Ten percent of surveyed employers said they had eliminated subsidized health benefits for future retirees in the past year, which would be current workers, and that mostly affects new hires. Looking to the future, 20 percent said they are likely to terminate subsidized health benefits for future retirees. There also appears to be substantial interest among employers in providing access only to health benefits, having retirees pay 100 percent of their own costs. These findings of our survey are consistent with the examples in the letter that you referenced, Mr. Chairman.

Far more common than benefit terminations are increases in retiree premium contributions and cost sharing. In the past year, 71 percent of firms said they had increased retiree premium contributions and 57 percent increased retiree prescription drug cost sharing requirements. Again, looking to the future, more of the same seems in store. Nearly nine in ten employers said they are likely to increase retiree premium contributions and more than two-

thirds said they are likely to increase deductibles, physician office copays, and out-of-pocket limits.

With the recent enactment of the Medicare drug law, there is much interest in whether the legislation will accelerate the erosion of highly valued retiree health benefits or reverse these trends by allowing more employers to stay in the game by alleviating some of the cost pressure. The law allows employers to maintain benefits by offering considerable financial incentives, more flexibility, and multiple options for coordinating around Medicare.

Employers have a number of options to consider. They could, for example, accept the subsidy from Medicare and provide a benefit that is at least as equivalent in value to the standard Medicare drug benefit. They could decline the subsidy and instead choose to supplement the new Medicare Part D benefit in some manner. Or they could terminate coverage altogether.

How employers respond is, of course, of critical interest. The relative generosity of employer coverage as compared to the forthcoming Medicare drug law could add to concerns among seniors about losing this valued coverage and we plan to continue our efforts to monitor employers' activities in this area.

While millions of retirees enjoy the financial protections offered by employer-sponsored plans today, all signs do point to an erosion of this coverage in the years ahead, an erosion that was predicted prior to the enactment of the Medicare drug law. Continued erosion of this coverage has the potential to undermine the health and financial security of retirees as they grow older and underscores the need to monitor these trends in the future and their impact on aging Americans.

Thank you, Mr. Chairman.

Senator BREAUX. Thank you, Ms. Neuman.

[The prepared statement of Ms. Neuman follows:]

The State of Retiree Health Benefits: Historical Trends and Future Uncertainties

Patricia Neuman, Sc.D.
Vice President and Director, Medicare Policy Project
The Henry J. Kaiser Family Foundation

A Hearing of the

Special Committee on Aging
The United States Senate

May 17, 2004

Statement of Patricia Neuman, Sc.D.

Thank you, Mr. Chairman and Members of this Committee. I am pleased to be here to testify on the state of retiree health coverage. I am Patricia Neuman, a Vice President of the Henry J. Kaiser Family Foundation and Director of the Foundation's Medicare Policy Project. I am also an associate faculty member at the Johns Hopkins University School of Public Health in the Department of Health Policy and Management.

Employer-sponsored health plans play a critical role in providing health insurance for retirees—both those who are considered early retirees between the ages of 55 to 64 and for retirees on Medicare. For just over three million retirees ages 55 to 64, employer plans bridge a potentially risky gap in coverage between the time they leave employment and when they are first eligible for Medicare. This coverage provides needed health insurance for early retirees at a time in their lives when they are likely to face increasing health problems and might otherwise find comprehensive, affordable health insurance difficult to obtain. For one in three seniors with Medicare, employer-sponsored health plans have been a vital source of supplemental coverage and the primary source of prescription drug coverage.

Over the past fifteen years, the share of employers offering retiree health benefits had declined dramatically. This erosion threatens to increase the number of early retirees who are uninsured and to diminish needed supplemental coverage for seniors on Medicare. Sustained double-digit increases in health care costs for retirees are expected to result in continued cutbacks in the future. Within the last two years, several large employers have announced plans to cut back on their retiree health obligations. For example, Sears Roebuck and Company recently announced that, starting January 2005, retiree health benefits will no longer be available for new hires and will be eliminated for all employees under age 40.[1] Aetna recently announced it would cut subsidies for retiree health benefits for those who retire in 2004.[2] Lucent Technologies, Inc. did not eliminate benefits but made severe cuts in retiree health coverage and substantially raised retiree contributions to premiums.[3]

Against this backdrop, two recent events are being monitored for their potential impact on the future of retiree health coverage. First, the *Medicare Prescription Drug, Improvement, and Modernization Act*, enacted in 2003, provides $88 billion in direct and indirect subsidies for employers to encourage them to maintain health benefits for Medicare-eligible retirees. Clearly a hot-button issue throughout the debate over the new law was the question of whether a new Medicare drug benefit would accelerate the erosion of highly-valued retiree health benefits. How employers respond to these incentives is a critical concern, and one that the Foundation will continue to monitor.

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[1] Sandra Guy, "Sears says benefit cuts meant to help it compete," *Chicago Sun-Times*, 28 January 2004, Financial Section, p. 33.
[2] Diane Levick, "Aetna Accused of Breaking Promises," *Hartford Courant*, 1 May 2004, Business Section, p. E1.
[3] Ellen Schultz and Theo Francis, "How Lucent's Retiree Programs Cost It Zero, Even Yielded Profit," *Wall Street Journal*, 29 March 2004, p. A1.

The second recent development that could impact the future of retiree health benefits, particularly for Medicare-eligible retirees, is the proposed final rule adopted by the Equal Employment Opportunity Commission, making it easier for employers to coordinate benefits with Medicare, without violating the Age Discrimination in Employment Act.

Given the value of employer-sponsored benefits to retirees, the sustained erosion of this coverage has the potential to undermine the health and financial security of retirees as they grow older and underscores the need to monitor trends in retiree coverage and their impact on aging Americans.

The Role of Retiree Health Today

Early Retirees

More than three million retirees between the ages of 55 and 64 rely on employer-sponsored plans for their health insurance coverage (Exhibit 1). For early retirees, employer plans generally provide access to relatively affordable and comprehensive coverage. Without this coverage, many retirees who are pre-65 and too young for Medicare would be hard-pressed to find comparable, affordable coverage on their own. If an employer terminates retiree health benefits, the retirees do not have a right under COBRA to purchase health coverage through a plan offered by their former employer.

Older adults without employer-sponsored benefits often turn to the non-group individual market for health insurance coverage. Unfortunately, the individual market has proven to be a less than reliable source of affordable coverage—particularly for those with either a history of medical problems or those with modest incomes. Premiums in the individual market can be expensive for early retirees, presenting a considerable financial hurdle for those living on fixed incomes. And often, their benefits are less generous than those typically offered to retirees by employers.

For example, a 60-year old man in Baltimore City who is a non-smoker could find a policy with a $235 monthly premium, a $500 deductible, a 20% coinsurance on office visits after the deductible, and a $500 limit on prescription drug coverage.[4] He could find a policy with a lower premium of $159/month but would face both a higher deductible and higher coinsurance. By contrast, a retiree of the same age would most likely pay considerably less in monthly premiums and have more generous benefits. According to the 2003 Kaiser/Hewitt Survey on Retiree Health Benefits, the weighted average retiree premium contribution was $166 per month in 2003. Even if retiree contributions to premiums increased by 20% between 2003 and 2004, a retiree in an employer plan would pay far less in premiums than they would in the individual market. Also, unlike the example of the policy in the individual market where caps on pharmacy benefits are becoming increasingly common, absolute limits on drug benefits offered by employer plans are rare.

Some early retirees—particularly those with health problems—are unable to buy insurance in this market at any price; and those who can, are likely to face substantially

[4] Quotes from EHealthInsurance.com, https://www.ehealthinsurance.com/ehi/Welcome.ds, accessed May 11, 2004.

higher premiums. According to two reports prepared for the Kaiser Family Foundation, one by Karen Pollitz and colleagues from Georgetown University, and the other by Deborah Chollet and Adele Kirk of the Alpha Center, insurers in the individual market tend to underwrite aggressively—screening applicants for pre-existing conditions, excluding coverage for the services people with specific health conditions need, or denying coverage altogether. In states where insurers are not required to guarantee issue, for example, insurers may deny coverage for such common conditions as rheumatoid arthritis, chronic headaches, angina, kidney stones, heart attacks, and stroke.

High-risk pools are another option in 31 states. Retirees in states with high-risk pools can buy coverage, without regard to medical history. Premiums, however, tend to be higher than those in the individual market, which limits the number of people who can afford to avail themselves to this opportunity.

Given these limitations, the erosion of employer-sponsored retiree health coverage puts early retirees at risk of being uninsured. While health insurance matters to people of all ages, it is especially important to retirees who, as they grow older, tend to experience more acute and chronic health problems. Mid-life and older adults are far more likely than younger adults to report being in fair or poor health and to have chronic health conditions such as heart disease, arthritis, and diabetes. They tend to have a greater need for medical services that can be prohibitively expensive without the financial protection offered by health insurance. And, at this stage in their lives, if they are unable to purchase health insurance in the individual market, they may not be in a position to return to work or find another job that offers health insurance.

Retirees 65+ on Medicare

Seniors, unlike early retirees, are fortunate to have Medicare as a safety-net insurer and as their primary source of health insurance. Still, many have come to rely on employer-sponsored retiree plans to provided needed assistance in supplementing Medicare's benefits. The erosion of retiree benefits to date, coupled with predictions of future terminations in coverage, higher premiums and cost-sharing, and additional cutbacks in benefits (discussed below) pose serious concerns for the financial security of retirees.

Today, more than a third of all people ages 65+ (about 11 million seniors) have supplemental coverage from an employer plan (Exhibit 2). Employer plans, like other forms of supplemental coverage, assist with Medicare's cost-sharing requirements and help pay for services, such as prescription drugs, not covered by Medicare. In fact, employer-sponsored plans are the primary source of prescription drug coverage for people on Medicare.

Retiree health benefits for seniors are typically more generous than other sources of supplemental coverage with the exception of Medicaid, which is only an option for those with low incomes. In general, employer plans have annual out-of-pocket limits that help to protect retirees from catastrophic spending. They also cover prescription drugs but without separate drug deductibles or benefit limits. By contrast, most Medigap polices do not cover prescription drugs, and the three standard policies that do cover pharmacy costs all have caps on these benefits. Likewise, about a third of enrollees in Medicare Advantage in 2003 are in plans that do not provide drug coverage,

and among enrollees in plans with drug coverage, about one in five face an annual cap of $750 or less.[5] At the same time, retiree contributions to premiums for employer-sponsored plans tend to be substantially lower than premiums charged for Medigap policies with more limited drug coverage, giving seniors far more bang for their buck.

Because of their relatively generous benefits, employer plans help shield retirees from substantial cost burdens underscoring why the erosion of retiree health coverage has been and continues to be a serious concern. Seniors with employer-sponsored coverage have substantially lower rates of cost-related prescription drug skipping than do those with other sources of coverage. Only 15 percent of those with employer-based coverage reported medication skipping for any cost-related reason compared to 39 percent of those in a Medicare HMO, and 25 percent with other private coverage, according to preliminary findings from a 2003 survey of seniors being conducted by the New England Medical Center, the Kaiser Family Foundation and the Commonwealth Fund (Exhibit 3).

Rising Health Costs and the Erosion of Retiree Benefits

The prevalence of retiree heath coverage has declined dramatically over the past 15 years. Among large employers (200+ workers), who are far more likely than small or mid-sized employers to offer retiree health benefits, the percentage offering retiree coverage has dropped from 66 percent in 1998 to 38 percent in 2003, according to the annual Kaiser/HRET Employer Health Benefits Survey. This decline is a function of the rising number of employers terminating coverage, as well as fewer new companies offering retiree health benefits due to rising health care costs (Exhibit 4).

Sustained double-digit increases in retiree health costs are clearly a major factor in the erosion of coverage and are a significant concern among employers. According to the 2003 Kaiser/Hewitt Survey on Retiree Health Benefits, the total cost of providing retiree health benefits increased by an estimated 13.7 percent between 2002 and 2003. This growth is essentially the same rate observed among active workers during this same time frame, according to the Kaiser/HRET Survey (Exhibit 5).

Caps on Future Retiree Health Obligations

In response to these cost increases and changes adopted in the early 1990s by the Financial Accounting Standards Board (FASB) that required firms to account for their future retiree health obligations, employers have implemented a number of strategies to curb their costs. Of note, our survey found that roughly half of all large (1,000+ workers) private-sector employers that offer retiree health benefits to 65+ retirees have imposed caps on their future obligations for retiree health coverage (Exhibit 6). Among firms that have caps on their retiree health obligations, nearly half have already hit the cap, and another third say they are likely to hit the cap in the next one to three years.

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[5] Achman and Gold, *Trends in Medicare+Choice Benefits and Premiums, 1999-2003, and Special Topics*, December 2003.

Efforts to Limit Employers' Retiree Health Costs

While there have been a number of highly publicized decisions by employers that resulted in the termination of benefits for current retirees—such as the Bethlehem Steel bankruptcy that resulted in a loss of health benefits for 95,000 retirees—our survey suggests that terminations are more likely to affect *future* retirees (current workers) than *current* retirees. Among surveyed employers offering health benefits to retirees, ten percent said they had eliminated subsidized health benefits for *future* retirees in the past year (Exhibit 7). Most of these terminations affect a subset of employees, generally those who were hired after January 1, 2003 (e.g., "new hires").

Far more common than benefit terminations are increases in retiree contributions to premiums and cost-sharing requirements. In the past year, 71 percent of participating large private-sector firms increased retiree contributions to premiums and 57 percent increased retirees' prescription drug cost-sharing requirements. More than a quarter of all surveyed employers said they increased hospital copayments (26%) and out-of-pocket limits (29%), and more than a third reported increasing deductibles (34%) and physician office visit copayments (37%) in the past year (Exhibit 8).

Looking to the near future, the Kaiser/Hewitt Survey on Retiree Health Benefits offers reason to suspect that the trend of declining retiree health benefits will continue; however, it is important to emphasize that this survey was conducted prior to the enactment of the Medicare legislation and does not reflect employers' likely response to the changes and incentives in the new law.

When asked about their likelihood of discontinuing coverage for their retiree populations, only two percent said they are very or somewhat likely to terminate all subsidized health benefits for *current* retirees. Again, this suggests that current retirees are largely shielded from terminations in coverage. However, the news was far less promising for current workers, or the retirees of the future. One in five surveyed employers said they are very or somewhat likely to terminate all subsidized health benefits for *future* retirees. Serious consideration is also being given to providing access to health benefits but having retirees themselves pay all of their costs. A quarter of surveyed firms reported that they are very or somewhat likely to require retirees to pay 100 percent of the cost of coverage (Exhibit 9).

Premium and cost-sharing increases are far more likely in the next few years, according to employers in our survey. To help ameliorate the effect of rising retiree health care costs, many employers said they would seriously consider major changes in their benefits, including increasing retiree contributions to premiums (86 percent), raising cost-sharing for prescription drugs (85 percent), and increasing deductibles (75 percent). And roughly two-thirds of all surveyed employers said they are very or somewhat likely to increase physician office visit copayments (69 percent) and out-of-pocket limits (65 percent) (Exhibit 10). Again, it is important to note that these findings are from the summer of 2003, prior to the final passage of the Medicare legislation.

Medicare Modernization Act

There is substantial interest in how the Medicare drug law will influence employers' decisions regarding retiree health benefits. The issue received considerable

attention during the legislative debate and contributed to the final shape of the Medicare law. Concerned about the possibility that a new Medicare benefit would accelerate the erosion of highly-valued retiree health benefits, policymakers designed the law to include financial incentives for employers to remain a primary source of drug coverage for the Medicare population.

The *Medicare Prescription Drug, Improvement, and Modernization Act of 2003* encourages continued coverage of retiree health benefits by offering employers considerable financial incentives, flexibility, and multiple options for coordinating their plans with Medicare. The new law includes tax-free direct subsidies equal to 28 percent of total drug costs between $250 and $5,000 per retiree if the employer plan provides drug coverage that is at least actuarially equivalent to the standard Medicare drug benefit. Today, most employers offer drug coverage that is of greater actuarial value than the standard Medicare drug benefit. However, the law does not preclude employers from scaling back drug coverage to the standard Medicare level and still receiving the financial subsidy.

How employers will respond to the new Medicare legislation with respect to benefits offered to Medicare-eligible retirees is a critical concern but will only become apparent after employers have had sufficient time to understand and analyze the implications for their firms. Employers have a number of options to consider. They could, for example:

- Accept the 28 percent subsidy and maintain benefits at their current value, or modify their benefit design to be equivalent in value to the standard Medicare drug benefit;
- Decline the subsidy, and, instead, choose to wrap around or supplement the new Medicare Part D benefit in some manner; however, if they take this approach, their contributions will not count toward retirees' out-of-pocket limit; or
- Terminate retiree health coverage altogether.

Some suggest that the 28% subsidy will allow employers to "stay in the game" by alleviating some of the cost pressure. Others are concerned that the new Medicare benefit may give employers an opening to cut back on their retiree health obligations, which is a concern because the benefit is substantially less generous than the typical employer plan.

Concluding Thoughts

Today, millions of retirees—both pre-65 and seniors on Medicare—enjoy the financial protections offered by employer-sponsored retiree health benefits. But, all signs point to an erosion of this coverage in the years ahead—an erosion that was predicted prior to the enactment of the Medicare drug law.

It now seems clear that fewer workers can count on such coverage when they retire. Fewer employers are offering retiree health benefits, and those that do are clearly looking for ways to limit their own financial liability. As a result, the current generation of

workers will be far less likely than their parents' generation to receive the same level of employer-sponsored retiree health benefits, if they get retiree coverage at all.

How employers will respond to the new Medicare drug law is clearly a critical concern but remains unclear at this time. The drug benefits offered by employers to Medicare-eligible retirees are far more generous than the standard drug benefit set forth in the new law. The typical employer plan does not impose a separate drug deductible nor interrupt coverage at a given benefit level until a retiree's drug spending reaches a set out-of-pocket limit (e.g., no doughnut hole). The relative generosity of employer coverage, as compared to the forthcoming Medicare drug benefit, could add to concerns among retirees about losing valued drug coverage.

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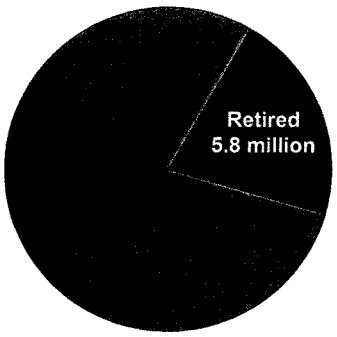
Exhibits

Exhibit 1

More than half of retirees ages 55-64 have employer-sponsored health benefits



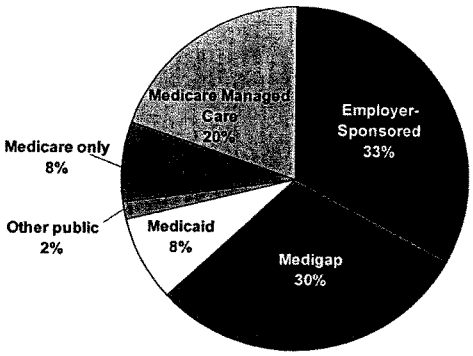
Of the 5.8 million retirees ages 55-64, 3.3 million (57%) have employer-sponsored coverage.

Total Number of People Ages 55-64 = 27.4 million

Source: Urban Institute analysis of CPS based on data from the 2003 Annual Social and Economic Supplement.

Exhibit 2

One in three seniors with Medicare also have employer-sponsored health benefits

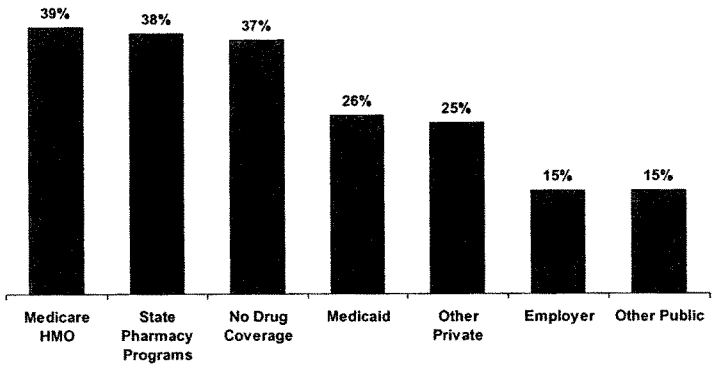


Total = 32.7 million non-institutionalized elderly Medicare beneficiaries

Note: Numbers may not add to 100% due to rounding.
Source: MedPAC analysis of Medicare Current Beneficiary Survey, Cost and Use file, 2000.

Exhibit 3

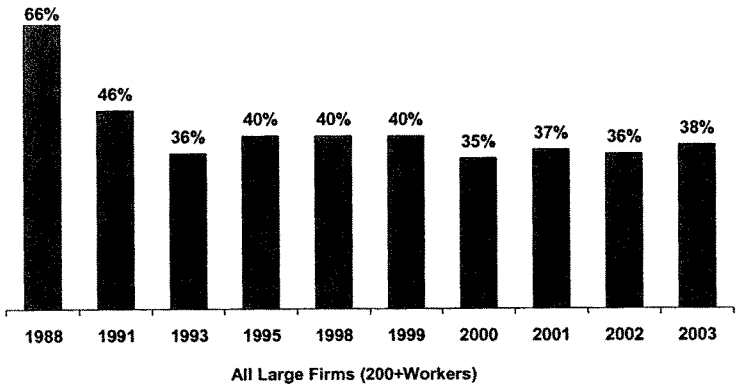
Seniors with employer prescription coverage are less likely to skip medications due to cost



Note: Analysis of seniors in sample with classifiable drug coverage.
SOURCE: Preliminary analysis from Kaiser/Commonwealth/Tufts-New England Medical Center 2003 Survey of Seniors in Twelve States.

Exhibit 4

The share of employers offering retiree health benefits has declined



Note: Based on responses of firms that offer health benefits to active workers. Tests found no statistically different estimates from the previous year shown: 1988-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003. In 2003, the sample was stratified to the firm size and industry distribution reported by the U.S. Census. This had the effect of increasing the reported prevalence of retiree benefits offered by large firms (200 or more workers) for this year and prior years. The differences are not statistically significant.

Source: Kaiser/HRET Employer Health Benefits Survey: 1999, 2000, 2001, 2002, 2003; KPMG Survey of Employer-Sponsored Health Benefits: 1988, 1991, 1993, 1995, 1998.

Exhibit 5

Total retiree health costs increased on average by 13.7% between 2002-2003; similar to active workers

Average increase in health costs reported by employers:

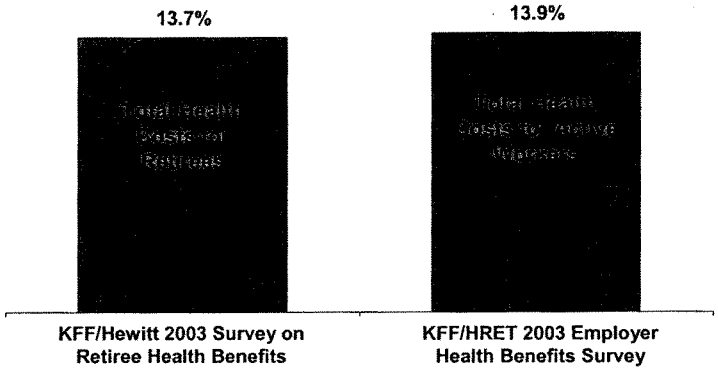
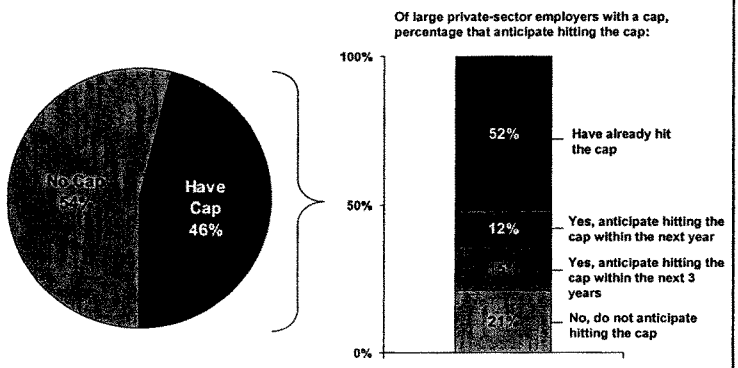


Exhibit 6

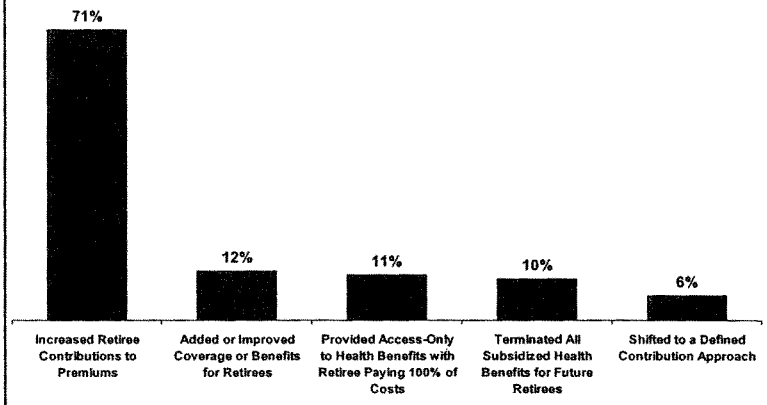
Nearly half of large private-sector employers offering health benefits to 65+ retirees have caps on their firm's contributions



Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
SOURCE: Kaiser/Hewitt 2003 Survey on Retiree Health Benefits, January 2004.

Exhibit 7

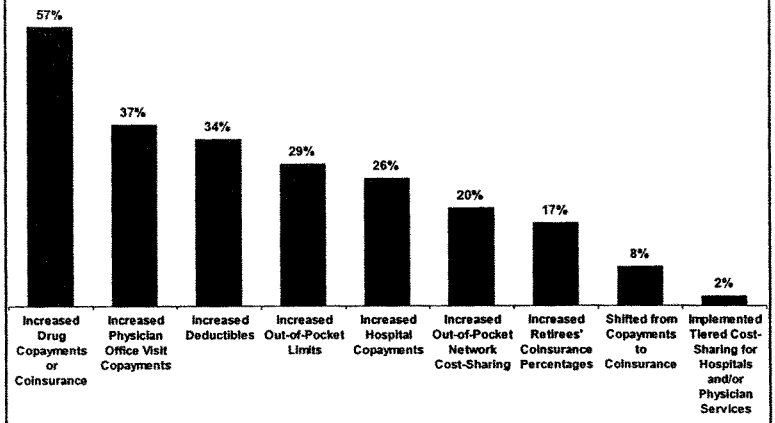
Seven in ten employers reported increasing retiree premium contributions in the past year; one in ten terminated benefits for *future* retirees



Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
SOURCE: Kaiser/Hewitt 2003 Survey on Retiree Health Benefits, January 2004.

Exhibit 8

Employers reported increases in retirees' cost-sharing for health benefits in the past year

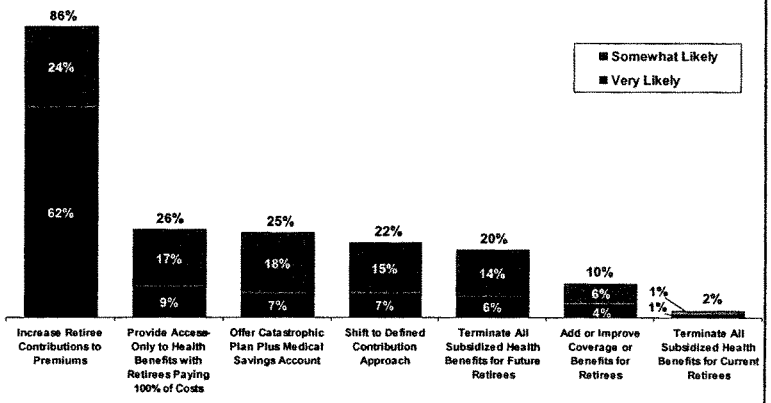


Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
SOURCE: Kaiser/Hewitt 2003 Survey on Retiree Health Benefits, January 2004.

Exhibit 9

Nearly nine in ten employers say higher retiree premium contributions are likely in the next three years; two in ten say terminations for *future* retirees likely

Percent of employers report the following changes are likely:

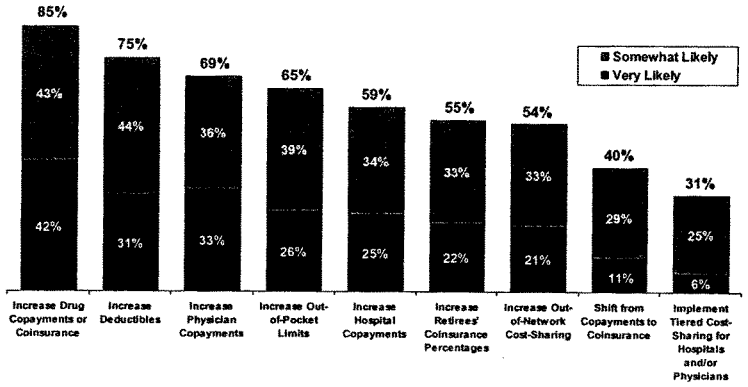


Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
SOURCE: Kaiser/Hewitt 2003 Survey on Retiree Health Benefits, January 2004.

Exhibit 10

Employers say increases in cost-sharing for retiree health benefits are likely in the next three years

Percent of employers report the following changes are likely:



Note: Based on responses from private-sector firms with 1,000 or more employees that offer retiree health benefits.
SOURCE: Kaiser/Hewitt 2003 Survey on Retiree Health Benefits, January 2004.

Senator BREAUX. Dr. Olsen.

STATEMENT OF ERIK D. OLSEN, D.D.S., PRESIDENT-ELECT, AARP BOARD OF DIRECTORS, GLENBROOK, NV

Dr. OLSEN. Thank you, Senator Breaux. My name is Erik Olsen. I am president-elect of AARP. I am a real honest to goodness Medicare beneficiary who receives a retirement benefit from my company. I am from Glenbrook, NV, and I am a volunteer.

First of all, I want to thank you for the opportunity to address the importance of retiree health benefits for all retirees and the critical need for employers to continue to provide these benefits to supplement Medicare.

AARP has been seeking an equitable solution to the age discrimination issues. It is in the interest of everyone—employers, unions, retirees—to find an alternative to the EEOC rule that best protects retiree health benefits. An equitable solution is not one that denies benefits to the oldest and often sickest retirees. Unfortunately, this is the solution the Commission has chosen.

Its rule sanctions age discrimination. It allows employers to terminate the supplemental health benefits of older retirees while providing benefits to younger retirees that may be significantly better than Medicare. The rule will risk millions of older retirees losing their health benefits by encouraging employers who currently provide health benefits to older retirees to consider dropping them.

Supplemental health benefits cover many of the costs and services not covered by Medicare. More than 12 million Medicare beneficiaries currently receive some form of retiree health benefits that are vital to their health and economic security. Employers may legally coordinate these supplemental benefits with Medicare so that older retirees are generally much less expensive to insure than younger retirees.

AARP believes the EEOC rule is both illegal and unsupported by its own record. It does not protect the rights of older workers or retirees or enforce the ADEA. Congress recently rejected a similar amendment. Rather than health policy, the Commission should enforce the age discrimination laws.

In considering the rule, the Commission did not assess how many Medicare-eligible retirees will lose their employer-provided supplemental benefits, where or whether they will find alternatives, or how they will afford them. Nor did it assess the impact of the recent improvements to Medicare, including tens of billions of dollars in employer subsidies to encourage employers to maintain these benefits.

The Commission has also ignored broader public sentiment. Almost 60,000 people filed comments in opposition to the rule. More than 160,000 people contacted Congress. The lack of public enthusiasm for the rule is pervasive.

In a broad AARP national survey of people aged 50 and above, 73 percent disagreed with the EEOC ruling. This sentiment prevails among all age and demographic segments, all political affiliations, and all income levels. In fact, younger AARP members, between ages 50 and 65, as well as union members, were slightly more likely to disagree with the ruling than the average group, and this report is available in the back of the room. It is called, "Per-

ceptions of the EEOC Ruling Among the 50-Plus Population." We have released that survey today. Finally, 79 percent believe that Congress should take steps to prevent age discrimination in retiree health benefits.

The lack of support for the rule is especially troubling because it represents an abrupt about face from the Commission's position only 4 years ago in its successful brief in the *Erie County* case. The decade-long decline in retiree health benefits is not a result of the age discrimination laws, but other factors such as health care cost increases and accounting changes to the treatment of retiree health expenses. I believe I just heard Ms. Silverman state that the GAO report that she cited supported that contention, that the Erie County was not one of the main issues.

We share with EEOC the goal of encouraging employers to provide retiree health benefits. We are encouraged by the EEOC's willingness to discuss with us a solution that better protects these benefits for all retirees, regardless of age. We believe that it is possible to design an approach that is equitable for older retirees and reasonable for employers.

AARP and its members urge you to protect retiree health benefits for both younger and older retirees. Thank you.

Senator BREAUX. Thank you, Dr. Olsen.

[The prepared statement of Dr. Olsen follows:]

TESTIMONY BEFORE THE

SENATE SPECIAL COMMITTEE ON AGING

ON

ACCESS TO ADEQUATE HEALTH INSURANCE: HOW DOES THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RECENT RULE AFFECT RETIREE HEALTH

MAY 17, 2004

WASHINGTON, D.C.

WITNESS: DR. ERIK D. OLSEN
PRESIDENT-ELECT
AARP BOARD OF DIRECTORS

For further information,
Contact: Michele Pollak
Federal Affairs Department
(202) 434-3760

Senator Craig, Senator Breaux, and members of the Special Committee on Aging.

Thank you for this opportunity to appear before the Committee. I wish to speak about the importance of retiree health benefits for *all* retirees, and the need for employers to treat both older and younger retirees equitably under the age discrimination laws.

For many years, AARP has been asking Congress – and many of the other groups and organizations represented at this hearing – to work towards an equitable solution to the age discrimination issues raised for retiree health benefits. An equitable solution is one that recognizes that all retirees, not just young retirees, need the health benefits that employers provide to their retirees. An equitable solution is one that addresses employers' concerns about escalating health care costs and makes it feasible and attractive for them to provide some level of health benefits for all its retirees.

An equitable solution is NOT one that denies benefits to the oldest and often sickest and poorest group of retirees, under the assumption that this will encourage employers to provide retiree health to younger retirees.

Unfortunately, this is the solution the EEOC, and the supporters of its rule, have chosen.

Let us be clear what the EEOC rule says: It exempts employer-provided retiree health benefits from the federal Age Discrimination in Employment Act (ADEA). It explicitly permits employers to discriminate by terminating or reducing the supplemental health benefits they provide to older retirees. Regardless of its impact on younger retirees, this rule will risk millions of older retirees getting substantially fewer health benefits than they currently receive. The EEOC rule will encourage employers who currently provide health benefits to older retirees to consider dropping them.

The importance of retiree health benefits is clear. In the wake of a national debate on how best to *improve* health benefits, including employer-provided benefits, for Medicare-eligible retirees, it surely is not in the "public interest" to encourage employers to eliminate supplemental health benefits for these same people. In fact, the recently enacted Medicare prescription drug law included tens of billions of dollars of direct subsidies to employers to encourage them to maintain these very benefits.

Medicare covers only about half of a typical beneficiary's total health care costs. Medicare beneficiaries must pay out of their own pockets for the many health care services not covered by Medicare as well as for the deductibles, co-pays and co-insurance, and premiums that Medicare requires. Services not covered by Medicare include routine dental, vision and hearing care, long-term care, certain preventive services, and, most importantly, prescription drug benefits.

Even after the Medicare prescription drug benefit takes effect, in 2006, beneficiaries will still be responsible for the premium costs, deductibles, and coinsurance associated with that benefit.

Persons receiving retiree health benefits typically have coverage similar to that of those who are still working. While a retiree's liability for the costs of health services under a retiree health plan varies from plan to plan, most include some drug coverage and caps on their annual out-of-pocket costs. Retirees who do not have access to employer-provided retiree health, or who lose it, must look to the private market. But, there is no assurance that the private market will offer a plan with benefits comparable to those that an employer provides; or that is affordable. Moreover, persons who lose their employer-provided benefits after their initial year of Medicare coverage have no guarantee of acceptance into any plan (unless a Medicare Advantage plan is available). This is, of course, a particular problem for persons who are disabled or otherwise have a pre-existing health condition.

AARP believes the rule is illegal, unsupported by the meager record compiled by the EEOC and, most importantly, bad civil rights and health care policy. (See attached copy of AARP's September 12th comments to the EEOC on the proposed rule).

The rule is illegal because EEOC does not have authority to rewrite the laws that Congress has written. EEOC's authority to issue exemptions under sec. 9 of the ADEA is very limited – as its own regulations make clear. Congress did not – and could not – give EEOC authority to amend the ADEA just because the Commission may now disagree with the policies Congress enacted. The extraordinary and improper reach of the rule is highlighted by the fact that less than six months ago Congress refused to amend the ADEA with language almost identical to this rule.

The rule is also illegal because its purpose is not to protect or expand the rights of older workers and retirees or to otherwise enforce the ADEA. Rather, it is intended to influence the actions of employers with regard to the provision of health care to a select group of retirees. The Commission argues that this is justified by the "public interest."

But, nowhere in the ADEA – or any other law – is EEOC given authority to determine what is good health care policy for the United States. Surely that is a task for the Congress, not an administrative agency whose sole responsibility is to deter employment discrimination. EEOC's lack of expertise in this field is particularly notable when one reads the record it has compiled in an effort to support the rule. No effort was made to determine the wider impact the rule

would have on the persons most affected – Medicare-eligible retirees – or how the recently-enacted Medicare prescription drug law will affect employer conduct.

When determining the "public interest," the EEOC simply ignored the "public" – the tens of thousands of people who filed comments objecting to the rule and the tens of thousands more who opposed similar legislation last fall. Almost 60,000 people filed comments with the EEOC in opposition to the rule. More than 160,000 people contacted the Congress during its debate on the Medicare prescription drug act to object to a similar provision (sec. 631).

Unlike the EEOC, Congress heard the public's voice and deleted that provision from the final law. And, in just the past three weeks, more than 75,000 people have contacted the EEOC and/or their Member of Congress to ask that Congress step in to prevent this rule from taking effect.

The lack of public enthusiasm for the EEOC's rule is pervasive. Earlier this month, AARP fielded a nationally representative survey of 3,142 people aged 50 and over (1,806 were AARP members) asking questions about the EEOC rule and retiree health benefits ("Perceptions of the EEOC Ruling Among the 50+ Population"). Over seven in ten (73%) people aged 50 and over disagree with the EEOC's ruling, including strong majorities of both AARP members (74%) and non-members (71%). We found this sentiment prevails among all the age and

demographic segments represented in the survey, and among all political affiliations and income levels.

In fact, younger AARP members, between ages 50-65, are slightly more likely to strongly disagree with the ruling – and this is the group EEOC says it is helping!

The survey included arguments both for and against the EEOC's ruling. Less than one-quarter (24%) of the 50+ population agree with argument that the "employers who provide retiree health benefits should be able to save money by offering more generous benefits only to younger retirees not eligible for Medicare." Conversely, almost eight in 10 (78%) agree that "it is unfair and discriminatory for employers to reduce or eliminate health benefits for its retirees aged 65 and older while offering these benefits to its younger retirees.

Seventy-nine percent said that "Congress should take steps to insure that companies that provide retiree benefits do not decide based on age who gets these benefits."

The record is also devoid of anything that would lead one to conclude the rule will have the desired, or required, effects. It certainly won't further the non-discrimination goals of the ADEA. It certainly won't protect the retiree health benefits of people as they age. There is no empirical evidence that employers

will be encouraged to provide retiree health benefits to any retirees if the rule takes effect. Even those writing in support of the rule make no promises to provide, or continue to provide, retiree health benefits to younger retirees. Indeed, had the Commission bothered to look, it would have found ample evidence to suggest that eliminating retiree health benefits for older retirees is often just one step towards eliminating it for all retirees. This is exactly what happened to an AARP member in Louisiana who worked for a predecessor company of International Minerals and Chemicals Global corporation. As of January 1, 2004, IMC Global ceased providing retiree health benefits to retirees above age 65. And, any employee under age 50 as of April 2003 will not get retiree health benefits upon retirement.

The EEOC says that this rule protects everyone's health benefits. But, it is clear that this rule does not protect the benefits of older retirees. More than 12 million Medicare beneficiaries currently receive some form of health benefits from their former employers. The EEOC did not try to assess how many people will lose their employer-provided supplemental benefits, where or whether they will find alternative benefits, or how they will afford those benefits. The record has no assessment of how the insurance industry will adapt, if at all, to the needs of this potential influx of private beneficiaries. Nor does the record address what will happen to the great number of older retirees who are disabled or have pre-existing medical conditions that may disqualify them from any – or any affordable – private Medigap policy.

Perhaps the most glaring omission in the record is EEOC's failure to assess how the improvements made to Medicare – including the tens of billions of dollars of direct subsidies to employers – made by the Medicare prescription drug law will affect employer practices. In fact, the new law benefits employers regardless of whether they qualify for the financial subsidies provided by Congress. The addition of a prescription drug benefit to Medicare correspondingly, and substantially, reduces an employer's cost for a supplemental health benefit for older retirees.

Congress was seeking ways to KEEP employers in the retiree health system, not ways to make it easier for them to exit that system. The EEOC rule obviously does the latter.

The lack of evidence in the record is especially troubling because this rule represents an abrupt about-face from the EEOC's position on the same issue only four years ago. In its brief to the 3rd Circuit in the *Erie County* case, the Commission stated:

> Health insurance benefits can be a costly employee benefit. Employers should not have their hands tied in their efforts to maximize the benefits for all employees, current and former. The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute. The answer is for the employer either to rely upon distinctions that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA . . .

There is hardly any discussion in the record of either the real reasons employers have been leaving the retiree health system or the real costs associated with providing these benefits to older retirees – and then eliminating them.

The paucity of support for the EEOC's position is highlighted by even a cursory look at the recent history in this area. It is clear that the decade-long decline in retiree health benefits has nothing whatsoever to do with the ADEA and its requirement that an employer provide these benefits in a fair and non-discriminatory manner. Retiree health benefits were declining for many years prior to the *Erie County* decision in 2000, for reasons having nothing to do with the ADEA.

The dramatic decrease in retiree health can be traced back to the early 1990's. The beginnings of the extraordinary increase in the cost of all health care, the restructuring of the private sector, the first wave of baby boomer retirements and, perhaps most important, the decision by the Financial Accounting Standards Board in 1992 to require employers to account for these future expenses as present liabilities, are all at fault. Over the past 15 years, there have been similar declines in all types of benefits, including a shift from defined benefit to less-costly, and less valuable, defined contribution pension plans and a shift of costs for employee health care from the employer to the beneficiaries.

Another fact ignored by the EEOC is that Medicare-eligible retirees are significantly less expensive to insure than younger retirees – sometimes the cost is only 25% of the cost for a younger retiree – because employers are already permitted to "coordinate" their retiree health benefit plans with Medicare. In the guidance it issued in the wake of its success in the *Erie County* case – and subsequently withdrew in favor of this rule – the EEOC noted that "employers may take the availability of Medicare benefits into account in structuring their health benefits to older retirees. As a result, employers may deduct from the health benefits they provide any Medicare benefits for which those retirees are eligible." In other words, employers who provide retiree health benefits to older retirees do not have to duplicate Medicare's benefits, but merely supplement them so that older retirees ultimately have same overall level of benefits as the younger retirees, even though the source of their benefits is a combination of the employer and Medicare. More than 75% of the employers who provide retiree health benefits, provide them to their Medicare eligible retirees in this manner. But, to the extent that employers perceive technical problems related to insuring that these Medicare supplemental plans comply with the ADEA, AARP is pleased to work on regulations, or legislation, that further clarifiy the legitimacy of such "wrap-around" plans.

AARP recognizes that there are critical issues surrounding retiree health benefits. As noted earlier, we have urged the Congress to look at these issues. In the wake of the *Erie County* decision, it has become clear that employers need

more guidance as to what they may and may not do under the age laws. For this reasons, AARP was especially disappointed that the EEOC withdrew its guidance that clarified that, when an employer provides retiree health benefits for Medicare eligible retirees, the employer may incorporate Medicare's benefits into its retiree health plan (as discussed above).

In issuing the rule, EEOC Chair Dominguez indicated her willingness to discuss with AARP a better solution to the issue than simply denying these benefits to the oldest and often the sickest of beneficiaries. We are pleased to participate in these discussions. But, please be assured that should these efforts not be successful, AARP will not hesitate to take other steps to protect its members' interests – and benefits – including asking the courts to prevent the rule from taking effect.

We urge you once again to address this issue in a responsible manner that protects the rights of older persons and recognizes the importance of retiree health benefits for both younger and older retirees.

Thank you.

September 12, 2003

Francis Hart, Executive Officer
Office of the Executive Secretariat
Equal Employment Opportunity Commission
1801 L. Street, N.W.
Washington, D.C. 20507

BY MESSENGER

Re: 68 Fed. Reg. 41542 (July 14, 2003)
Age Discrimination in Employment Act Rulemaking

Dear Ms. Hart:

AARP appreciates this opportunity to comment on the proposed exemption under the Age Discrimination in Employment Act ("ADEA"), published by the Equal Employment Opportunity Commission on July 14, 2003 (68 Fed. Reg. 41542). AARP would like to reserve the right to supplement these comments with a more detailed analysis of the policy and law governing the coordination of retiree health benefits and the ADEA.

AARP files these comments in opposition to the EEOC's proposal to exempt employer-provided retiree health benefits from the coverage of the Age Discrimination in Employment Act of 1967 (ADEA). In proposing this exemption, the Commission abandons its primary obligation to protect the rights of workers to non-discriminatory treatment by employers. The apparent purpose of the exemption is not to protect or expand the rights of older workers and retirees or to otherwise enforce the ADEA. Rather, it is intended to influence the actions of employers with regard to the provision of health care to a select group of retirees. The Commission attempts to do this by permitting employers to overtly discriminate against older retirees in hopes that this will encourage employers to

provide and improve health benefits offered to younger retirees. The Commission argues that this is justified by the "public interest."

It is astonishing that, in the midst of a national debate on how best to *improve* health benefits, including employer-provided benefits, for Medicare-eligible retirees, the EEOC believes that it is in the "public interest" to facilitate elimination of all employer-provided benefits for this same group of beneficiaries. Protecting retiree health benefits for both younger and older retirees is of critical importance to AARP and its members, but this rule will instead lead to fewer health benefits – and in particular reduced coverage for prescription drugs -- for retirees age 65 and over.

Older retirees rely upon their employer-provided retirement health benefit for access to benefits not covered by Medicare, most notably prescription drugs and protection from large out-of-pocket expenses, and crucial assistance with premium expenses. Employer group coverage affords many retirees health benefits that are otherwise unavailable to or not affordable for them. Many have no other access to a supplemental plan that will provide adequate and affordable prescription drug benefits or coverage for out-of-pocket expenses.

The President and Congress have made prescription drug coverage for the Medicare-eligible population one of the top domestic priorities for the year. Clearly, it is their view – and AARP's view – that the public interest is best served by maintaining and enhancing retiree health coverage for Medicare beneficiaries, particularly coverage for prescription drugs. The EEOC's proposal instead gives employers a green light to eliminate such coverage for the Medicare-eligible population. The tens of thousands of AARP members who have already weighed in with Congress and the EEOC on this very issue have sent a clear message as to where the public interest lies.

AARP believes that the proposed regulation (1) exceeds the authority of the EEOC to issue regulations under the ADEA generally, ADEA §9 (29 USC §628) specifically, and the Administrative Procedure Act; (2) contravenes the language, legislative history and purpose of the ADEA; and (3) represents an arbitrary, capricious and unjustified exercise of the EEOC's authority to issue regulations under the ADEA and change its policy and practices with regard to discrimination in employer-provided retiree health benefits.

Nothing in the ADEA – or any of the Commission's relevant enabling statutes – authorizes the EEOC to either consider or attempt to influence the manner in which employers provide retiree health benefits other than to prohibit discrimination. The EEOC's rulemaking authority under ADEA §9 to issue "exemptions [from the ADEA] that are in the public interest" is not a blanket grant of authority to rewrite the law; nor may the EEOC define "the public interest" without reference to the language and purposes of the ADEA. The Commission's own regulations highlight the limited nature of its authority to issue exemptions:

> The authority conferred on the Commission by section 9 ...will be exercised with *caution and due regard for the remedial purpose of the statute* to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in employment. Administrative action *consistent with this statutory* purpose may be taken...when found necessary and proper in *the public interest in accordance with the statutory standards.* . . . . [A] reasonable exemption from the Act's provisions will be granted only if...*a strong and affirmative showing* has been made that such exemption is in fact necessary and proper in the public interest.[1]

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[1] The Commission's current regulation setting standards for the use of ADEA §9 is substantially similar to the regulation first issued by the Department of Labor in 1969. See 29 C.F.R. §850.16 (34 Fed. Reg. 19193; Dec. 4, 1969).

The exemption authority under Section 9 has only been exercised once, and never by the Commission. When the Department of Labor issued regulations in 1969, it created an exemption for activities carried out by the public employment services of the states under the Manpower Development and Training Act of 1962 and the Economic Opportunity Act of 1964. See 29 C.F.R. §850.16(a).

29 C.F.R. § 1627.15(b) (*emphasis added*).

The case law establishes a similar analysis: the touchstones for evaluating agency action are both the express delegation of authority contained in the enabling statute (the ADEA) and the applicable standards for rulemaking contained in the Administrative Procedure Act. "If the intent of Congress is clear, that is the end of the matter . . .the agency must give effect to the unambiguously expressed intent of Congress." *Chevron USA v. NRDC, Inc.,* 467 US 837, 842-43 (1984). If Congress "has not directly addressed the precise question . . . the agency's interpretation of the statute is entitled to deference so long as it is 'reasonable' and not otherwise 'arbitrary, capricious or manifestly contrary to the statute.'" *Motion Picture Assn. of America v. FCC,* 309 F.3d 801 (DC Cir. 2002), *quoting Chevron.*

The proposed exemption directly contravenes the language of the ADEA, as amended by the Older Workers' Benefit Protection Act (OWBPA), and the entire body of regulatory history accompanying the statute. Neither the ADEA (as amended by the OWBPA) nor its legislative history permit or contemplate exemptions of the type proposed by the EEOC in this NPRM. Indeed, the statute specifically prohibits it. Therefore, the proposed exemption fails the *Chevron* test.

The extraordinarily detailed nature of the 1990 amendments leaves no room for the EEOC, or the courts, to argue that the language of the statute is not clear, explicit and *exclusive* with regard to the treatment of employee benefits under the ADEA. The OWBPA establishes:

- **A general rule** (non-discrimination in all employee benefits),
- **A specific defense** to a claim of discrimination in benefits (the equal benefit or equal cost defense), and
- **Limited exemptions to the general rule** for very specific practices enumerated in the law that otherwise would not satisfy the equal benefit or

> equal cost defense.[2] Even these exemptions share a specific characteristic of equity: similarly situated older and younger retirees receive the same amount of monthly benefit, even if derived from different sources (government, pension plan, or employer's funds). This equity is not present in the exemption proposed by the EEOC, which would allow employers to provide younger retirees with health benefits far more generous than those provided in Medicare, while denying all less expensive supplemental benefits to older retirees. [3]

No other defenses or exceptions are contemplated or permitted. As the Supreme Court held in *Chevron*, when Congress has spoken to the precise

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[2] Congress exempted very few employee benefits from the coverage of the "equal benefit or

> equal cost" rule established in ADEA §4(f)(2), 29 USC §623(f)(2); those exemptions are specified in the legislation. For example, the practice of providing retirees with "bridge" payments to Social Security that terminated upon receipt of Social Security benefits was specifically permitted, with limitations.

In contrast, the (according to the EEOC, common) practice of providing retirees with a health

> insurance "bridge" to Medicare was not included in the list of exceptions. Instead, it was made clear that employers need not duplicate Medicare benefits in their retiree health plans for Medicare eligible retirees. Thus, the OWBPA codified regulations that <u>specifically provided for different treatment of retiree health benefits</u> by allowing employers to reduce their retiree health expenses for retirees over age 65 through integration of Medicare. 29 U.S.C. § 623(f)(2)(B).

It is worth noting that, as a practical matter, this "integration" operates in the same manner as

> the Social Security "bridge" payment. If an employer provides younger retirees a health plan that is no better than Medicare, its integration with Medicare will be 100% and the benefit will cease at age 65.

[3] The only other "exception" is found in §4(l)(2)(D), permitting an offset against severance for retiree health benefits received by pension eligible employees at the time of a layoff or plant closing. This last provision highlights the fact that Congress did not ignore the existence of retiree health benefits when passing the ADEA, but rather chose not to include it in the list of exemptions noted above. Indeed, the importance that Congress placed upon the availability of employer provided retiree health benefits is highlighted by the remedy it provides for violations by an employer who subsequently reduces or eliminates the retiree health benefit: not damages but specific performance. *See Erie County Retirees Assoc.*, EEOC *amicus* brief, at p. 28. ("If anything, the fact that Congress addressed the issue of retiree health benefits and did so only in the context of a statutory offset for severance benefits strongly supports the view that Congress did not intend . . . to exempt discrimination in retiree health benefits from the reach of the statute.")

question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, *supra*, 467 US at 843.

Since the EEOC cannot rely upon the language of the ADEA and the regulations codified by the OWBPA, its legal justification rests upon the slim reed of a Statement of Managers that was included in the Congressional Record on the occasion of passage of the OWBPA in 1990. Unfortunately, the EEOC's strained interpretation[4] inaccurately forces the Statement of Managers into conflict with the language of the statute and its committee reports, thereby discounting its value as guidance.

The flaws in the EEOC's current analysis are highlighted in the EEOC's own (successful) brief to the Third Circuit in *Erie County Retirees Assoc.* v. *County of Erie, PA, et al.*, 220 F.3d 193 (3d Cir. 2000). In its brief, the EEOC not only rejects the interpretation now proffered by the EEOC ("I[]t is clear from the legislative record that the consensus for adopting an explicit limitation on [retiree health] coverage did not exist."[5]); but emphasizes that such an interpretation must give way to the overwhelming weight of contradictory language in the contemporaneous Committee reports and the language of the ADEA itself:

> The issue . . . is not which side of the legislative debate had the greater success in lining the legislative record with statements favoring its position. The issue is what language actually ended up in the text of the ADEA. The legislative history . . . cannot trump the broader view of coverage that emerges from the text of the ADEA's prohibitory provision, as originally enacted, and from the broad prohibition against discrimination in "all" employee benefits.

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[4] Nowhere does the Statement of Managers contemplate that employers are permitted to *eliminate* retiree health benefits solely for older retirees, as opposed to reducing them to reflect incorporation of Medicare benefits into the employer's retiree health plan.

[5] *Erie County Retirees Assoc.* v. *County of Erie, PA, et al.*, 220 F.3d 193 (3d Cir. 2000), Brief of the EEOC as *amicus curie* in support of the Appellants, at 28 (January 10, 2000).

Erie County Retirees Assoc. v. *County of Erie, PA, et al.*, 220 F.3d 193 (3d Cir. 2000), brief of the EEOC as *amicus curie* in support of the Appellants, at 25-26 (January 10, 2000).

As the EEOC pointed out, "there is a plausible reading this legislative history [the Statement of Managers] that is compatible with a broader view of statutory coverage. *Id.*, at 27. *See* note 4, *supra*.

Even if one could read the Statement of Managers in the manner most recently urged by the EEOC, this one statement cannot override the clearly expressed will and intent of Congress found in both the language of the statute and in the reports issued by the Committees of jurisdiction.[6] "Without a textual foundation, [the Statement of Managers] . . . is precisely the type of free-floating legislative history that should be viewed with skepticism. *Blanchard v. Bergeron*, 489 US 87, 97-100(1989) (Scalia J., concurring)."

The proposed rule also fails the "public interest" standard the EEOC must apply to it. The EEOC has failed to show that *any* public interest is served by the proposed exemption: it is unable to cite any authority or data in support of its contention that eliminating employers' obligations to provide retiree health in a nondiscriminatory manner will encourage employers to continue to offer retiree health benefits to younger retirees. The record is also devoid of any discussion of the harm older retirees will suffer or how that harm will be offset by fulfillment of the ADEA's overall goals of encouraging employment of older workers and eliminating arbitrary age discrimination. Less than four years ago, the Commission came to precisely the opposite conclusion with regard to the identical question:

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[6] The problem with this history is that it has no anchor in the text of the statute. Are the Managers saying that retirement health benefits, in general, are excluded from the reach of the statute? If so, where is that exclusion found in the text of the statute? Are the managers saying that employers are categorically permitted to rely upon Medicare eligibility in making distinctions in the provision of retirement health benefits? If so where is that categorical defense found in the text of the statute?
Erie County Retirees Assoc., EEOC *amicus* brief, at 22-23

> Health insurance benefits can be a costly employee benefit. Employers should not have their hands tied in their efforts to maximize the benefits for all employees, current and former. The answer to this conundrum, however, is not to arbitrarily exclude a group of individuals from the protection of the statute. The answer is for the employer either to rely upon distinctions that are not age-based or to structure any age-based distinctions in a manner that comports with the ADEA . . .

Erie County Retirees Assoc. EEOC *amicus* brief at 30.

The major component of the record – the EEOC's "study" of the relationship of the ADEA and employer's retiree health practices and its subsequent analysis and conclusions – is both inadequate and flawed in its analysis and conclusions.

Some of the most glaring flaws, inaccuracies and omissions in both the study and the record include the following:

1. **An assessment of the harm and related costs – economic, medical, and otherwise -- that would be suffered by older retirees who lose or are denied access to employer provided retiree health benefits.** The Commission does not even provide an estimate of the *number* of retirees who will be affected, much less an estimate of their relative, individual abilities to afford to purchase replacement policies.

   Although employer-provided Medicare supplements do not shield retirees from all out-of-pocket costs, they provide substantial relief for these and other expenses and improve access to health care. The type of supplement a Medicare beneficiary has can make a big difference in that beneficiary's access to health care and in limiting his/her out-of-pocket costs. Loss of a supplement or a substantial decrease in the benefits or employer contribution can have a dramatic negative effect. Loss of supplemental coverage usually means the loss of prescription drug coverage and increased liability for out-of-pocket expenses, supplemental premiums and other health related spending. It is not uncommon for persons.losing employer-provided retiree coverage to face a 40% increase

in out-of-pocket health spending, primarily due to the increased premium expenses if they purchase Medigap individually. MedPac, *Report to the Congress: Variation and Innovation in Medicare . . . June 2003*, at pp. 21-24.

2. **The availability, accessibility and costs of alternative policies to complement Medicare for older (age 65+) retirees; distinctions among states in such policies; or a comparative analysis of employer-sponsored plans vs. individually purchased plans.** Retirees who lose employer-provided coverage may not have access to the same level or type of benefits when they seek individual coverage. Availability of different plans is highly dependent upon geography, economic forces and state regulation. For example, Medicare Managed Care supplements Medicare for about 11% of the Medicare population. But, this option is not available in all geographic areas, especially rural areas. And, many plans offer at best a limited prescription drug benefit and allow the retiree to use only a limited network of providers and impose restrictive plan rules for access to specialist care.

In addition there is no guarantee of access to prescription drug benefits (the federal guarantee issue protections only guarantees access to plans that do not include drug benefits).

3. **An assessment of the impact the proposal may have on the Medicare system (and on the states).** For example, will the number of persons participating in Part B increase? Decrease? If Congress establishes a new "Part D" to provide prescription drug benefits, what impact will eliminating employer-provided benefits have upon the newly amended Medicare system?

4. **An assessment of the impact of the proposal on the practices and policies of insurers.** E.g., will insurers offer prescription drug coverage

even in areas where it is now scarce? How will individual premium costs be affected if employer-provided plans are no longer a common benefit?

5. **An analysis of the common and available mechanisms now used by employers to value and expense retiree health benefits.** This is, perhaps, the most willful error in the record. The EEOC contends that it is "impracticable" for employers to accurately expense and value retiree health benefits as required to satisfy the equal benefit or equal cost rule. Not only is the EEOC incorrect in this contention -- indeed, the ADEA itself contains a formula for valuing the benefits and costs associated with employer-provided retiree health benefits[7] – but it failed to consider either that the equal benefit or equal cost rule is rarely if ever invoked with regard to retiree health -- retiree health expenses for older retirees are invariably less than for younger retirees due to the ability of an employer to incorporate Medicare into its plan, or the wide availability and use of methods for doing precisely these calculations.

   In response to the issuance of FAS 106, there has been developed various strategies for private employers to use in order to accurately account for these benefits. *See* 27 EMPLOYEE BENEFITS JOURNAL, *Retiree Health Coverage* (September 2002) (suggestions and methodologies for analyzing statistical, demographic, premium and claims data); CPA JOURNAL ONLINE, J. Johnson, *OPEBs: FASB prescribes strong medicine* (July 1992) (explaining how to implement the new accounting standard), at http://www.luca.com/cpajournal/old/12826661.htm. The federal government has adopted the same requirement for accounting for these postemployment benefits.[8]

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[7] Section §4(l)(2)(D) (*see* n. 3, *supra*) establishes two formulas (one for pre-65 retirees; one for 65+ retirees) for use by employers to calculate the value of retiree health benefits for purposes of offsetting the value of these benefits against a severance benefit.

[8] In 1997, the Office of Personnel Management issued a FINANCIAL MANAGEMENT LETTER: COST

The Academy of Actuaries' correspondence with the EEOC outlines a variety of issues related to valuing retiree health benefits. It notes that employers routinely estimate per capita costs for FAS 106 financial reporting purposes and that composite per capita costs are allowed for ease of computation. *See* Letter, John J. Schubert, American Academy of Actuaries, to David Frank, EEOC Legal Counsel, October 16, 2002; *see also Outline of Possible Methods for Addressing the Erie County Ruling*, prepared by American Academy of Actuaries' EEOC-ADEA & Retiree Health Workgroup (April 2002).[9]

Without endorsing any of these proposals, AARP suggests that the Commission could have explored whether use of similar alternative measures would have satisfied the requirements of the ADEA and imposed less harm upon older retirees. The accounting and actuarial professions have dealt with new and difficult valuations before and have managed to meet their professional obligations to their clients in a timely and expert manner. This is no different. The EEOC's assertion that such valuations are impossible is just wrong.

6. **A complete lack of data or information – other than anecdotal evidence in the form of employer statements – to support the contention that employers really will provide and/or maintain retiree health benefits at high levels for younger retirees if permitted to discriminate against retirees age 65 and older.**

FACTORS FOR PENSIONS AND OTHER RETIREMENT BENEFITS (No. F-97-08 October 23, 1997) setting forth cost factors and a methodology for calculating the cost of pensions and other retirement benefits.

[9] *See also* Letter, American Academy of Actuaries (AAA) to Governmental Accounting
Standards Board (GASB) (May 16, 2003), concerning accounting and financial reporting by employers for other postemployment benefits (OPEB). The AAA sets forth the actuarial considerations related to the effects of aging on the OPEB valuation. The letter also sets forth the process that ensued between AAA representatives and the GASB to develop alternative estimation methods for valuing these benefits.

This is by no means an exhaustive list. And, even a cursory analysis of the literature included in the record compiled by the Commission disproves its contention that the costs of retiree health benefits for Medicare eligible retirees, as required by the ADEA in the wake of *Erie County*, has been the cause of the precipitous drop in employer participation in the retiree health system. It is abundantly clear that employers' willingness to continue to offer retiree health to *any* retirees was declining well before 2000, as a result of the issuance of FAS 106 in the early 1990's and the dramatic increases in health care costs, especially for prescription drugs. *Erie County* is nothing more than a red herring now used by the EEOC to allow employers to save money by eliminating substantial portions of a benefit they were already scaling back prior to the case even being filed. Unfortunately, and illegally, this money is being saved at the expense of the rights and benefits to which older retirees are entitled.

Moreover, the fact that the record must focus on health care issues in order to adequately support the proposed exemption underscores the distance that the Commission has strayed from its statutory boundaries. The Commission's failure to address those issues, despite its "determination" that this rule will "encourage" employers to continue providing retiree health benefits, is a reflection of the fact it has neither the expertise nor the authority to meddle in the establishment of health care policy for the United States.

Even assuming the EEOC has the authority from Congress to make policy in the health care arena – an assumption that AARP vigorously disputes – the need for an adequate record is heightened by the fact that this proposal represents a complete about-face in the Commission's policy, both in regulations and litigation. "[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Bureau Mfrs. Assn. v. State Farm Mutual*, 463 US 29, 43 (1983). Moreover, more than 30 years of consistent interpretation and enforcement of the equal benefit or equal cost rule constitutes

a "settled course of behavior [that] embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. . . . There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Id.,* at 42-43.

The proposed exemption represents what is, at best an arbitrary exercise of the Commission's authority to issue regulations that are unsupported by either the law or the rulemaking record. At worst, it will wreak significant harm upon the very group of people the Commission is charged with protecting. The only clear beneficiaries will be employers who will receive not only an unanticipated financial windfall, but will be able to use this regulation in private lawsuits as a defense to liability for violating the ADEA. In contrast, many thousands of retirees will be harmed by the loss of their retiree health benefits as they age and will be unable to find, or to afford, an adequate replacement. Far from protecting the rights of older workers - which is a primary job of the EEOC - the proposed regulation will diminish those rights and strand thousands of retirees without adequate health insurance.

The proposed regulation should be withdrawn and the EEOC's earlier guidance (repealed on August 21, 2001) should be reinstated.

Sincerely,

David Certner
Director, Federal Affairs

Senator BREAUX. Mr. Imparato.

STATEMENT OF ANDREW J. IMPARATO, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, WASHINGTON, DC

Mr. IMPARATO. Yes. Thank you, Senator Breaux, for chairing this hearing and for inviting me to be a participant. We in the disability community see your Special Committee on Aging as an important committee for people with disabilities because there is such a strong correlation between aging and the acquisition of a variety of disabilities.

By way of personal background, I am a disability rights lawyer and I run a national membership organization that has about 80,000 members around the country. We have got a little ways to go before we are as big as AARP. But we are happy to be with them on this panel talking about the implications of EEOC's final rule for retirees with disabilities, in particular.

I am also a member of the Ticket-to-Work and Work Incentives Advisory Panel, and one of the things we are looking at in that panel, which advises the Social Security Administration, is how to make it easier for people on Medicare to return to work. So we try to look at the broad health policy issues that affect people's decision to work or to continue working.

The main point that I wanted to make today is that retiree health benefits must be looked at in the broader context of public and private health insurance, both on the acute care side and on the long-term care side. As you know with all the work you have done in the Medicare program, Senator Breaux, there are a lot of problems with Medicare in terms of its ability to meet the needs of Medicare beneficiaries with disabilities and chronic health conditions I appreciate Mr. Olsen talking about the fact that there are 12 million Medicare beneficiaries who see the need to supplement the benefits that Medicare provides because they know that if they relied solely on Medicare, they wouldn't get all of their health care and long-term care needs met. I can just tell you from the perspective of my mother, who is 74 and on the Medicare program, she has a lot of needs that the Medicare program is unable to meet in terms of her personal health care needs. So that is Medicare.

Another huge program that people with disabilities, both under 65 and over 65, rely upon is the Medicaid program. Again, even though Medicaid is a lot more generous than Medicare, there are serious problems with the Medicaid program in terms of its ability to meet the needs of people who need long-term care. As you know, the Medicaid program requires States to pay for long-term care if it is in a nursing home or other institutional setting, but it does not require States to pay for long-term care in home and community-based settings, which is where the vast majority of Medicaid beneficiaries want to receive the care, and that is true whether they are over 65 or under 65.

Then finally, we have heard about the problems with the retiree health benefits provided by employers, the fact that employers are providing less and less of those benefits, and I appreciated Patricia Neuman's testimony regarding employers' use of caps. If an employer is applying a cap to what it is going to pay for in terms of

its retiree health benefits, those caps are going to play out in a way that people who have the higher-cost needs are going to run up against caps earlier and they are not going to have their needs met by the retiree health benefits system, either.

So in this context, I think the EEOC final rule is moving us in the wrong direction. We see it as having a strong potential to make it easier for employers to remove benefits for the people who are the most disabled and the most in need of those benefits. I have a lot of respect for Cari Dominguez, for Commissioner Silverman, and I do believe that they sincerely believe they are helping older retirees.

I trust AARP's analysis on this more than I do the Commission's, and I say that as a former EEOC Commission attorney. I don't think they are experts in health policy. I think AARP has a lot more expertise in what is going on in the market and I think we should listen to their perspective on the issue.

Finally, I just wanted to touch on the fact that today is the 50th anniversary of the *Brown* v. *Board of Education* decision. We in the disability community see access to health care and access to long-term services and supports as implicating civil rights laws. People with disabilities want to be able to participate fully in society, and that is true whether we are over 65 or under 65. If we don't have access to the adequate services and supports that we need, we can't participate fully in society.

You may have heard that today we won a huge victory in the Supreme Court in the *Tennessee* v. *Lane* decision, where the Court is upholding your power as a Senator to recognize the civil rights of people with disabilities under the Constitution. We are delighted with that ruling, but we think that it is important that we recognize laws like the Americans with Disabilities Act have important goals that are affected by things like retiree health benefits, Medicare and Medicaid.

So in closing, I just want to say that we in the disability community look forward to working with you, particularly with your colleagues on the Finance Committee, which has a large role to play in all of this, and with my colleagues here on the panel to try to address the ongoing barriers to full participation for people with disabilities. Thank you very much.

Senator BREAUX. Thank you.

[The prepared statement of Mr. Imparato follows:]

Testimony of Andrew J. Imparato

President and Chief Executive Officer

American Association of People with Disabilities

Hearing On:

U.S. Equal Employment Opportunity Commission's
Final Rule on the Treatment of Retiree Health Benefits under the
Age Discrimination in Employment Act

Before the
Special Committee on Aging
United States Senate
Washington, D.C.

May 17, 2004

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Chairman Craig, Ranking Member Breaux, and Members of the Special Committee on Aging:

Thank you for the opportunity to provide testimony regarding the United States Equal Employment Opportunity Commission's (EEOC's) recently released final rule on the treatment of retiree health benefits under the Age Discrimination in Employment Act (ADEA). I am honored to have this opportunity. My name is Andrew J. Imparato and I am the President and Chief Executive Officer of the American Association of People with Disabilities (AAPD), a national non-profit, non-partisan membership organization promoting political and economic empowerment for the more than 56 million children and adults with disabilities of all ages in the U.S. With more than 80,000 members, AAPD is the nation's largest and most diverse cross-disability membership organization. Our members include individuals with all types of disabilities, their family members, and others who support our mission. As AAPD's President, I am proud to be a member of the Executive Committee of the Leadership Conference on Civil Rights (LCCR), and an active participant on LCCR's task force dealing with equal employment opportunity issues.

As a former attorney adviser to EEOC Commissioner Paul Steven Miller, I follow closely the work of the EEOC, and have great admiration and respect for the Commission's capable Chairperson Cari Dominguez, her colleagues on the Commission, and its talented

and committed staff. Also, as a relatively new member of the Ticket to Work and Work Incentives Advisory Panel to the Social Security Administration (I was appointed to this position last year by Senator Daschle, in consultation with Senator Kennedy), I believe it is critical that disabled people of all ages have adequate health care and long-term services and supports so that they may remain active and contributing members of society throughout their lives.

I am here today because I am concerned that the EEOC has taken an action that will unnecessarily imperil retiree health benefits for the retirees who are the oldest and most disabled—in short, the individuals most in need of quality health coverage. I believe the EEOC's final rule exempting retiree health benefits from the ADEA is not consistent with the Commission's mission to protect and enforce the civil rights of all workers, and places older retirees in danger of losing critical health coverage—coverage that they trusted would be available to them as they grew old and needed it. I am hopeful that the members of this Committee, working with your colleagues on the Finance Committee and the Committee on Health, Education, Labor and Pensions will look for ways to remedy the problem that EEOC's final rule has created for retirees.

In 1993, I came to Washington, D.C. to join the staff of the Disability Policy Subcommittee of the U.S. Senate Committee on Labor and Human Resources, when it was beginning the process of taking up national health care reform. Although we have made important improvements in health policy since the early 1990s, I believe that today

we continue to face a growing crisis that prevents too many average Americans from accessing the quality, affordable health care they deserve.

My testimony today is based on my assessment of the likely impact of the EEOC's final rule on retiree benefits. This assessment must take into account the other benefits that accrue as individuals reach retirement age. I would like to begin by making the point that the most important public health care program for retirees, the Medicare program, is generally ill-equipped to address adequately the acute and long-term care needs of retirees with disabling and chronic health conditions. Medicare is a program that was designed at a time when people with disabilities and chronic health conditions were, to a great extent, not expected to work or be active participants in the lives of their communities. To this day, the Medicare program is reluctant to pay for things like wheeled mobility and other forms of durable medical equipment, attendant care services, assistive technology, mental health care, and other supports that many disabled people of all ages require if they want to keep active and engaged in the life of their families, workplaces, communities, and places of worship.

We have learned from the disability rights movement that disability is a natural part of the human experience. A disability need not and should not limit a person's ability to make choices, pursue meaningful careers, and participate fully in all aspects of community life. As a person living with bipolar disorder, I can tell you that my work and my home life with my wife, two boys, our extended family and our friends and neighbors sustain me through my frequent bouts of depression. If I were to allow myself to get isolated or, worse yet, be institutionalized, I am confident that my capacity to fight the

depression would be greatly diminished. Yet, when I look at the employment rates, home ownership rates, and other key indicators for disabled people in the U.S., I must conclude that I am the exception rather than the rule when it comes to living with a disability in America. Fourteen years after passage of the Americans with Disabilities Act (ADA), far too many disabled Americans continue to be trapped in poverty or subsistence wages, social isolation, and insecurity about their future.

Until we modernize both the Medicare and the Medicaid programs so that they consistently support disabled people of all ages to maximize their independence; until we provide real choices in integrated community settings for people with disabilities and seniors who require long-term services and supports; we will continue to rob millions of disabled people and seniors of their freedom, their dignity, and their ability to pursue their dreams.

Turning back to the topic of today's hearing, I believe Commissioner Stuart J. Ishimaru articulated very well the concerns that led him to cast the sole vote opposing the EEOC's final rule exempting retiree health benefits from the requirements of the ADEA. I encourage you to read his statement on the EEOC website at www.eeoc.gov/abouteeoc/meetings/4-22-04/ishimaru.html. As he noted at the Commission's meeting on April 22, 2004, the final rule "will allow [an employer] to discriminate against older retirees in the type of health care benefits it provides." I concur. Moreover, I would argue that the older retirees who are most likely to lose key benefits as employers take advantage of the new loophole that EEOC has created are

retirees with disabilities and chronic health conditions. This vulnerable population deserves to grow old with dignity, surrounded by family and friends. Yet, if we allow employers to shift benefits away from the oldest and sickest retirees and toward the youngest and healthiest, we are forcing the older individuals to rely on Medicare and Medicaid to pick up the slack. For the reasons stated above, under current law, Medicare is very ill-equipped to safeguard the dignity of disabled beneficiaries. Moreover, even when a person is willing to impoverish herself and her family to become eligible for Medicaid, the Medicaid program remains an inadequate safeguard because it continues to suffer from a bias toward institutional care that unfairly isolates and warehouses hundreds of thousands of disabled recipients of all ages.

Chairman Craig, Ranking Member Breaux, and members of the committee, if we are truly committed to the goals of the ADA and the ADEA, let us recognize that retirees of all ages need quality health care and a system of long-term services and supports that will safeguard their dignity and independence as they acquire disabling conditions. Retiree health benefits currently address health needs that the Medicare program, even with new prescription drug benefits, is not well-equipped to address. Retiree health benefits are important building blocks supporting a comprehensive system of benefits. Certainly, retiree health benefits are only part of the solution. We need better quality disability and long-term care insurance products that will pay to keep individuals at home and independent as long as possible. We need incentives for younger workers to buy such policies and/or for employers to provide them. We need a Medicare program that recognizes the critical role that assistive technology and long-term supports and services

can play in keeping people independent and active as we age. We need a Medicaid program that gives people real choice in where to receive the long-term services and supports they need to survive. In other words, we need elected officials like the members of this Committee to re-engineer our country's public and private safety net so that the onset of a disability will not mean separation, isolation and poverty for our nation's retirees.

EEOC's final rule exempting retiree health benefits from the ADEA, I fear, is a step in the wrong direction. I commend you for holding today's hearing, and I urge you to work with the senior community and the disability community to restore security and peace of mind to the millions of retirees whose health and well-being have been placed in jeopardy.

Thank you again for the opportunity to testify. I would be happy to answer any questions that you may have.

Senator BREAUX. Mr. Meredith.

STATEMENT OF BRUCE MEREDITH, GENERAL COUNSEL, WISCONSIN EDUCATION ASSOCIATION COUNCIL, MADISON, WI

Mr. MEREDITH. First, thank you, Senator Breaux, for giving me the opportunity to give the union's perspective on this very complex issue.

My name is Bruce Meredith and I am general counsel for the Wisconsin Education Association Council, the NEA affiliate in Wisconsin. We represent about 90,000 members throughout the State.

I am here on behalf of the NEA for two reasons. First, most collective bargaining agreements in Wisconsin contain voluntary early retirement provisions, frequently referred to as ERPs, and most of these contracts provide for medical coverage prior to Medicare eligibility.

Second, Wisconsin was one of the States targeted by the EEOC prior to its rule change, and WEAC and school districts faced almost 200 lawsuits before the lawsuits were withdrawn. Thus, I saw firsthand the potential disaster triggered by an overly legalistic, overly rigid, and in my opinion, legally wrong interpretation of the ADEA, which for convenience I will label the *Erie* doctrine.

I wish to make one central point. Contrary to the misleading information provided by opponents, the EEOC's rule regarding medical benefits will not jeopardize a single retiree's health benefits. In fact, the EEOC rule is necessary to give unions a chance to save the post-retirement health plans we still have.

To understand why this is the case, I need to discuss what actually happens in negotiations over these provisions. Unions and employers agree to ERPs because some senior members want to retire before they become eligible for Medicare and full pension benefits. Because most of these members are at the top of the salary schedule, many employers believe that there are financial and educational advantages to give these employees the option to retire early. Some decline this option and continue to teach long past when they become eligible for Medicare and other benefits.

But the key to obtaining these provisions that give employees the option to retire is that they make financial sense to the employer. If they do not make financial sense, unions have great difficulty maintaining them and even more difficulty in negotiating them for the first time.

Most of Wisconsin plans consist of medical plans to ensure coverage prior to Medicare. The reason why this is so important is when workers retire, being able to be assured of insurance coverage is probably the single greatest component in making a decision to retire. If you are not assured of coverage in a plan, private or Medicare, you are basically putting your whole life savings at risk if a serious medical injury strikes.

There are three types of plans in Wisconsin, as well as, I believe, in the rest of the country. The first is called a wrap plan. Under this plan, the employer supplements Medicare benefits to approximate the same benefits provided to active employees.

A second is called a supplement, and this frequently adds additional benefits such as pharmaceutical benefits, but not complete coverage.

The third and perhaps most common are a cutoff of eligibility for insurance at Medicare, and these are called bridges. Unions typically try to bargain a wrap plan, but many employers simply believe these plans are too expensive and will not agree to them. Absent job actions, which are typically illegal in most States, there is simply no way to force an employer to provide a wrap if it believes such a plan is too financially onerous. In those situations, the only realistic plan is for the union to scale down its demands.

While most future and current retirees would prefer wraps, what is most essential is that they have a plan until they reach Medicare coverage. Once Medicare covers them, they are ensured basic coverage and typically can purchase more.

So why is the *Erie* doctrine so dangerous for workers? Because under that doctrine, the union is allowed only one bargaining position on early retirement health care. If it cannot achieve a full wrap, it risks abandoning all programs whatsoever.

Today, obtaining full wraps is extraordinarily challenging, and you have heard some of the reasons—rapidly escalating health care costs, financially difficult times, and new accounting rules. It would be naive, at best, to believe that employers, when threatened with an age discrimination suit, will simply provide a full wrap-around plan. In the real world, most employers will do exactly what the employer did in *Erie*, simply end the plan or reduce benefits to current employees. A lawyer may get attorney's fees, but everyone else loses.

Just last week, a local school board in Bristol, WI, in response to a threatened age discrimination suit based on *Erie*, announced that it was invoking the contract savings clause, a common provision that allows employers to revoke provisions that are arguably illegal, and stated that it was suspending all early retirements until a new agreement was negotiated. Under *Erie*, the union will basically have one and only one proposal to make, a full wrap, and the school board will likely counter with no plan at all and there is no clear resolution in bargaining.

Many of our members are also members of AARP. They have been outraged by AARP's position, which they feel threatened one of their most cherished provisions. Although I have not been privy to their conversations with the AARP members, there seems to be two themes to these conversations. The first is that the union will be able to negotiate an even better provision with the *Erie* threat. They typically respond by saying, "Well, have you met our school board president?" or "Have you ever tried bargaining for increased health care benefits in these difficult times?"

The other is that if the contract cuts off benefits at Medicare, then maybe they shouldn't retire at all. In response, many of them reply this is a personal decision they have thought a lot about and it is basically our decision and shouldn't be theirs.

In short, in the real world of current bargaining over health care, it is not the EEOC's rule that threatens the health care benefits of future and current retirees. It is the *Erie* doctrine.

On behalf of the NEA and other public and private sector unions, we wish to thank the EEOC for their careful and well-crafted rule. Without its vision, some of our members' most valued benefits would have been lost forever. Thank you.

Senator BREAUX. Thank you.
[The prepared statement of Mr. Meredith follows:]

STATEMENT OF

THE NATIONAL EDUCATION ASSOCIATION

SUBMITTED TO THE

SPECIAL COMMITTEE ON AGING

UNITED STATES SENATE

ON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RULING ON RETIREE HEALTH BENEFITS

May 17, 2004

Chairman Craig and Ranking Member Breaux:

Thank you for the opportunity to testify in support of the Equal Employment Opportunity Commission's ("EEOC") final rule exempting from the prohibitions of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), the coordination of employer-sponsored retiree health benefits with the benefits for which those retirees are eligible under Medicare (or a counterpart state-sponsored health benefits plan). 29 C.F.R. §§ 1625 and 1627 (RIN 3046-AA72).

The National Education Association's ("NEA") is a nationwide employee organization with in excess of 2.7 million members, the vast majority of whom are employed by public school districts, colleges, and universities throughout the United States. One of our top goals is to ensure that adequate health benefits are available to education employees after they retire. Therefore, we strongly support EEOC's final rule, which would remove a significant obstacle to the attainment of this goal.

NEA operates through a network of affiliated organizations, including some 13,000 local affiliates. Through collective bargaining where that is allowable, and through other means of bilateral decision-making in jurisdictions that do not provide for collective bargaining, these local affiliates represent NEA members and other education employees in dealing with their employers regarding terms and conditions of employment including compensation. A major component of the compensation provided to education employees is the health benefits that they receive while actively employed and after they have retired. And, as is the case in other sectors of the workforce, education employees are increasingly facing the prospect that retiree health benefits will be reduced or eliminated. See, e.g. General Accounting Office "Retiree Health Benefits: Employer-sponsored Benefits May Be Vulnerable to Further Erosion," GAO Doc. No. GAO-01-374 (May 2001).

As a practical matter, the EEOC's final rule addresses only one new, and for the time being, relatively small barrier to the maintenance of employer-sponsored retiree health benefits plans – the fear that a novel interpretation of the ADEA will take hold and lead to the invalidation of many commonly designed retiree health benefits plans that coordinate employer-provided benefits with Medicare. To be sure, there are other formidable barriers to the maintenance of employer-sponsored retiree health benefits plans. Those barriers include: the volatility of medical inflation; accounting standards applicable in the private sector, and soon in the public sector as well, that require employers to front load long term benefit liabilities on their balance sheets; and the increasing hostility of management towards fixed long-term labor costs. If the EEOC's final rule were prevented from taking effect, a barrier of similar magnitude would soon emerge.

The fear of the ADEA liability arose out of the blue in 2000. For decades employers and unions have been designing and implementing retiree health benefits plans on the assumption that such plans could be coordinated with Medicare, by reducing employer-sponsored health benefits to those retirees who were Medicare-eligible, without raising any issues under the ADEA. That assumption was well-founded. Notwithstanding the widespread prevalence of Medicare-coordinated retiree health benefits plans, we are not aware of any challenges to the design of such plans based on the ADEA until 2000. Then, the United States Court of Appeals for the Third Circuit disrupted the status quo with its decision in Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193 (3d Cir. 2000), that invalidated such a plan and led numerous employers who sponsor such plans to fear that their plans might, too, be challenged as age discriminatory.

In Erie County, a group of Medicare-eligible retirees challenged an employer-sponsored retiree health benefits plan that distinguished between retirees who were Medicare-eligible (and thus generally over age 65) and retirees who were not Medicare-eligible. In particular, the plan provided continuation coverage to retirees under the same point of service ("POS") program (a hybrid of indemnity and managed care benefits) provided to active employees until the retirees were eligible for Medicare. Thereafter, the plan provided retirees with coverage under a health maintenance organization ("HMO") that was coordinated with Medicare. In distinguishing between groups of retirees in that way, the plaintiffs argued, the employer engaged in age discrimination and violated the ADEA. The court agreed, finding that Medicare eligibility was a proxy for age, and that the plan therefore made age-based distinctions in providing benefits. On the basis of these findings, the court concluded that the plaintiffs had made out a prima facie case for a violation of the ADEA under section 4(a)(1), 29 U.S.C. § 623(a)(1), and remanded the case to the district court to determine whether the plan could satisfy the "equal benefit equal cost" affirmative defense under section 4(f)(2)(B) of the ADEA, 29 U.S.C. § 623(f)(2)(B).

NEA believes that the court's conclusions in Erie County were wrong for two reasons. First, the correlation between Medicare-eligibility and age 65 should not have been sufficient to find a prima facie case of age discrimination when it was clear that need, and not age, drove the distinction between type of health benefits provided to the Medicare-eligible and non-Medicare-eligible retiree groups. Age was only an incidental byproduct of Congress' Medicare eligibility criteria. The obvious reason that HMO coverage was provided to the Medicare-eligible retirees, rather than the POS coverage that was provided to the other retirees, was that the Medicare-eligible retirees had benefits available to them from a source other than the plan, and the other retirees did not. If Congress had not used age as a criterion for determining Medicare eligibility, then age would not have affected, even indirectly, the level of health benefits that a retiree would have been provided under the plan. Where there was no

indication that the plan's design was based on some sort of stereotypical notions about older retirees, no prima facie case should have been found.

Second, the court failed to give proper weight to the legislative history of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which contained a clear statement in the joint "Statement of Managers" expressly providing that the practice of coordinating employer-sponsored retiree health benefits plans with Medicare eligibility is lawful under the ADEA. Specifically, the OWBPA managers stated:

> 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 the 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 the 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.

Final Substitute: Statement of Managers, 136 Cong. Rec. S25353 (Sept. 24, 1990); 136 Cong. Rec. H27062 (Oct. 2, 1990). The court simply was wrong in rejecting the expressly stated views of the OWBPA managers.

But even if Erie County were correctly decided, the actual results in the case – more than any question of legal theory or statutory interpretation – demonstrate best why the ruling should not stand as a matter of public policy, and why the EEOC was right to exercise its express statutory exemption authority to exempt the practice of coordinating employer-sponsored retiree health benefits with Medicare from liability under the ADEA. In the wake of the Third Circuit's decision, the case was ultimately settled not by improving the benefits provided to the Medicare-eligible retirees, but by diminishing the benefits provided to the retirees not eligible for Medicare. This is the sort of "equality" that only a lawyer could embrace. The plaintiffs' legal victory achieved nothing for themselves and only resulted in a loss of benefits to others. Because this result is the predictable outcome in any future case where the retirees not eligible for Medicare are not protected by contractual guarantees, it serves no policy purpose to force employers into a situation in

which the least costly means of complying with the statute is to reduce benefits for some retirees without raising benefits for others.

This is why NEA strongly supports the EEOC's use of its exemption power under section 9 of the ADEA, 29 U.S.C. § 628, to avoid the "unintended consequences that are not consistent with the purposes of [the ADEA] and are not in the public interest" that would result from the position taken in Erie County. 68 Fed. Reg. 4542 (Jul. 14, 2003). The EEOC exemption is borne out of the reality that an interpretation of the ADEA that would result in a net loss of employer-sponsored retiree health benefits cannot promote the purposes of the ADEA and cannot be in the public interest.

For NEA affiliates, the impact of the Erie County decision, if not mooted by the EEOC's final rule, would be particularly profound. For a variety of reasons, education employees often retire before they are eligible for Medicare. Such retirements are made possible by the availability of employer-sponsored retiree health benefits. But if the Erie County position were not exempted, NEA affiliates would face substantial negotiating problems in their attempts to maintain the employer-sponsored retiree health benefits that they previously have won. In the case of employer-sponsored plans that provide superior health benefits to those retirees not eligible for Medicare (relative to the health benefits provided to the Medicare-eligible retirees), the employers would insist on reducing or eliminating those benefits to bring their plans into compliance with the ADEA. Similarly, in the case of employer-sponsored plans that provide substantially similar coverage to all retirees, employers that no longer could afford to maintain those plans would insist on reducing or eliminating those benefits for all of its retirees – even if they could afford to continue to provide superior health benefits to retirees who were not eligible for Medicare (relative to the health benefits provided to the Medicare-eligible retirees), because to do so arguably would violate the ADEA. And, the NEA affiliates would not be able, through collective bargaining or other legal means, to force employers to retain or adopt a retiree health benefit plan design that arguably would be inconsistent with the ADEA, regardless of the economic pressure that they could bring to bear.

NEA believes that the implementation of the EEOC's final rule not only would be helpful to its affiliates' efforts to negotiate for the continuation of health benefits for retirees who are not eligible for Medicare, but – contrary to the rhetoric posed by opponents of the EEOC's final rule – would not harm their efforts to negotiate for the continuation of health benefits for Medicare-eligible retirees as well. Those opponents have argued that a high percentage of employers that sponsor retiree health benefit plans that provide substantially similar benefits to all their retirees (rather than providing inferior or no health benefits to their Medicare-eligible retirees) continue to do so because they believe that to do otherwise would violate the ADEA; and that, once the EEOC's

final rule is implemented, those employers will begin reducing or eliminating the coverage provided to their Medicare-eligible retirees.

Common sense dictates that this syllogism is false because its premises belie reality. Employers sponsor retiree health plans of all sorts because, for any number of possible reasons, they perceive – or at one time perceived – that it would be in their economic interest to do so. If that perception changes, the employer will seek to reduce or eliminate its retiree health plans to the greatest extent permitted by the contractual commitments it has made to its retirees or the union. Application of the ADEA restrictions (without the benefit of the EEOC's final rule) on this process would only affect the means by which the employer reduced or eliminated retiree health benefits, not whether it would do so at all. For example, an employer that provides substantially similar benefits to all its retirees and that desires to reduce the costs attributable to those benefits, might be required to reduce the benefits provided to all of its retirees rather than only those provided to the Medicare-eligible retirees in order to comply with the ADEA. There is no reason to believe that the Medicare-eligible retiree would be better off in such an environment, but it is clear that the retiree that is not eligible for Medicare would be worse off.

The EEOC's final rule, if implemented, would return the legal landscape for employer-sponsored retiree health plans back to the status quo before Erie County, where employers, unions, employees, and retirees can make rational economic choices based on the availability of health benefits from all sources and other factors unrelated to age, and without the specter of potential ADEA claims reducing the ability of all of the interested parties to optimize the retiree health benefits made available. In that environment, NEA affiliates will have a better chance of preserving employer-sponsored retiree health benefits for a greater number of retirees.

For all of these reasons, NEA urges the Committee to support the implementation of the EEOC's final rule without modification or delay. Thank you for considering this testimony.

Senator BREAUX. Next, Mr. Klein.

STATEMENT OF JAMES A. KLEIN, PRESIDENT, AMERICAN BENEFITS COUNCIL, WASHINGTON, DC

Mr. KLEIN. Thank you, Mr. Chairman. By way of introduction, the American Benefits Council represents companies that either sponsor or provide services to health and retirement plans that cover 100 million Americans, so our interest in this issue is very keen, indeed.

I would really just like to use my few moments to make five relatively quick points. The first is that the business community, my organization, and the organized labor community's views are in complete alignment that the *Erie County* case was wrongly decided and that the EEOC rule is not somehow breaking some new public policy ground, but really, it is simply helping to restore us to the situation that business and labor always understood was both the correct law, as well as good public policy, before the *Erie County* case. The fact is that the EEOC's action is consistent with what the law has continued to be for the last 4 years everywhere in the country other than the Third Circuit.

My second point is that I really would like to take head-on this criticism that the EEOC's rule will somehow give employers a green light to reduce or drop coverage for the over-65 group. I suppose by the same rationale I could point to the decline of retiree health care coverage in the last 4 years and say that it is the faulty decision in the *Erie County* case that accounts for the fact that this retiree health care coverage has been declining. But I think that both that contention, as well as the claim that somehow the EEOC rule will contribute to the drop of coverage, both of those contentions, both of those claims, would be terribly misleading to you in Congress.

I think that the unfortunate reality is that absent other public policy initiatives, health care coverage for retirees, both those before age 65 as well as those over age 65, are likely to continue on their downward trend for reasons that have absolutely nothing to do with the EEOC's rule, and for reasons that have nothing to do with the Third Circuit Court of Appeals decision. I think virtually all of my fellow panelists here have identified what those reasons are.

You pointed out in your opening statement the statistics about that incredible decline that we have seen over the last 15 years. I would add one other reason for the decline in coverage, apart from the ballooning health care costs and apart from the accounting standards that require these liabilities to be reflected on the balance sheet. I would also point out a lack of adequate vehicles to pre-fund, to pay for retiree health care coverage, and I would like to discuss that further in what will be my fifth point.

But in summarizing this one, I would just say that I really cannot come before you in good conscience and say that the EEOC rule will somehow rejuvenate the retiree health care system. What I can say is that the rule is one of the few things that can be done right now to at least make the declining trend less severe than it otherwise might be, especially for those who are most vulnerable, as Mr.

Meredith said, those younger retirees who are not yet eligible for Medicare.

My third point is that both we and the labor community, the business community and others, as well as the critics of the EEOC, could speculate indefinitely about the impact of this EEOC rule. But the one thing that we don't need to speculate about is what actually happened to the retirees in the *Erie County* case. Following the Third Circuit Court of Appeals decision in the *Erie County* case, the older retirees did not have their benefits increased, as the plaintiffs would have liked. Rather, the younger retirees had their benefits reduced, which the employer found necessary to do in order to ensure that it was not violating the age discrimination law.

That result, reducing the benefits to younger retirees, is exactly the outcome that Congress hoped to avoid when in 1990 it passed the Older Worker Benefit Protection Act. I think anyone who thinks that employers are somehow going to boost benefits to older retirees is not really paying attention to the realities of the health care system.

My fourth point is really that most employers view Medicare as the principal health plan for their retirees once they reach age 65. Most employers that do provide retiree health coverage, do provide some additional benefits for those things that are not covered by Medicare. But by contrast, the benefits that are provided to non-Medicare-eligible retirees are typically just an extension of whatever coverage the company has been providing to its active workers. So that is a very crucial distinction to be made.

In no way should this be somehow considered age discriminatory. It is just common sense, and it was the topic of considerable legislative history in the Older Worker Benefit Protection Act.

I spoke in my second point about the EEOC rule and the contention that it might give a green light to businesses to cutoff coverage. I see that I have a red light, so I will just wrap up with my fifth point if I may, very, very quickly, and that is that I think that this controversy is really a very serious distraction from what Congress should be considering, which is how to reverse this trend that we all have spoken about and that you introduced in your opening remarks.

We have just three specific suggestions, which I would be happy to elaborate on further in the question period, and in fact, since my time is up, why don't I stop there and just invite you if you would like to ask me questions about them.

Senator BREAUX. Thank you very much, Mr. Klein.

[The prepared statement of Mr. Klein follows:]

AMERICAN BENEFITS
COUNCIL

Testimony of

James A. Klein

President

AMERICAN BENEFITS COUNCIL

Before a hearing of the

Senate Special Committee on Aging

on the Equal Employment Opportunity Commission's recently released final rule on the treatment of retiree health benefits under the Age Discrimination in Employment Act (ADEA)

May 17, 2004

Good afternoon Senator Breaux and members of the Committee. Thank you for the opportunity to appear this afternoon. I am James Klein, President, of the American Benefits Council, which is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans covering more than 100 million Americans.

The Council is pleased that the Committee is holding this hearing to examine the Equal Employment Opportunity Commission's (EEOC) final rule on the treatment of retiree health benefits under the Age Discrimination in Employment Act (ADEA). The Council strongly supports the EEOC's final rule and believes it will serve to clarify that the long-standing practice of coordinating employer-provided retiree health coverage with eligibility for Medicare or a state-sponsored retiree health benefit program is <u>not</u> age discriminatory and does <u>not</u> violate the ADEA. This clarification will help prevent older Americans from losing their retiree health coverage and will stabilize employer-sponsored retiree health benefits that are rapidly eroding.

Rapidly rising health care costs, unfavorable accounting treatment of retiree health obligations, and the lack of federal policies designed to encourage employers to provide retiree health benefits have all played a major role in the

significant decline of employer-sponsored retiree health benefits for millions of American workers. Over the past 15 years, there has been a well-documented decline in the share of employers offering retiree health benefits, dropping from 66 percent in 1988 to 38 percent in 2003.[1] This trend is likely to continue. Retiree health plan costs increased 16 percent between 2001 and 2002, while costs increased 13.7 percent for active employees, and many employers are quickly reaching the caps they imposed on their retiree health spending following the adoption of Financial Accounting Standards Board (FASB) Statement No. 106 on "Employers' Accounting for Post-retirement Benefits Other Than Pensions". [2]

Retiree health benefits sponsored by employers are generally in one of two forms. This coverage serves either as a "bridge" benefit available to early retirees that terminates once the person reaches Medicare's eligibility age or, for those who are age 65 or older, as a supplement to Medicare benefits. Typically the pre-Medicare retiree will continue in the same employer plan that covers the active employees. Retiree health plans that supplement Medicare for retirees age 65 and older typically provide benefits not covered by Medicare, such as prescription drugs, or provide financial assistance with premiums, deductibles or co-payments. It is important to note that these plans are intended to meet distinctly different retiree health care needs and are not generally intended, nor

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[1] Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Benefits 2003 Annual Survey", Section 11: Retiree Health Benefits, Exhibit 11.1: Percentage of All Large Firms (200 or More Workers) Offering Retiree Health Benefits, 1988-2003.
[2] Hewitt Associates, "Health Care Costs Increases Expected to Continue Double-Digit Pace in 2003," press release, October 14, 2002, based on data from the Hewitt Health Value Initiative.

required, to provide the "same" benefits to early retirees as they do to post-65 retirees.

Background on *Erie County Retirees Association v. The County of Erie*

In *Erie County Retirees Association v. The County of Erie*, the Court of Appeals for the Third Circuit held that an employer that voluntarily provides retiree health benefits may be prohibited from reducing retiree health benefits for individuals eligible for Medicare. In reaching its decision in August 2000, the Third Circuit overturned a District Court holding that was clearly supported by the relevant legislative history. The federal law in question in the *Erie County* case is the Age Discrimination in Employment Act (ADEA), as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA).

The facts of the *Erie* County case were as follows. In 1997, the County redesigned its retiree health benefits plan and Medicare-eligible retirees began to receive their benefits largely through an HMO. The County's pre-Medicare retirees generally continued to receive benefits through a point-of-service plan. A group of the County's Medicare-eligible retirees sued. Among other things, the retiree group alleged that: the HMO benefits were inferior to the point-of-service benefits (even in conjunction with what the Medicare program covered), the

Medicare-eligible distinction was an illegal age-based distinction, and that the program could not meet the "equal cost or equal benefit" test.[3]

The trial court concluded that ADEA "clearly was not intended to apply to retirees ... who premise their complaint on alleged disparities in their retirement health benefits based on Medicare-eligibility."[4] The Third Circuit rejected that view and remanded the case to the trial court to determine whether the employer, Erie County, Pennsylvania, could prove that its program fit within the law's "equal cost or equal benefit" safe harbor. In its instructions, the court said the "equal benefit" prong could be met if the sum of what Medicare provides plus what the employer provides to the Medicare-eligible retirees equals or exceeds what the employer provides to pre-Medicare retirees. But the "equal cost" prong can look solely at what the employer pays (rather than what Medicare pays plus what the employer pays). The Third Circuit essentially concluded that an employer must spend equal amounts for early retirees and Medicare-eligible retirees, without regard to what is provided by Medicare unless the aggregate benefits are identical.

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[3] 29 U.S.C. 623(f)(2)(B)(i). The "equal cost or equal benefit" rule states, in the pertinent part, that it is not unlawful for an employer to provide different benefits under an employee benefit plan "where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage." (Emphasis added.)

[4] *Erie County Retirees Association v. County of Erie*, 91 F. Supp. 2d 860, 880 (W.D. Pa. 1999).

While the Medicare-eligible Erie County retirees technically "won" their case, it was a pyrrhic victory. The result in the *Erie* County case was that the employer felt compelled to reduce benefits for pre-Medicare retirees to protect itself from violation of the ADEA, without any increase in benefits for Medicare-eligible retirees as the plaintiffs desired. This is exactly the scenario legislators were attempting to *avoid* during consideration of the OWBPA in 1990.

Federal Legislative History and EEOC Action

In 1990, after the Senate Labor and Human Resources Committee reported its version of the OWBPA (S. 1511), concerns were raised that the bill could cause the practice of coordinating retiree health benefits with Medicare to be considered age discriminatory under the ADEA. For example, when the bill was debated on the Senate floor, Senator Charles Grassley (R-IA) 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. As Senator Orrin Hatch (R-UT), one of the managers, explained, "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."[5]

[5] 136 Cong. Rec. S13 297-98 (daily ed. Sept. 18, 1990).

Senator Grassley's concerns were further addressed when the Senate voted to pass a final substitute version of the bill. The Statement of Managers on the final version of the OWBPA is explicit that the practice of taking Medicare eligibility into account in structuring retiree health benefits is not prohibited. When the bill was presented in the House of Representatives, Representative Bill Goodling (R-PA) 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."[6] The legislative history confirms that the OWBPA was never intended to interfere with employers' practice of coordinating retiree health benefits with Medicare eligibility. The Third Circuit even acknowledged that a substantial amount of legislative history is in conflict with its own decision.

Employers, state and local governments and labor unions have all relied on explicit legislative history concerning ADEA. It has long been widely understood that the law permitted them to provide health benefits solely to pre-Medicare retirees or to coordinate retiree health benefits with Medicare. After the *Erie* County decision in August 2000, the EEOC adopted the ruling as its national enforcement policy. A year later, after hearing from organized labor, state and local governments, employers and others, the Commission

[6] 136 Cong. Rec. H 8628 (daily ed. Oct. 2, 1990).

unanimously voted to rescind those portions of its Compliance Manual that discussed the *Erie* County decision. The Commission realized that requiring employers to attempt to meet the "equal cost or equal benefit" test would be complex and costly, particularly since employers could avoid the exercise by simply eliminating retiree health benefits entirely, since they are voluntary, or by reducing the retiree health coverage for early retirees.

In July 2003, the EEOC published a Notice of Proposed Rulemaking (NPRM) proposing to create a narrow exemption from the prohibitions of ADEA for the practice of coordinating retiree health benefits with eligibility for Medicare or a comparable state health benefits program. On April 22, 2004, the EEOC finalized the proposed rule making it clear that it agrees with employers and unions that the practice of coordinating employer-provided retiree health coverage with eligibility for Medicare should not be considered a violation of the federal age discrimination law. The EEOC correctly concluded that doing so would be contrary to the interests of retirees because it would result in a significant decrease, not enhancement, of health care coverage to retirees.

Opportunities to Reverse Retiree Health Coverage Trends

The EEOC's final rule is critically important to retirees, particularly early or pre-Medicare eligible retirees who would likely face significant reductions in their early retiree health benefits if the Commission did not act. Finalizing the

proposed EEOC rule will however assist at least somewhat in stabilizing the retiree health benefit system and ensure that retiree health benefits remain available for future retirees in years to come. But the EEOC's action is stabilizing an *eroding* retiree benefits system. In all likelihood the enormous cost pressures on the health care coverage system will lead to a continued decrease in coverage for both pre- and post-65 retirees for some time to come. To reverse these trends what is needed are new savings mechanisms to encourage more retiree medical coverage opportunities. For example, the Council has been working on a proposal to establish Retiree Medical Benefit Accounts (RMBAs) that would use existing individual and workplace savings under 401(k) and IRA plans to allow individuals and workers to elect annually to allocate a portion of their pre-tax retirement contributions into a separate RMBA within their retirement plan. Distributions from a RMBA would be tax-free and penalty-free if made after a certain age and used for "medical care" as defined in Sec. 213(d) of the Internal Revenue Code.

In addition, the new Health Savings Accounts (HSAs) created under the Medicare Modernization Act of 2003, are also tax-preferred savings vehicles that may be used for retiree health and hold some promise. The Council believes the RMBA or some other vehicle devoted *entirely* to retiree health savings is still needed and we will continue to promote the concept. One change to HSAs that would be helpful would be if early retirees were allowed to use funds from their

HSA accounts to purchase retiree health insurance, rather than prohibiting the availability of HSA funds for this purpose, as under current law, for those who have not yet reached age 65.

The Council also supports bipartisan legislation aimed at encouraging employers to establish more flexibility in the use of defined benefit and defined contribution retirement plans to meet retiree health care needs. The "Pension Preservation and Savings Expansion Act of 2003" (H.R 1776), introduced by Representatives Rob Portman (R-OH) and Ben Cardin (D-MD), includes a provision (section 1401) that would allow retirees to elect to use retirement plan distributions on a pre-tax basis to pay their share of the cost of retiree health plan coverage (including coverage under a qualified long-term care insurance contract).

The "Portman-Cardin" bill also includes a proposal (section 1402) that would expand so-called section 401(h) accounts used to fund retiree health benefits. Section 1402 of H.R. 1776 would expand section 401(h) accounts so that they could be maintained as part of a profit-sharing or stock bonus plan and not just as part of a defined benefit pension plan or a money purchase pension plan, as is the case under current law. This expansion would encourage more employers to consider this option to fund retiree health benefits.

In closing, the Council strongly supports the EEOC's decision to finalize its rule exempting from ADEA the coordination of employer-sponsored retiree health benefits with Medicare. This action is critically important and will help arrest the trend of older Americans losing retiree health coverage. The EEOC regulation provides reassurance to employers and labor unions and retirees that the longstanding practice of taking Medicare eligibility into account in structuring retiree health programs is not age discriminatory but instead benefits retirees of all ages. The rule is consistent with Congressional intent and the legislative history of the law and will help the effort to prevent further significant reductions in the health benefits provided to retirees, particularly those not yet eligible for Medicare who have no other health care coverage.

Thank you for the opportunity to testify today.

Senator BREAUX. I thank each and every panel member for their presentations. It is an incredibly important issue and there is a great deal, I would say, of misunderstanding about the EEOC decision. I have had people come up to me and say that the *Erie* case and EEOC decision are going to mean that retirees will lose all their health coverage and they are scared to death. That is unfortunate.

But it seems to me that there are about three million or so, Ms. Neuman, pre-65 retirees that have employer-sponsored health insurance and there are about 11 million post-65 that have some form of supplemental or employer-sponsored health assistance. It seems to me that without the EEOC decision, that if somehow we are going to say there cannot be a difference between those two categories and what an employer provides them, then employers have two choices. One, they can increase 11 million and make it equal to the three million, or they can reduce the three million to make them equal to the 11 million. It is a simplification, but is that sort of correct?

Dr. NEUMAN. I think that is fair.

Senator BREAUX. Dr. Olsen, I don't know any company in the United States, and maybe in the AARP shop there is a library of companies on a computer, that are increasing the retirees' health benefits. In fact, I think there are libraries full of companies in this country that are doing just the opposite. So how does AARP reach the conclusion that disagrees so vehemently with the EEOC and hopes that the result will be that both sides would have an increase in their benefits, as opposed to what has happened?

Dr. OLSEN. Well, first of all, probably in the library there might be one company, but I doubt it.

Senator BREAUX. Yes.

Dr. OLSEN. The second thing is, this is really a company-by-company situation and obviously it would vary by the company, and it did with *Erie County*. My understanding is after *Erie County* and the issue was settled, including with the support of the EEOC, there was a guidance issue that provided that, in fact, they would supplement up to Medicare and the Medicare counted as an equivalency factor. Therefore, I think these things can be worked out to make them equal.

What we are having a problem with, instead of doing something like this, we are doing this, is just taking away the benefit from those, and I take your word if it is 11 million, I thought it was 12, but a lot of people——

Senator BREAUX. It is close enough for Congressional purposes.

Dr. OLSEN. It is close enough, right. You said it, not me. [Laughter.]

But anyway, to me, that seems to be the solution we are taking. We recognize health care costs are rising and there are all these problems and we have worked with you, as you know, on these issues and it just seems to us there has got to be some equitable solution for these folks and a reasonable answer for the employer without just giving the green light to toss all these folks out to pasture.

Now, the thing to remember——

Senator BREAUX. Which folks are AARP——

Dr. OLSEN. We are representing both of them.

Senator BREAUX. OK. Which folks are AARP concerned about being tossed out?

Dr. OLSEN. Well, under the way we are seeing it, these after-65 folks on Medicare will no longer receive any supplemental—well, I shouldn't say all, but this will accelerate that tendency and that is our problem. We just think there must be some solution that can be worked out.

As I understand the guidance that the EEOC had issued after *Erie* was allowing this system to operate, and that subsequently has been removed as part of this rulemaking process.

Senator BREAUX. Why would not companies, if they are faced with a choice of not having to be able to provide two different packages, not simply reduce the size and benefits of the pre-65 retirees——

Dr. OLSEN. Well, I think there——

Senator BREAUX [continuing]. In order to be in compliance?

Dr. OLSEN. First of all, there is the entire health care situation. That is a subject in another hearing. But there are ways, and I think Ms. Neuman mentioned, within the retiree system of reducing these costs. There are annual maximums. There are these kinds of things. There are different ways of approaching it.

But we just think there must be some equitable way that is also reasonable to employers that we don't have to have a system that allows the entire over-65 people to be pushed out of the system.

Senator BREAUX. It defies logic, at least to me, that if we have a situation in this country where companies are, in fact, reducing rather dramatically their retiree health benefits in this country, that if all of a sudden we say that you are going to have to add 11 or 12 million more that are going to have to have exactly the same benefit and cost type of health plans as everybody, that they have to increase it by 11 or 12 million more, that that is not going to dramatically reduce the benefits, particularly to those under 65. Those over 65 are eligible for Medicare, so they are protected, I would argue, very adequately under the Medicare program.

Mr. Klein, can you comment on the discussion I have just had with Dr. Olsen?

Mr. KLEIN. I think you are 100 percent correct in your analysis of the impact and, in fact, that is precisely what happened to the retirees in the *Erie County* case. The older retirees did not have their benefits increased. The employer there realized that to protect itself against a claim of age discrimination, it would have to reduce the benefits for the younger retirees.

Senator BREAUX. In the real world, I think everybody in Congress, at least I think, is trying to make sure that retirees get the best coverage they can possibly receive and it is a combination of Medicare and some supplemental benefits to raise the standard and to encourage through any way we can employers to take care of those retirees before 65. That is what I think everybody would hope we could reach.

Mr. Meredith, it seems that your emphasis was on the damage that it does to your union members' negotiating ability and I am not sure I followed it quite as well as I needed to. Can you elaborate on the point you were trying to make?

Mr. MEREDITH. Yes, and I am sorry if I wasn't clear enough. Essentially——

Senator BREAUX. Oh, you were. I just didn't understand.

Mr. MEREDITH. Under the EEOC—I mean, part of negotiations is to listen to the other side and try reaching compromises. Under the *Erie* doctrine, the union cannot compromise. By law, the union has one position, and when you can't compromise, it is hard to get a deal.

Senator BREAUX. So you can't compromise because you have to have a whole package?

Mr. MEREDITH. We have got to tell the employer, in order to make it legal, you have to give the post-retirees the exact same benefits you give pre-retirees on a wrap program, and sometimes we are able to get that. But increasingly, it is difficult——

Senator BREAUX. That would be a good goal if you could get that.

Mr. MEREDITH. That is always our first position in negotiations. But with the EEOC, it is our first and last position, and as a result, we feel we can lose everything, because when you are stuck with all or nothing, you frequently end up with nothing, and that is what we feel the *Erie* doctrine was driving unions into, the inability to reach reasonable compromises with the employer to get the best deal available.

Senator BREAUX. For non-union retirees, they don't have a shot.

Mr. Imparato, you have listened to this debate. From my opinion, EEOC has clearly carved out a position of discrimination, but they would argue, and I would tend to agree, that in doing that, they are actually trying to increase the benefits of both categories that they are, in fact, discriminating against, because they feel that if we don't have this, that those in the previous category, pre-65, run the risk of having nothing at all, which companies can legally do right now. Rather than risk that, they have said, "All right, they can have a plan that is different from what is received by people in the post-65."

So discrimination, under their argument, at least as I see it, would actually bring about a greater equality of both sides having a pretty solid, even set of health benefits, one being employer partially provided and the rest picked up by Medicare, so they have got a pretty good plan that equals what is over here by the private employer. I mean, that is their argument as I understand it. What is wrong with that?

Mr. IMPARATO. I would go back to this whole issue of what is equitable and what are the purposes of the Age Discrimination in Employment Act? Why do we have the law to begin with?

In terms of what is equitable, from my perspective, an employer is going to spend X-amount of money on retiree health benefits. We want the Age Discrimination in Employment Act to be enforced in a way that makes sure that that money gets spent in a way where people under 65 and over 65 are able to benefit, but that it is not disproportionately benefiting the people under 65.

To me, the reason we have this Age Discrimination in Employment Act is because there is a long history of employers writing people off after they get to a certain age and trying to focus on the younger, healthier workforce, and to me, this phenomenon of providing greater benefits for people under 65 than for people over 65

is part of that history. People over 65 are more vulnerable. They are not in the workforce anymore. They are not represented by the unions, to a large extent. If their benefits are not protected by this Federal law, they are more likely to experience discrimination and to experience inequitable distribution of the money that the employers are willing to spend on retiree health benefits.

Senator BREAUX. I would argue that the nondiscrimination law is to ensure equal results. It is not to ensure that an employer put up the same amount of money for a pre-65 as opposed to a post-65. The law is to require health benefits to people in all categories. Under the EEOC's concept, is that everybody would end up with approximately the same health benefits, one of them 100 percent provided by their employer, the other one 100 percent provided by the Federal Government through Medicare, both with a small contribution from the individual. But the end result is they are both getting the same amount of health care.

Mr. IMPARATO. But Senator——

Senator BREAUX. That is not discrimination.

Mr. IMPARATO. Senator, what you just articulated is the *Erie* doctrine. The *Erie* doctrine, which was the law before EEOC's final rule, was that there are equal benefits or equal costs to the employer for the two populations, and what you just described, if the over-65 population has Medicare and the under-65 has the equivalent of Medicare, unless I am missing something, that would satisfy the *Erie* doctrine. They are both getting equal benefit as retirees. Am I missing something?

Senator BREAUX. I am missing it, because my understanding is it is a question of what kind of plan the employer provided, and if the employer provides more benefits for a pre-65 than that employer provides to a post-65, that is, under the *Erie* case, illegal discrimination based on age by the employer.

Mr. IMPARATO. Let us go back to your hypothetical. Let us say an employer for the over-65 population only provides Medicare. So basically, they provide no retiree health benefits.

Senator BREAUX. They provide zero.

Mr. IMPARATO. For the under-65 population, they provide the exact equivalent of Medicare plus, let us say, better prescription drug coverage than Medicare, even the revised Medicare. From my perspective, that is not equitable because they are spending more money on the under-65 population on a benefit that the over-65 population equally needs.

Senator BREAUX. Mr. Klein.

Mr. KLEIN. I just think that it may be an accurate portrayal of the case, but it is a tortured explanation of what constitutes discrimination. As I said, employers consider Medicare to be the basic plan that individuals get when they reach age 65, and for reasons that have been amply discussed by everyone here, there are more and more employers finding it difficult to continue to sponsor their own coverage both for actives as well as for retirees.

If the employer nonetheless wants to help bridge people over until they reach that point where they will get Medicare, and, in fact, may offer something in addition to Medicare, as most employers do who offer coverage, it is hard for me to understand how that

can be construed as being discriminatory. I think it just artificially pits one group of retirees against another.

Employer-sponsored coverage is something that is the cost is borne by employers and employees or early retirees. Medicare is something that is paid for through employer and employee contributions through payroll taxes. I just think that it is a rather tortured interpretation.

Senator BREAUX. Ms. Neuman, can you help us out from a Kaiser perspective, not arguing for or against, but what is the projection from maybe your people as to what would likely happen, considering where we are today, in the area of health care if the *Erie* case had been allowed to stand as it was originally decided?

Dr. NEUMAN. Mr. Chairman, we have been tracking trends in coverage and we continue to do that. We are looking to see what will happen in the future. I don't think it is possible to tell from the work that we have done how the *Erie* decision, one way or another, would have affected changes in the coverage.

Senator BREAUX. OK. Is the *Erie* decision a positive for an employer providing health benefits to their retirees or is it a negative?

Dr. NEUMAN. You know, I wish I could answer that question. I am not trying to be evasive, but based on the work that we have done, I really can't speak to that.

Senator BREAUX. Well, let us discuss it, then. How would it be positive? How would a decision that says that they have to provide the same benefits to post-65 retirees be positive for them and how would it be negative?

Dr. NEUMAN. Well, from a retiree point of view——

Senator BREAUX. No, from an employer who is providing the insurance, how would the requirement that you add the 11 to 12 million more to have the same benefits as those you are providing to pre-65 be good for the employer's ability to provide health insurance and how would it be bad?

Dr. NEUMAN. The issue from an employer point of view is one of costs and employers have to make decisions about how they are going to be controlling costs. One thing our survey has suggested is that employers are looking at a variety of strategies that are out there, including where to look for savings, and this could be one of the places that they would need to turn to in order to be responsive to a requirement to provide equal——

Senator BREAUX. I want to keep it very simple. If I am having trouble providing an employee plan for somebody that used to work for me that is not yet 65 and I provide less for the people that used to work for me that are over 65, and I am having trouble with the first group and somebody tells me I have also got to provide the same benefits for those who are after 65, how in the heck can that be nothing but terrible? They are already dropping the ones pre-65.

Dr. NEUMAN. Right.

Senator BREAUX. If I have got to add 11 million more that have insurance after 65, how can that be anything but awful? Mr. Klein?

Mr. KLEIN. I can't say it any more eloquently than you just did, sir.

Senator BREAUX. It is not very eloquent. That is Louisiana. [Laughter.]

Dr. Olsen.

Dr. OLSEN. I guess I don't think anybody is saying to raise the level of Medicare benefits. I think we are trying to discuss with the EEOC of a way of establishing this as an equivalency that makes some sense, and in discussions, and maybe the——

Senator BREAUX. Let me jump in on that point. I am sorry to interrupt, but you talked about an equivalency.

Dr. OLSEN. Right.

Senator BREAUX. Is AARP satisfied, if the employers were providing a health benefit plan for pre-65 and then they were providing a plan for those over 65 that was equivalent when you consider what Medicare contributes and what the employer contributes, is that the equivalency you are OK with?

Dr. OLSEN. Yes. We have been satisfied with the idea of the supplement representing an equivalency, and that was the guidance of the EEOC after Erie and up until now.

If I could make one other comment, I know we were involved a few months ago relative to employee retirement coverage when the Medicare Rx thing was at its peak.

Senator BREAUX. We heard a word or two from you.

Dr. OLSEN. Yes, a word or two. [Laughter.]

So Congress, I think very fortunately, added a lot of subsidies and incentives for the employer community to continue coverage, and there is even some thought that maybe this would help a little. We have to wait and see. But clearly, we are in an interim period before this starts in 2006.

Therefore, I guess I am somewhat astonished and amazed that we would now come out about halfway through this interim period with a rule that almost seems to give a green light to dropping coverage when just a few months ago, we created all these subsidies for employers to keep the coverage.

Senator BREAUX. I recognize that.

Dr. OLSEN. Thank you.

Senator BREAUX. Mr. Klein, back to the point we talked about, the concept of an employer providing one set of benefits for pre-65 retirees and providing a different set for post-65 but with the Medicare benefits would be the same as the pre-65. Dr. Olsen says that is what AARP is supporting. What is your comment on that?

Mr. KLEIN. I think my understanding, too, of the "equal cost-equal benefit" rule is that if the benefits that are being provided are equal, that is considered per se to be not discriminatory. But if you have a result where the benefits are less for one group than another, you can nonetheless still demonstrate that you are not discriminating if the cost that you incur is the same.

Therefore, I think we have to take the analysis further to answer your question. If you have a situation where the under-age 65 group is actually getting overall better coverage, more coverage than the over-age 65 group when you add up Medicare plus whatever it is their employer is providing, I think the AARP would say that that is discriminatory, and I think that there are two compelling reasons that it is not.

The first is the ample legislative history, which is described in some length in my written testimony, that Congress specifically addressed this point when it took up the Older Worker Benefit Pro-

tection Act in 1990 and specifically sought to exempt the retiree situation. It spoke about older versus younger workers. It wasn't referring to retirees and specifically had discussions and colloquies about being able to preserve this kind of, if you want to call it, disparate treatment.

The second reason is that it is a somewhat convoluted interpretation of discrimination to say that that older group is being somehow discriminated against simply because the employer is spending more money on the younger group. Absent the employer spending that money, that younger group is going to get nothing.

Senator BREAUX. But I have a little bit of a problem with the concept that an employer would be able to spend $5 on a pre-65 retiree, but then for a post-65 retiree, I am only going to spend $2, even though Medicare is not going to make up the other $3. That would mean that that employer's actual contribution does not produce the same result. Is that not discrimination that should be avoided and illegal?

Mr. KLEIN. I don't think so, and I don't think that that is the position of Congress back when it amended the Age Discrimination in Employment Act, and I think even if you feel——

Senator BREAUX. Why should an employer be able to spend less money for an older worker than a younger retiree when the older worker generally will have substantially higher needs from a health standpoint?

Mr. KLEIN. Well, the younger worker—I am sorry, the younger retiree would still have health care needs that might not be met——

Senator BREAUX. Yes, but it is clear that the post-65 is going to have substantially higher health costs than a pre-65 worker. I mean, that is just a fact.

Mr. KLEIN. Well, I think that we have to sort of accept the notion, whether as a matter of social policy, what we are providing under Medicare is an appropriate benefit for a group that is age 65 and over.

Senator BREAUX. Yes, but we talked about—my question was——

Mr. KLEIN. No, and once one accepts that——

Senator BREAUX. My question said, suppose you are not reaching an equal point. Then you are saying that the employer should have the right to contribute less to a post-65 retiree's health benefits who has higher cost than they would be able to contribute to a pre-65 retiree who has a lower cost. That, I am not sure I can handle.

Mr. KLEIN. Well, I guess I would just say two things in response to that. One, as a general rule, it is certainly an accurate statement that older retirees have higher health care costs than younger retirees. But on an individualized basis, that wouldn't, of course, necessarily be the case.

The other point is that even if one disputes the conclusion of Congress previously as to the non-applicability of any of this to retiree health, was it really Congress's intention to get into a distinction between levels of coverage between the pre-65 as well as the post-65? Would they be in the protected class.

Senator BREAUX. I imagine some companies, Ms. Neuman perhaps knows or anybody, would provide health care coverage for

their retirees only until they get to be 65 and contribute nothing after that.

Mr. KLEIN. Well, the other——

Senator BREAUX. Let me ask Ms. Neuman if that is correct.

Dr. NEUMAN. Some do, but most of the firms in our survey provided both the pre-65 and a 65-plus.

Senator BREAUX. But it is about almost up to 20 percent, I think, that provide it only to pre-65.

Mr. KLEIN. Senator, I think your analysis is absolutely correct there, but the way that employers are going to rectify the situation is by what you mentioned earlier. They are going to then just spend only $2 on the pre-age 65 folks.

Senator BREAUX. I think that everyone has had a chance to really spell out your views on the thing. It is indeed a complicated situation. This is not easy, but neither is anything else dealing with health care. It is very, very complicated and is the real challenge, I think, that we as a nation have.

We are debating health care coverage for people who have health care coverage. We still have 41 or 43 million Americans now who have none at all, zip, zero. We arguably are the richest nation in the history of the world and we have 43 million Americans who have no coverage at all for their health care, which is absolutely—it should be unacceptable in this country.

I would suggest that before we all meet in the Federal courthouse on this issue that the groups like yours that are here try to get together and see if there is some recommendation that could be jointly made to Congress about how we can legislatively address this. The other alternative is everybody go to the courthouse and litigate. I am not sure there are enough clear laws on the books to really bring about the best result.

Anti-discrimination laws are what we are litigating under, but I am not sure they quite fit the health situation that we are trying to figure out. I think we are all trying to make sure people who are retired get the best health coverage they possibly can get. That is the goal. I am not sure the anti-discrimination laws are designed to produce that result in these unusual circumstances, so it may mean that we need something else.

I would just encourage all of you to become involved in a serious effort in the private sector to come up with recommendations that we might consider, because everybody has a major interest in this. This is not something I think can be handled in the courthouse. It should be handled in the Congress, and hopefully we can use your recommendations to look for a solution. Boy, if we could get some kind of a generic recommendation from all sides, it would be very, very helpful to the people you represent as well as to the people that we represent.

With that, this committee hearing will be adjourned. Thank you very much.

[Whereupon, at 3:23 p.m., the committee was adjourned.]

APPENDIX

ERIC THE ERISA INDUSTRY COMMITTEE
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May 17, 2004

The Honorable John Breaux
U.S. Senate Special Committee on Aging
G 31 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Breaux:

The ERISA Industry Committee (ERIC) is very concerned about legislative efforts to overturn the April 22 Equal Employment Opportunity Commission (EEOC) exemption from the Age Discrimination in Employment Act (ADEA) that permits employers to coordinate post-employment health care coverage with Medicare. The EEOC proposed final rule has calmed the waters giving more confidence and certainty to America's employers. Efforts to derail the EEOC's responsible decision would result in an increased number of employers retreating from health arrangements.

As you are aware, employers voluntarily provide health care coverage to employees, retirees and often to their families. Many ERIC members provide retiree benefits to attract and keep good employees, and to reward them for years of dedicated service. Without, the EEOC rule becoming final, well meaning employers will be subject to lawsuits under the ADEA.

Some say the purpose of the EEOC rule is to permit employers to cut retiree health coverage. In fact, employer retiree health coverage was voluntary before the *Erie County* decision, and it remained voluntary after *Erie County*. Employers facing double-digit health inflation have been effectively forced to reduce or terminate retiree health coverage in order to comply with the *Erie County* decision. The EEOC rule creates no new right to reduce or terminate coverage that did not already exist, but it does provide urgently needed relief from the only economically viable option employers have to comply with the *Erie County* decision – to reduce or terminate coverage for retirees who are not Medicare-eligible.

We appreciate your support on this issue, as do the many retirees whose employer-provided health coverage will be strengthened by the EEOC rule. If we can provide you with any additional information, please call me directly.

Sincerely,

Mark Ugoretz
President

THE ERISA INDUSTRY COMMITTEE is a non-profit association advocating the employee benefit and compensation interests of America's major employers.

National Conference on Public Employee Retirement Systems
The Voice for Public Pensions

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STATEMENT FOR THE RECORD

BEFORE THE

SENATE SPECIAL COMMITTEE ON AGING

ON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S PROPOSED RULE EXEMPTING THE COORDINATION OF RETIREE HEALTH BENEFITS WITH MEDICARE FROM ADEA

MAY 17, 2004

BY

THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREEMENT SYSTEMS

NCPERS • 444 North Capitol Street NW, Suite 221, Washington, DC 20001 • 202-624-1456 • Fax 202-624-1439 • info@NCPERS.org • www.NCPERS.org

INTRODUCTION

The National Conference on Public Employee Retirement Systems (NCPERS) is the largest national, nonprofit public pension advocate. NCPERS was founded in 1941 to protect public employees and public pension systems. Today our membership includes over 500 pension funds representing $2 trillion in assets.

On behalf of the 500 pension funds we represent, we are pleased to submit our statement for the record in support of the Equal Employment Opportunity Commission's Proposed Rule Exempting the Coordination of Retiree Health Benefits with Medicare from Age Discrimination in Employment Act.

EEOC PROPOSED RULE BENEFITS ALL RETIREES

As you know, state and local government employers are not legally mandated to provide health benefits to retired government workers. However, partially because of collective bargaining and partially as an enticement to be public servants at wages generally lower than comparable work in the private sector, government retirees have traditionally received good retirement health care benefits.

Unfortunately, the times are changing. States and localities are not immune to the economic down turn that the nation has experienced over the past few years. These jurisdictions are facing tough financial times. Many address budget shortfalls by reducing health benefits. This trend would be exasperated if the Third Circuit's decision in Erie County Retiree Association vs. County of Erie (Erie County) is left unchallenged.

In Erie County, it was ruled that providing higher health benefits to pre-Medicare eligible retirees than Medicare-eligible retirees violated ADEA. However, some employers provide the "better" health benefits to pre-65 retirees because otherwise they would have no access to affordable health insurance. Once retirees enroll in Medicare, it's reasonable for the employer-based insurance to become the secondary insurer.

The net effect of this decision is that firefighters and police officers (who retire earlier than 65, some with mandatory retirement ages) and teachers could lose their employer-provided health benefits until they reach age 65 and become Medicare-eligible.

The EEOC proposed rule, when finalized, will encourage jurisdictions to continue to provide health benefits to retirees—both to those who retire before they become Medicare-eligible and those after Medicare becomes the primary payer of benefits.

This coordination of benefits, known as a Medigap program, allows employers to continue providing health benefits before retirees apply for Medicare, and then provide supplementary benefits once Medicare becomes the primary payer.

If the proposed rule does not become final, employers would face the choice of either enrolling all retirees—regardless of Medicare-eligibility status—into the employer-sponsored program—OR—eliminating coverage for retirees.

The cost to provide full benefits to all employees and retirees—regardless of Medicare status—would be prohibitive. Older retirees rely on employer-sponsored health benefits to cover medical costs not covered by Medicare.

Since public safety officers retiree earlier than 65—many having mandatory retirement ages—the loss of health benefits would leave them uninsured. Most could not afford private coverage or qualify for such coverage given their health status. The same is true for many teachers who retire earlier than 65.

The EEOC rule will allow public safety officers to retire with employer-provided health coverage until they reach 65. Then Medicare becomes the primary payer, with the employer-provided health coverage paying for what Medicare does not cover.

I am sure the members of the Committee know that the Federal Employee Health Benefit Program (FEHBP) provides participants the choice of high option plans and low option plans. The high option plans pay for most of your medical costs. The low option plans require you to pay most of the medical costs. These high option plans cost more than low option plans.

Right now, most jurisdictions offer high option plans to employees and pre-Medicare retirees. When Medicare becomes the primary payer, paying most of the costs, the employer-provided health insurance is reduced to a low option plan that pays those costs not covered by Medicare—thus providing retirees full coverage.

That policy makes financial sense. It works well. It does not discriminate. And it provides most of our retirees with some form of health insurance.

CONCLUSION

Right now, some NCPERS retirees are paying $1000 - $1200 per month for their share of the health insurance premium. That is upwards of $14,400 per year, just for health insurance coverage. In some cases, the cost of health insurance is consuming all of their pensions.

The EEOC proposed rule is a good, common sense rule that provides younger retirees access to affordable health care. Without the EEOC rule, millions of our retirees will lose health insurance and many will become part of the 44 million Americans without health insurance.

By not supporting the EEOC's proposed rule and letting the Erie County decision stand will make matters worse. NCPERS asks the Committee to support the EEOC rule on exempting retiree health benefits from the ADEA.

Mr. Chairman, thank you for the opportunity to submit our statement for the record. Please contact us at 202-624-1456, if you or other Committee members have any questions or if we can be of further service.

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