

H.R. & Employee Benefits E-Update

EEOC Authority To Allow Employer-sponsored Plans To Coordinate Retiree Health Benefits With Medicare Affirmed

July 19 Health Plan Seminar To Include Update On Health Plan Coordination of Benefits With Medicare

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A new Third Circuit decision has opened the door for the Equal Employment Opportunity Commission (EEOC) to finalize proposed regulations allowing employers to adopt and maintain Medicare bridge plans, Medicare wrap-around plans, and certain other retiree medical benefit plan designs providing reduced benefits for Medicare-eligible retirees without violating the Age Discrimination in Employment Act of 1967 (ADEA). An update on federal rules governing the coordination of employer-sponsored medical coverage with Medicare and other government health programs will be among the topics discussed at the "Health Plan Update In Texas" to be held July 19, 2007 in Dallas.¹

In its June 4, 2007 opinion in *AARP v. EEOC*, the Third Circuit ruled that the EEOC has the power to issue a regulation exempting from the prohibitions of the ADEA employer-sponsored benefits plans that coordinate retiree health benefits with eligibility for Medicare or state-sponsored health benefits programs.

The decision opens the way for the EEOC to finalize and implement proposed rules published in the Federal Register on July 14, 2003 that would exempt from the ADEA age discrimination prohibitions employer-sponsored health plan provisions that coordinate retiree health benefits with Medicare. If adopted as currently published by the EEOC, the final rule would read as follows:

(b) Exemption. Some employee benefit plans provide health benefits for retired participants that are altered, reduced or eliminated when the participant is eligible for Medicare health benefits or for health benefits under a comparable State health benefit plan. Pursuant to the authority contained in section 9 of the [ADEA], and in accordance with the procedures provided therein . . . it is hereby found necessary and proper in the public interest to exempt from all prohibitions of the Act such coordination of retiree health benefits with Medicare or a comparable State health benefit plan. 68 Fed. Reg. at 41,548-49.

Claiming that rule was contrary to the ADEA and its own rules, the AARP filed suit to enjoin the implementation of the rule on in the Eastern District of Pennsylvania on February 4, 2005, challenging the proposed regulation under the Administrative Procedure Act and the ADEA.

The Third Circuit's decision affirming the EEOC's authority to issue a regulation exempting retiree health plan provisions providing for the coordination of retiree medical benefits with Medicare does not mean that employers or their health plans have carte blanche to discriminate against retirees under the ADEA. Both the Court's opinion and EEOC's published statements make clear that the proposed regulatory exemption, if finally adopted, only provides relief for the retiree health plan rules it describes. As the EEOC noted in the Preamble to the proposed rule: "The rule only exempts the narrow practice of coordinating employer-sponsored retiree health benefits with eligibility for Medicare or a comparable State health benefits program. ADEA coverage of any other aspect of an employer-sponsored retiree health plan, or of any other employer act, practice, or benefit of employment, including employer-sponsored health plans for current employees, is not affected by the rule."

Furthermore, employer-sponsored health plans also must exercise care to ensure that their health plans comply with Federal rules regulating the coordination of health plan benefits with Medicare, Medicaid, military and certain other government programs. Most health benefit arrangements covered by ERISA include coordination of benefit provisions, pursuant to which the benefits otherwise payable under the health plan may be reduced by benefits paid, or deemed by the claims fiduciary to be payable, under another plan. When designing or administering the coordination of benefits procedures of a health plan, it is critical to ensure that the coordination of benefits with Medicare, Medicaid, and certain other government health programs do not violate Federal law.

The Social Security Act, for instance, requires that most health plans comply with special rules regarding the coordination of Medicare and Medicaid benefits with benefits received under an employer-sponsored plan. These rules and their implementing regulations generally prohibit employer-sponsored health plans from treating Medicare as primary to the employer-sponsored health plan's coverage with respect to working individuals enrolled in Medicare. The Medicare Secondary Payer regulations also generally prohibit employer-sponsored health plans from (1) failing to pay primary benefits; (2) offering coverage that is secondary to Medicare to active, Medicare-entitled individuals; (3) terminating coverage for an active individual based on Medicare entitlement due to age or disability; (4) imposing limitations or conditions on benefits for a Medicare entitled active individual not also applicable to others enrolled in the plan; (5) requiring active Medicare entitled individuals to wait longer for coverage to begin than non-Medicare eligible persons; (6) limiting payments to providers and suppliers to no more than Medicare would have paid while paying higher amounts for the same services and supplies for plan beneficiaries not entitled to Medicare; (7) providing misleading or incomplete information that would induce a Medicare entitled individual to reject an employer plan, such as by informing the individual of the right to accept or reject the employer plan but failing to disclose that if the plan is rejected, the plan cannot provide or pay for secondary benefits; (8) telling or requiring Medicare eligible participants and beneficiaries or their health care providers that Medicare must be billed first for services furnished without also stipulating that this directive applies only when Medicare is the primary payer; and (9) refusing to enroll an individual for whom Medicare would be a secondary payer when enrollment is available for similarly situated individuals who are not entitled to Medicare. Likewise, Federal law also generally prohibits employer-sponsored health plans from discriminating against Medicaid eligible individuals or taking into account benefits otherwise payable under Medicaid when determining plan benefits. Violation of these rules can subject the health plan, and in some cases its administrators and fiduciaries to liability to the Department of Health and Human Services, to participants and beneficiaries, or both.

If you want assistance evaluating your current human resources or employee benefit practices in light of the ADEA, the Medicare law or otherwise or have other questions about the implications of this decision or other federal regulatory and enforcement positions on your human resources, employee benefit or internal controls practices and liabilities, please contact: Cynthia Marcotte Stamer, P.C., Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, LB 48, Dallas, Texas 75240. Telephone (972) 419-7188. E-mail cstamer@gpm-law.com.

We hope that this information is useful to you. If you found this alert of interest, you may also be interested in reviewing other editions of this E-Alert such as the recently posted "DOL Releases FLSA Overtime Calculator," "Congress Looking At Companies Relationships With Compensation Consultants," and "Texas Licensing Regulator's Update Of Criminal Conviction Guidelines May Merit Review Of Employer's Criminal Conviction and Background Check Policies." To review these and other informative updates and advisories on human resources, employee benefits, and related matters, go to CynthiaStamer.com. If you or someone else you know would like to receive future Alerts or other information about developments, publications or programs, please be sure that we have your current contact information – including your preferred e-mail – by providing that information to us through registration on our website at Cynthiastamer.com or via telephone, fax or e-mail.

ABOUT CYNTHIA STAMER

Board Certified In Labor and Employment Law by the Texas Board of Legal Specialization and Chair of both the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group and the ABA Real Property, Probate & Trust Section Welfare Plan Committee, attorney Cynthia Marcotte has nearly 20 years experience helping employers, employee benefit plans and their fiduciaries, and their consultants, vendors and advisors, design, implement, administer and defend health and other employee benefit, human resources and other internal controls, outsourcing and other external services arrangements, compensation, and other human resources, employee benefit, and related programs, practices, and risk management strategies. Her practice focuses on working with businesses to design human resources, employee benefits, and operational programs, plans, and products and other aspects of helping businesses manage their people and processes, prevent and solve problems, manage risks and costs, and support other business objectives.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal consultant, author and speaker, who regularly conducts management and other training on a wide range of human resources and other related risk management matters. She also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. For instance, in addition her many leadership roles in the American Bar Association, Ms. Stamer also serves the editorial advisory board of The Bureau of National Affairs, Inc. (BNA), Employee Benefits Library on CD and various other editorial advisory boards, is a past Chair of the Dallas Bar Association's Executive Compensation and Employee Benefit Committee, is a former Board Member and Continuing Education Chair of the Southwest Benefits Association, a former member of the Society For Human Resources Management's Consultants Forum and Region IV Boards on the Board of Directors of the National Kidney Foundation of North Texas, and in leadership roles in various other professional, charitable and civil organizations.

Ms Stamer is the author of 100s of publications on a host of human resources and related issues. Her writings have appeared in a variety of other publications, including works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, and Government Institutes, Inc. and others. For a listing of some of these publications, see cynthiastamer.com. Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications.

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