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## Winning the Battle, but Losing the War: Purported Age Discrimination May Discourage Employers from Providing Retiree Medical Benefits, 35 J. Marshall L. Rev. 709 (2002)

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## COMMENTS

### WINNING THE BATTLE, BUT LOSING THE WAR: PURPORTED AGE DISCRIMINATION MAY DISCOURAGE EMPLOYERS FROM PROVIDING RETIREE MEDICAL BENEFITS

CHRISTOPHER E. CONDELUCI\*

It has been our policy to encourage employers to provide generous employee benefits. Clearly, this objective is frustrated, if not defeated, if Congress enacts legislation that so heavily encumbers American companies that they must reduce or eliminate such benefits...we must be concerned about the impact on all employees of additional Federal requirements that unnecessarily complicate existing arrangements or that will shift a firm's resources from actual benefits into regulatory compliance or litigation. If an employer is forced to reduce or eliminate benefits for some workers to avoid litigation exposure or to avoid going afoul of the law, we have to ask the question: Is it worth it?<sup>1</sup>

#### INTRODUCTION

The employer-sponsored health benefit system in the United

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1. 136 CONG. REC. S13,594, S13,600 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch).

States is voluntary.<sup>2</sup> Congress enacted the Employee Retirement Income Security Act of 1974<sup>3</sup> (“ERISA”) to provide protection for plan participants and “to prescribe a uniform set of requirements for employers in the voluntary delivery of such benefits.”<sup>4</sup> In addition to ERISA, several federal laws affect the design of employer-provided benefits including the Age Discrimination in Employment Act of 1967<sup>5</sup> (“ADEA”) as amended by the Older

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2. Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1084 (2001); see also 120 CONG. REC. S29,942, S29,942 (statement of Sen. Javits) (stating that the purpose of the Employee Retirement Income Security Act (“ERISA”), enacted in 1974, was “to maintain the voluntary growth of private [pension and employee benefit] plans while . . . making needed structural reforms in such areas as vesting, funding, termination, etc. so as to safeguard workers against loss of their earned or anticipated benefits. . .”). See also Margaret G. Farrell, *ERISA Preemption and Regulation of Managed Health Care: The Case for Managed Federalism*, 23 AM. J. L. & MED. 251, 251 (1997) (stating that ERISA was enacted to maintain the voluntary growth of employee benefit plans); see also *United States General Accounting Office, Retiree Health Insurance: Erosion in Retiree Health Benefits Offered by Large Employers: Testimony Before the Subcomm. on Oversight, Comm. on Ways and Means House of Representatives*, 105th Cong. Pub. No. GAO/T-HEHS-98-110, 10 (1998) (statement of William J. Scanlon, Director Health Financing and Systems Issues Health, Education, and Human Services Division)[hereinafter *GAO Testimony I*] available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=he98110t.pdf&directory=/diskb/wais/data/gao> (last visited Aug. 23, 2002); see generally Dana M. Muir, *From YUPPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation*, 34 GA. L. REV. 195 (1999).

3. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified at 29 U.S.C. § 1001 et. seq. and amended in various sections of 26 and 29 U.S.C.). ERISA is the federal labor law, together with I.R.C. § 401 (1994 & Supp. III 1997), which regulates the adoption and maintenance of voluntary employer-sponsored retirement and welfare plans. ERISA’s provisions were codified in Title 29 of the United States Code, whereas the related tax provisions of the Internal Revenue Code were codified in Title 26 of the United States Code. Kennedy, *supra* note 2, at 1084 n.1.

4. Kennedy, *supra* note 2, at 1084.

Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b) (2000).

5. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 et. seq.). The Age Discrimination in Employment Act (“ADEA”), enacted in 1967, has been amended by subsequent sessions of Congress. See, e.g., Kerry A. Brennan, Note, *Early Retirement Incentives: “Golden Handshake” for Some, Age Discrimination for Others*, 54 BROOK. L. REV. 927, 929 n.9 (1988) (listing

Workers Benefit Protection Act of 1990<sup>6</sup> (“OWBPA”).

The ADEA creates a protected class consisting of workers that are age forty and older.<sup>7</sup> Specifically, the ADEA, as amended by the OWBPA, prohibits employers from providing fewer benefits because of an individual’s age.<sup>8</sup> Although ERISA prescribes a uniform set of minimum rules for providing health benefits, ERISA did not contemplate retiree medical benefits<sup>9</sup> at the time of its enactment.<sup>10</sup> Instead, as health benefits were used by

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the amendments as: “Pub. L. No. 93-259, 88 Stat. 74 (1974); Pub. L. No. 95-256, 92 Stat. 189-93 (1978); Pub. L. No. 97-248, 96 Stat. 353 (1982); Pub. L. No. 98-369, 98 Stat. 1063 (1984); Pub. L. No. 98-459, 98 Stat. 1792 (1984); Pub. L. No. 99-592, 100 Stat. 3342 (1986).”

6. Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 629, 630); *see* Older Worker Benefit Protection Act (“OWBPA”) § 102, 29 U.S.C. § 630(l) (2000). “The term ‘compensation, terms, conditions, or privileges of employment’ encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.” *Id.*; *see also* S. REP. NO. 101-263, at 16 (1990). “Through this legislation, Congress intends to make unmistakably clear that the ADEA’s purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits.” *Id.*

7. ADEA § 12(a), 29 U.S.C. § 631(a)(2000). “The prohibitions in this chapter shall be limited to individuals who are at least forty years of age.” *Id.*

8. *See* 135 CONG. REC. S9948, S9950 (daily ed. Aug. 3, 1989) (statement of Sen. Metzenbaum). *See also* PLAN SPONSOR.COM, *EEOC Reviewing Policy on Retiree Health Benefits*, July 25, 2001, at <http://www.plansponsor.com/eprise/main/PlanSponsor/News/Rules/eoceriereview.htm> (last visited Aug. 1, 2002) (stating that the Third Circuit Court of Appeals held that the ADEA applied to employers who provided unequal benefits).

9. Retiree medical health benefits are provided to retired employees in a similar manner as health benefits are provided to active employees. There are several approaches employers can take in providing retiree medical benefits. *Id.* For example, the medical benefits a retiree receives may depend upon the retiree’s age, length of service with the employer, and the year in which the employee retired. *Id.* Additionally, benefits can be provided on a cost-sharing basis where both the employer and the retiree contribute toward health insurance premiums. *Id.* Several retiree medical benefit programs are provided through health maintenance organizations or traditional indemnity plans. *Id.* The purpose of providing such benefits is to allow retirees the opportunity to receive affordable health benefits up until the time Medicare benefits become available, i.e., when the retiree reaches age sixty-five. *Id.* To be eligible for retiree medical benefits, a retiree must have been a “regular” employee at the time of his or her retirement. *See generally* THE SEGAL COMPANY, *Benefits to Balance Your Personal and Professional Lives: Retiree Medical Benefits*, at <http://www.segalco.com/careers/benefits.html> (last visited Aug. 20, 2002); Richard H. Herchenroether, *Medical Expenses Insurance: Simpler and Better*, BENEFITSLINK.COM, 1998, at <http://www.benefitslink.com/articles/msa.shtml> (last visited Aug. 20, 2002); Woods Hole Oceanographic Institution, Human Resources Office, *Retiree Medical Benefits*, Mar. 1, 2001, available at <http://www.whoi.edu/services/HR/retiree/med.htm> (last visited Aug. 20, 2002).

10. ERISA § 3(1), 29 U.S.C. § 1002(1) (2000).

employers to attract and retain employees, employers increasingly began providing such incentives.<sup>11</sup>

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The terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

*Id.*

11. *United States General Accounting Office, Retiree Health Insurance: Gaps in Coverage and Availability, Testimony Before the Subcomm. on Employer-Employee Relations, Comm. on Education and the Workforce House of Representatives*, 107th Cong. Pub. No. GAO-02, 178T, 3 (2001) (statement of William J. Scanlon, Director, Health Care Issues)[hereinafter *GAO Testimony II*] available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=d02178t.pdf&directory=/diskb/wais/data/gao> (last visited Aug. 23, 2002).

Since World War II, many employers have voluntarily sponsored health insurance as a benefit to employees for purposes of recruitment and retention, and many have also extended these benefits to their retirees. The federal tax code gives employers incentives to subsidize health benefits because their contributions can be deducted as a business expense, and these contributions are also not considered taxable income for employees.

*Id.*

In addition to providing retiree medical benefits in hopes of attracting and retaining employees, many employers today are providing such benefits as incentives to encourage older employees to leave active employment with their respective employer. David M. Katz, *Medical, Dental, Prescription Drugs: Ain't Retirement Grand? Eager to get workers off the payroll, employers consider boosting retirement benefits*, CFO.COM, Nov. 5, 2001, at <http://www.cfo.com/Article?article=5181> (last visited Aug. 20, 2002). Thus, “the approach to losing workers is the same as it was for retaining workers.” *Id.* Employers are beginning to offer “attractive” benefits to downsize their workforce. *Id.* “As some employers have discovered, better retiree health-care coverage can be particularly attractive to workers in their mid to late 50s.” *Id.* Because workers in their 50s traditionally want to retire, and likewise because employers have traditionally found it to be in their best interests to encourage early retirement, employers have sought to provide additional benefits in hopes of incentivizing early retirement. *Id.* But those employees opting to take advantage of early retirement find themselves in a position where they are well short of receiving Medicare benefits. *Id.* In order to bridge the gap between early retirement and the receipt of Medicare benefits upon reaching the age of sixty-five, employers have sought to provide generous retiree medical benefits as an incentive to leave employment. *Id.* Such employers, however, subsequently terminate or reduce those benefits when the retiree reaches Medicare-eligibility. *Id.*

Today, retiree medical benefits are arguably one of the most valued benefits an employee can receive from his or her employer.<sup>12</sup> Providing affordable health care for retirees is an important social policy issue.<sup>13</sup> With the baby boom generation looming on the verge of retirement, retiree medical benefits are becoming increasingly important.<sup>14</sup> Thus, Congress and the courts should encourage employers to provide their employees with retiree medical benefits. Congress consistently attempts to strike a balance between regulating employee benefit plans and encouraging employers to provide such benefits.<sup>15</sup> The courts, on the other hand, often interpret federal statutes in a manner that discourages employers from providing these valuable employee benefits, contrary to Congressional intent.<sup>16</sup>

In August 2000, the Third Circuit Court of Appeals ruled in *Erie County Retirees Assoc. v. County of Erie, Penn.*<sup>17</sup> that a retiree medical benefit plan violated the ADEA because the plan failed to give older retirees<sup>18</sup> the same health benefit choice as younger retirees.<sup>19</sup> Specifically, active employees and non-Medicare-eligible

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12. Telephone Interview with Mary Lou Dixon, plan participant, Shaler Area School District Retiree Medical Benefit Plan (Aug. 15, 2001).

13. See 136 CONG. REC. S13,594, S13,600 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch). "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 is a positive practice which helps provide important protections for retirees. . . . [that] are vital to retirees of all ages." *Id.*

14. Employers recognize the importance of retaining an experienced workforce, while at the same time, struggle with their increased medical coverage. *GAO Testimony I, supra* note 2, at 3. The decision of when to retire often turns on the availability of employers continuing to provide benefits. *Id.*

15. See, e.g., *Opening Statement of Chairman Johnson, Hearing on Retirement Security for the American Worker: Opportunities and Challenges Before the Subcomm. on Employer-Employee Relations Committee on Education and the Workforce, House of Representatives, 107th Cong.* (Nov. 1, 2001) (statement of the Honorable Sam Johnson (R-TX), Chairman, Subcomm. on Employer-Employee Relations) available at <http://edworkforce.house.gov/hearings/107th/eer/retiree110101/osjohnson.htm> (last visited July 11, 2002). "As all the members know and understand, retiree health coverage provided by employers under ERISA is a *voluntary* undertaking by employers. We should not do anything that would cause this coverage to be withdrawn due to higher costs or complicated Federal governmental policy (emphasis added)." *Id.*

16. See generally, *Erie County Retirees Assoc. v. County of Erie, Penn.*, 220 F.3d 193 (3rd Cir. 2000).

17. 220 F.3d 193 (3rd Cir. 2000).

18. "Older retirees" are retirees age sixty-five or older and Medicare eligible.

19. "Younger retirees" are retirees below the age of sixty-five and traditionally not yet eligible for Medicare. See *Erie County*, 220 F.3d at 217 (holding that the retiree class "established a claim under [§ 4(a)(1) of the

retirees were given the opportunity to choose between a point-of-service<sup>20</sup> (“PSO”) health plan and a health maintenance organization<sup>21</sup> (“HMO”), but retirees eligible for Medicare<sup>22</sup> were only offered the HMO.<sup>23</sup> The Third Circuit held that benefits available to Medicare-eligible retirees under the HMO provided less benefits than those available to active and non-Medicare-eligible retirees, thus violating the ADEA.<sup>24</sup> Structuring retiree medical benefits in such a manner, however, is a relatively common practice among employers.<sup>25</sup>

The Equal Employment Opportunity Commission (“EEOC”) has jurisdiction over the ADEA.<sup>26</sup> In October 2000, two months after the *Erie County* decision, the EEOC adopted the Third Circuit’s decision in its enforcement guidelines.<sup>27</sup> Specifically

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ADEA] because they [were] treated differently in their ‘compensation, terms, conditions, or privileges of employment, because of . . . age,’” but noting that “the safe harbor provided under [§ 4(f)(2)(B)(i) of the ADEA] [may be] applicable if the County [could] meet the equal benefit or equal cost standard”).

20. A PSO health plan combines the features of an Health Maintenance Organization (“HMO”) and a traditional indemnity plan. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 235 n.1 (5th ed. 1997). A POS plan, “is an [HMO] organization in which the patients are prepaid enrollees who may receive services from providers who are not members of the HMO’s panel.” *Id.*

21. “[An] (HMO) is an organization that offers prepaid, comprehensive health coverage for both hospital and physician services. Members are required to use participating providers and are enrolled for specified periods of time.” *Id.*

22. 42 U.S.C. § 1395 (2000).

Every individual who— (1) is entitled to hospital insurance benefits under part A, of this subchapter or (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, is eligible to enroll in the insurance program established by this part.

*Id.*

23. *Erie County*, 220 F.3d at 197-98.

24. *Id.* at 217.

25. GAO Testimony I, *supra* note 2, at 6; see also GROOM LAW GROUP, *Third Circuit Questions Legality of Retiree Health Plans That Provide Different Medical Benefits to Pre-Medicare Retirees and Medicare-Eligible Retirees*, Aug. 30, 2000, at 3, available at <http://www.americanbenefitscouncil.org/documents/adeadecisionmemo.pdf> (last visited Aug. 20, 2002) (stating that many companies institute policies that grant different levels of health care benefits to eligible Medicare employees and non-eligible Medicare employees); Brief of Amici Curiae, *The ERISA Industry Committee in Support of Petitioner at 11, County of Erie, Penn. v. Erie County Retirees Assoc.*, 121 S. Ct. 1247 (2001) (No. 00-906).

26. See generally 29 U.S.C. § 626 (2000).

27. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE

citing *Erie County*, the EEOC “assert[ed] that employers may not reduce or eliminate retiree health benefits when a retiree becomes eligible for Medicare. . . .”<sup>28</sup> The EEOC contended that if an employer eliminated coverage for retirees when they were eligible for Medicare, or if the employer did not offer equitable benefit coverage to older and younger retirees, older retirees would receive less coverage than younger retirees because of their age, which the ADEA prohibits.<sup>29</sup>

The ruling in *Erie County* can best be described as retirees winning the battle, but losing the war, because the decision, especially for retirees in the Third Circuit, threatens the availability of retiree medical benefit programs.<sup>30</sup> As a result, employers may choose to eliminate these programs entirely, rather than risk violating a federal discrimination law.<sup>31</sup> Because there is no requirement for employers to provide retiree medical benefits,<sup>32</sup> significant increases in the cost of benefits and administration have already caused employers to reconsider the scope and

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MANUAL, § 3 Employee Benefits ¶ 7212 5807-5807-3 (2002). [hereinafter EEOC MANUAL].

Benefits will not be equal, on the other hand, where a plan sets a specific, age-based cutoff for the length of time employees can receive payments . . . . Moreover, benefits will not be equal where a plan reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age. . . Example: employer B provides health insurance for its retirees but eliminates that coverage once the retirees become eligible for old-age benefits under Medicare. Because eligibility for these Medicare benefits is tied to age, employer B's plan treats retirees differently on the basis of age.

*Id.*

28. *Id.* at ¶ 7214 5817; see also WATSON WYATT WORLDWIDE, *Court Ruling Threatens Employer-Sponsored Retiree Medical Benefits*, June 2001, at <http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=9145&Component=The+Insider> (last visited Aug. 21, 2002).

29. Jerry Geisel, *EEOC Enforcement of Erie Case on Hold*, BUS. INS., July 30, 2001, at 1.

30. See QUARLES & BRADY, LLP, *Practical Guide to Employment Relations: Does Your Retiree Health Plan Violate the ADEA*, Jan. 2001, Issue 30, available at [http://www.quarles.com/up\\_pra13.asp](http://www.quarles.com/up_pra13.asp) (last visited Aug. 20, 2002)

31. See WIMBERLY, LAWSON, STECKEL, NELSON & SCHNEIDER, P.C., *Lower Benefits for Older Retirees May Violate Age Discrimination Law*, Volume XXI, Issue 10, Oct. 2000, available at [http://www.wimlaw.com/news\\_oct00.htm](http://www.wimlaw.com/news_oct00.htm) (last visited Aug. 1, 2002) (providing that “the elimination of benefits, or reduction of coverage, upon a participant’s eligibility for Medicare has been a relatively common feature of retiree medical programs”).

32. See GAO *Testimony I*, *supra* note 2, at 10-11 (stating that “[n]othing in federal law prevents an employer from cutting or eliminating health benefits. In fact, an employer’s freedom to modify the conditions of coverage or to terminate health coverage is a defining characteristic of America’s voluntary, employer-based system of health insurance.”).



availability of their retiree medical programs.<sup>33</sup> With the added threat of liability under age discrimination laws, employers may “throw their hands in the air,” and terminate benefits altogether. Such extreme cases were never contemplated, nor are they acceptable to Members of Congress in the regulation of the completely voluntary, employer-provided, employee benefits system.<sup>34</sup> Therefore, is *Erie County* good law?

On August 17, 2001, by a unanimous vote, the EEOC temporarily abandoned the *Erie County* court’s holding by officially rescinding their current interpretation of how the ADEA applies to retiree medical benefit plans.<sup>35</sup> The EEOC announced that it would begin reviewing its policy “concerning the application of the [ADEA] to employer-sponsored retiree health benefit plans, such as those offering extended health care coverage in the form of a Medicare bridge,” (i.e. coverage until Medicare eligibility at age sixty-five).<sup>36</sup> Commission Vice Chair Paul M. Igasaki acknowledged that the EEOC “must carefully craft a policy which protects the rights of older retirees but does not deter employers from providing health benefits to retirees in general.”<sup>37</sup> Despite the EEOC’s temporary shift in policy, however, the *Erie County* decision is still valid legal precedent that enables retirees to bring suit against their former employers.<sup>38</sup>

Part I of this Comment discusses the *Erie County* holding, facts, and rationale. Specifically, Part I focuses on the Third Circuit’s application of the ADEA to retirees. Part II examines the Third Circuit’s reasoning that led to the conclusion that the ADEA applied to retirees. Part II also asserts that “retirees” should not be considered “individuals” for the purposes of the ADEA, and criticizes the Third Circuit for concluding that section

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33. Paul Fronstin, *Retiree Health Benefits: Trends and Outlook*, EBRI ISSUE BRIEF NUMBER 236, Aug. 2001, at 7, 9 [hereinafter EBRI REPORT].

34. See *supra* note 1. (statement of Sen. Hatch); see also 136 CONG. REC. S13,253, S13,254 (daily ed. Sept. 17, 1990) (statement of Sen. Kassenbaum) (stating that “[w]e should be encouraging employers to offer benefit programs to workers, not discouraging or eliminating popular beneficial employee benefit programs”).

35. Press Release, EEOC, EEOC Rescinds Guidance; Will Review Policy on Retiree Health Benefits (Aug. 20, 2001) at <http://www.eeoc.gov/press/8-20-01.html> (last visited Aug. 1, 2002) [hereinafter EEOC Press Release].

36. *Id.*

37. *Id.*

38. See GROOM LAW GROUP, *EEOC Rescinds*, Aug. 29, 2001, at [http://www.groom.com/articles\\_display.asp?display=107](http://www.groom.com/articles_display.asp?display=107) (last visited Aug. 1, 2002). “The Commission’s action does not eliminate the risk of liability associated with Medicare-based benefit differentials in retiree health plans. The *Erie County* decision itself remains controlling precedent within the Third Circuit (Pennsylvania, New Jersey, Delaware and the Virgin Islands). Interested parties likely will continue to press for more definitive comfort.” *Id.*

4(a)(1) of the ADEA protects “retirees.” Part III examines the district court’s initial holding and rationale in *Erie County*. Part III also provides an analysis of the OWBPA’s legislative history, illustrating that statements made by Members of Congress provide a clear and unambiguous intent that the ADEA should not apply to retirees. Part III concludes by examining the Third Circuit’s reliance on the EEOC and portions of the OWBPA’s legislative history, and contends that such reliance is contradictory and inconsistent with established precedent. Part IV explores the EEOC’s policy with regard to the ADEA and retirees and examines the principles associated with the equal benefit or equal cost safe harbor.<sup>39</sup> Part IV also discusses the district court’s application of the equal benefit or equal cost safe harbor as directed by the Third Circuit, and argues that the *Erie County* decision as a whole will result in the elimination of retiree medical programs. Finally, Part V proposes that other circuits should *not* follow the *Erie County* decision and that Congress, the courts, and the EEOC should recognize that the ADEA is inapplicable to retirees. Part V concludes by proposing various legislative and regulatory changes to the ADEA and the equal benefit or equal cost safe harbor.

#### *Background of the Law*

ERISA provides rules and requirements regulating the voluntary delivery of benefits to employees.<sup>40</sup> The ADEA prohibits age discrimination by providing that “an employer . . . [cannot] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”<sup>41</sup> The OWBPA resurrected one of the ADEA’s original purposes—the elimination of age discrimination in employee benefits.<sup>42</sup> In order to restore this purpose, the OWBPA specifically defined the term “compensation, terms, conditions, or privileges of employment” in the ADEA to include “all employee benefits.”<sup>43</sup> Thus, the ADEA, as amended by

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39. 29 U.S.C. § 623(f)(2)(B)(i) (2000).

40. *See generally* 29 U.S.C. § 1001 *et. seq.* (2000).

41. 29 U.S.C. § 623(a)(1) (2000). “It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” *Id.*

42. S. REP. NO. 101-263, at 15 (1990). The “Findings” in the OWBPA provides that “legislative action is necessary to restore the original congressional intent in passing and amending the ADEA, which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.” *See* OWBPA § 101.

43. OWBPA § 102; 29 U.S.C. § 630(l) (2000); S. REP. NO. 101-263, at 16

the OWBPA, "prohibit[s] discrimination against *older workers* in all employee benefits *except* when age-based reductions in employee benefit plans are justified by significant cost considerations."<sup>44</sup>

One of the original purposes underlying the enactment of the OWBPA was to expressly overrule *Public Employees Retirement System of Ohio v. Betts*,<sup>45</sup> wherein the Supreme Court eliminated the ADEA's protections against discrimination in employee benefits.<sup>46</sup> In *Betts*,<sup>47</sup> the Supreme Court held that the ADEA

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(1990) (emphasis added).

44. S. REP. NO. 101-263, at 15 (1990).

The bill restores the bipartisan pre-Betts understanding of the employee benefit provisions of the ADEA . . . by reaffirming the 'equal benefit or equal cost' principle . . . a principle that reflects common sense as well as Congressional intent. . . . Because age-related cost differences do exist for some benefits (such as life insurance or disability), employers who demonstrate such a cost differential may comply with the ADEA by expending equal amounts for the benefit per employee. This "equal benefit or equal cost" rule is fair to employees because it encourages employers to provide equal benefits for older workers. It also is fair to employers because it gives them the flexibility to provide unequal benefits if they have sufficient age-based cost justifications.

136 CONG. REC. S13,236, S13,242-43 (daily ed. Sept. 17, 1990) (Summary of the OWBPA).

45. 492 U.S. 158 (1989).

In this case the slim conservative majority interpreted the Age Discrimination in Employment Act of 1967 [ADEA] as providing little or no protection for older workers from discrimination in employee benefit plans. The original intent of Congress in passing and amending the ADEA was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations. The EEOC under the Reagan administration had vigorously litigated to defend this very interpretation of the act.

137 CONG. REC. S14,512, S14,514 (daily ed. Oct. 8, 1991) (statement of Sen. Jeffords).

46. *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989).

47. *Betts*, 492 U.S. at 163. June Betts was a public employee in Ohio. *Id.* At age sixty-one she became permanently and seriously disabled and had no choice but to retire. *Id.* Ohio's Public Employee Retirement System (PERS), enacted in 1933, provided for basic retirement and disability retirement. *Id.* Disability retirement was limited to employees sixty and under. *Id.* Betts was not allowed to take disability retirement because she was over sixty, and therefore forced to settle for basic retirement benefits. *Id.* She filed suit in Federal court contending that the plan discriminated against older workers in violation of the ADEA. *Id.* at 164. Applying the EEOC's equal benefit or equal cost test, the district court held in favor of Betts, finding the PERS did not satisfy section 4(f)(2)'s exception to the ADEA. *Id.* The Sixth Circuit subsequently affirmed the district court's decision. *Id.* at 164-65. The Supreme Court, however, rejected this long-standing and accepted interpretation of section 4(f)(2), and instead adopted a "plain meaning" approach to the term "subterfuge." *Id.* at 168. The Court held that a post-

permitted age discrimination in employee benefit plans.<sup>48</sup> Specifically, the Supreme Court held that an employer need not demonstrate a legitimate cost justification in order to deny employee benefits based on age.<sup>49</sup> The decision effectively ignored the ADEA's legislative history, was contrary to the views of the Department of Justice and the EEOC, and reversed well established precedent set forth by the federal courts and applicable federal agencies.<sup>50</sup>

In addition to overruling *Betts*, the OWBPA deleted the "subterfuge" language in section 4(f)(2)<sup>51</sup> of the ADEA and replaced it with the current provision,<sup>52</sup> including the express codification of

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ADEA employee benefit plan does not violate the ADEA "so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* at 177. Better stated, it was not a violation of the ADEA for an employer to discriminate against an older worker in terms of employee benefits so long as the benefit plan was not a vehicle for discrimination in other prohibited ways, such as salary, hiring or firing. *Id.*

48. *Id.* at 182.

For More than [twenty] years, older workers have been protected from age discrimination not only in hiring, firing, promotions, demotions, and compensation, but also in the critical area of employee benefits. However, on June 23, 1989, the U.S. Supreme Court in the *Betts* decision essentially eliminated the applicability of the Federal Age Discrimination in Employment Act to employee benefits. As a result of the Court's decision, employers can now freely discriminate against older workers in such vital employee benefits as health insurance, disability and life insurance.

136 CONG. REC. E2770, E2770 (daily ed. Sept. 10, 1990) (statement of Rep. Roybal).

49. *Betts*, 492 U.S. at 182; see also 135 CONG. REC. E2880, E2880 (daily ed. Aug. 4, 1989) (statement of Rep. Clay) (stating that Justice Kennedy ignored ADEA's legislative history, and did not give credence to the "plain language of the statute," and instead, held that, "the only way that an employer could violate (4)(f)(2) of the ADEA—the exemption for bona fide employee benefit plans that are not a subterfuge to evade the purpose of the law—was if the employer also discriminated in some other nonfringe benefit aspect of the employment relationship.").

50. 135 CONG. REC. S9948, S9950 (daily ed. Aug. 3, 1989) (statement of Sen. Metzenbaum). "This is the first time since Congress passed the ADEA that employers have been permitted to discriminate in providing employee benefits. The *Betts* decision reverse[d] 20 years of settled law, including regulations supported by the Johnson, Nixon, Ford, Carter, Reagan and Bush administrations, and the [decisions of Five Circuit Courts]." *Id.*

51. See, e.g., *Erie County*, 220 F.3d at 203-04; (citing *Betts*, 492 U.S. at 165) (noting that at the time of the *Betts* decision, section 4(f)(2) of the ADEA reflected the old subterfuge language and did not reflect the amended language added by the OWBPA, i.e. section 4(f)(2) provided "that it was not unlawful for an employer 'to observe the terms of . . . any bonafide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the ADEA'").

52. 29 U.S.C. § 623(f)(2) (2000).

the equal benefit or equal cost standard in section 4(f)(2)(B)(i).<sup>53</sup> The equal benefit or equal cost standard provides that an employer may lawfully reduce employee benefits, provided that 1) the benefits available to older workers are no less favorable than those the employer provides to younger workers, and 2) the employer spends the same amount of money, or incurs the same cost, on behalf of older workers as on behalf of younger workers in providing such benefits.<sup>54</sup>

In 1969, "the Department of Labor (DOL) issued a three-paragraph regulation interpreting section 4(f)(2)" of the ADEA as originally legislated.<sup>55</sup> The DOL interpretation provided that:

A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.<sup>56</sup>

This "equal benefit or equal cost" standard explicitly carved out an exception from ADEA liability for employers providing benefits to employees.<sup>57</sup> In 1979, the enforcement authority over the ADEA was transferred to the EEOC, where the EEOC subsequently redesignated the DOL regulations interpreting section 4(f)(2) of the ADEA to 29 C.F.R. section 1625.10.<sup>58</sup> Courts have applied 29 C.F.R. section 1625.10 holding that "an employer could avail itself of the section 4(f)(2) safe harbor if it provided either equal benefits to older and younger workers or incurred equal costs on behalf of each."<sup>59</sup>

Today, the EEOC adheres to section 4(f)(2)(B)(i) and 29 C.F.R. section 1625.10, and includes the equal benefit or equal cost safe harbor in its Compliance Manual.<sup>60</sup> The EEOC policy provides

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53. OWBPA § 103; 29 U.S.C. § 623(f)(2)(B)(i) (2000).

54. 29 U.S.C. § 623(f)(2)(B)(i) (2000).

55. 135 CONG. REC. S9948, S9948-49 (daily ed. Aug. 3, 1989) (statement of Sen. Pryor).

56. *Id.*; see also 29 C.F.R. § 1625.10(2001) (applying different terms but maintaining the basic premise of the DOL interpretation).

57. 135 CONG. REC. S9948, S9949 (daily ed. Aug. 3, 1989) (statement of Sen. Pryor).

58. *Erie County*, 220 F.3d at 203 n.5 (citing S. REP. NO. 101-263, at 8-12 (1990)).

59. *Id.* at 203; see also *Auerbach v. Bd. of Ed. of the Harborfields Cent. Sch. Dist. of Greenlawn*, 136 F.3d 104, 111 (2nd Cir. 1998) (articulating that "for a plan to comply with the ADEA, the employer had to show that it either provided the same benefits to older employees or incurred the same costs on behalf of older employees[,] and providing that "[u]nder this 'equal benefit or equal cost' principle, so long as the employer could provide a cost-based justification for the disparate benefits, the plan would not be a 'subterfuge'").

60. See EEOC MANUAL, *supra* note 27, at ¶ 7212 5807.

that the equal benefit or equal cost safe harbor allows an employer to provide lesser benefits to older employees so long as that employer can show that the cost of the benefits for older workers was at least equal to the cost of the benefits of younger employees.<sup>61</sup> Thus, if an employer's cost of providing benefits to an older worker exceeds the cost of benefits provided to a younger worker, the employer is permitted to provide smaller benefits to older workers, so long as the employer incurs the same cost for all workers.<sup>62</sup>

On October 3, 2000, the EEOC broadened its view regarding the applicability of the ADEA and the equal benefit or equal cost safe harbor to encompass retirees.<sup>63</sup> For example, the EEOC's Compliance Manual issued on October 3, 2000, stated that:<sup>64</sup>

Benefits will not be equal . . . where a plan sets a specific, age-based cutoff for the length of time employees can receive payments . . . . Moreover, benefits will not be equal where a plan reduces or eliminates benefits based on a criterion that is explicitly defined (in whole or in part) by age.

The incorporation of this policy into the EEOC Compliance Manual was a direct result of the *Erie County* decision.<sup>65</sup> The EEOC, however, has not consistently held this view. Rather, the EEOC has interpreted the ADEA as inapplicable to retirees.<sup>66</sup>

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61. *Id.*

62. *Id.* at ¶ 7212 5807-3 (stating that the employer must justify the reason for offering different benefits to older and younger employees); *see also* *Erie County Retirees Assoc. v. County of Erie, Penn.*, 91 F. Supp. 2d 860, 865 (W.D. Pa. 1999) (providing that "the purpose behind § 4(f)(2) [of the ADEA] was to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations").

63. *See, e.g.* Brief of Amicus Curiae the Equal Employment Opportunity Commission at 16-17, *Erie County Retirees Assoc. v. County of Erie, Penn.*, 220 F.3d 193 (3rd Cir. 2000) (No. 99-3877) [hereinafter EEOC Amicus Brief].

64. EEOC MANUAL, *supra* note 27 at ¶ 7212 5807-3.

65. *See* PLAN SPONSOR.COM, *supra* note 8 (explaining that the court's holding in *Erie County* was "incorporated in to the EEOC's compliance manual.").

66. Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

The issue has also been presented concerning an employer's obligations to employees aged sixty-five through sixty-nine who are at present not actively employed but who are receiving health care benefits by virtue of extended coverage under an employer's health plan. In such a situation, the Commission will look to all the facts and circumstances to determine whether an employment situation still exists. Employees engaged in seasonal work who retain seniority rights and other indicia of a continuing employment relationship will in all likelihood fall within the meaning and spirit of Section 4(g). On the other hand, employees gratuitously provided extended coverage after the termination of employment status were not intended to fall within the scope of Section

For example, in 1982, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982<sup>67</sup> ("TEFRA"). TEFRA amended the ADEA to include section 4(g) which provided that "employees aged sixty-five through sixty-nine shall be entitled to group health coverage offered to employees under age sixty-five under the same terms and conditions."<sup>68</sup> Section 4(g) provided stricter guidelines than the equal benefit or equal cost safe harbor subsequently codified by the OWBPA, but nonetheless was an "outgrowth" of the equal benefit or equal cost standard.<sup>69</sup>

The EEOC published interim regulations interpreting section 4(g).<sup>70</sup> Pursuant to its interpretation of the section, the EEOC explicitly stated that "retirees are not embraced by the term 'employee' for the purposes of section 4(g) of the ADEA."<sup>71</sup> However, Congress repealed section 4(g) in 1989.<sup>72</sup> Although section 4(g) was repealed in 1989, the EEOC has, prior to 2000, interpreted the ADEA as inapplicable to retirees.<sup>73</sup> Thus, former Section 4(g) is important for this discussion because it illustrates that prior to *Erie County*, the EEOC interpreted the ADEA one way, but subsequently changed its view, effectively flip-flopping on whether the ADEA indeed applied to retirees.

In 2000, it seemed that the EEOC's view changed, as illustrated through its interpretation of the ADEA in an amicus

4(g). Their status would be most like that of a retiree. Retirees are not embraced by the term employee and are, therefore, not covered by the literal wording of the new section.

*Id.*

67. Pub. L. No. 97-248, 96 Stat. 324 (1982).

68. Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") § 4(g) (codified at 29 U.S.C. § 623(g)); *see generally* Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983). Section 4(g) was subsequently repealed in 1989. *See* Pub. L. No. 101-239, 103 Stat. 2233 (1989).

69. Brief for the County of Erie, Penn. at 12, County of Erie, Penn., Petitioner v. Erie County Retirees Assoc. et. al, Respondents (No. 00-906).

70. Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

71. Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

72. Pub. L. No. 101-239, 103 Stat. 2233 (1989).

73. *Erie County*, 91 F.Supp. 2d at 877.

[F]rom 1982 to 1989, the protections afforded by § 4(f)(2) were superseded and supplanted by a more specific and exacting form of protection under § 4(g) . . . it is apparent that the EEOC considered retirees to be outside the scope of protection afforded by Section 4(g). Thus, we can logically infer that the EEOC likewise viewed retirees as outside the scope of protection afforded by § 4(f)(2), at least where the subject of health benefits is concerned.

*Id.*

brief filed with the Third Circuit.<sup>74</sup> The EEOC explicitly provided that “there is every reason to believe” that Congress intended the protections of the ADEA to extend to retirees.<sup>75</sup> On August 17, 2001, however, the EEOC changed this position once again by temporarily abandoning the *Erie County* decision, and launching a review of its policy toward the retiree medical plans and the ADEA.<sup>76</sup> Such flip-flopping on whether the ADEA indeed applies to retirees indicates the EEOC’s inconsistent views on what Congress actually intended by enacting the ADEA, which arguably reduces the credibility and reliability of the EEOC’s interpretation of the ADEA, and its applicability to retiree medical plans.

### I. THE *ERIE COUNTY* DECISION

In *Erie County*, Medicare-eligible retirees, i.e. retirees age sixty-five and over, initiated a class action lawsuit against the County of Erie, Pennsylvania (“County”) contending that the County’s retiree medical program violated the ADEA’s prohibition against discriminating in the terms and condition of employment based on age.<sup>77</sup> The retiree class argued that because of their age and eligibility for Medicare, employers treated them adversely with respect to their health insurance coverage as compared to those retirees *under* the age of sixty-five, i.e. non-Medicare-eligible retirees, who received superior health coverage.<sup>78</sup>

For clarity, one must first understand the holding rendered by the Third Circuit in *Erie County*. The Third Circuit Court of Appeals, in reversing the district court, flatly discarded Congress’ intent underlying the ADEA,<sup>79</sup> as provided in the OWBPA’s legislative history.<sup>80</sup> The Court of Appeals held that the congressional intent was not controlling.<sup>81</sup> Instead, the court adopted the EEOC’s argument, as provided in its amicus brief, which asserted that the ADEA applied to changes in benefits affecting *retirees*, and concluded that the ADEA “protected class” consisted of “*individuals*” and that the term “*individuals*” was broad enough to encompass “*retirees*.”<sup>82</sup> Therefore, the court held

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74. *Erie County*, 220 F.3d at 210.

75. EEOC Amicus Brief, *supra* note 63, at 16-17.

76. EEOC Press Release, *supra* note 36.

77. *Erie County*, 220 F.3d at 197-98; *see also* Donald P. Carleen, *Retiree Medical Plans and ADEA*, N.Y. J., Oct. 20, 2000, *Employee Benefits Law*, at 3 (stating that the case was of first impression in the Third Circuit at the time).

78. *Erie County*, 220 F.3d at 197-98.

79. *Id.* at 208-10 (finding that nothing “in the language of the ADEA” indicated that Members’ statements that the ADEA was inapplicable to retirees were “accurate,” thereby finding them not to be “persuasive”).

80. *Id.*

81. *Id.*

82. *Id.* at 210



that the retiree class, as "individuals," established a claim of age discrimination under section 4(a)(1) of the ADEA<sup>83</sup> (providing that it is "unlawful for an employer" to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.")<sup>84</sup>

The court based its conclusion on the finding that Medicare eligibility "follow[s] ineluctably upon attaining age sixty-five," i.e., "Medicare status is a direct proxy for age."<sup>85</sup> The court also concluded that the benefit plan that Medicare-eligible retirees were enrolled in provided less benefits than those provided to non-Medicare-eligible retirees.<sup>86</sup> Thus, since the court considered Medicare eligibility an age-based factor, and the retiree class fell within the broad definition of "individuals" as provided in ADEA, the court ruled that discriminatorily providing inferior benefits to the retiree class covered under the plan was a violation of section 4(a)(1) of the ADEA.<sup>87</sup> The Third Circuit provided, however, that the County could avoid liability under the ADEA if it satisfied the equal benefit or equal cost safe harbor as provided in section 4(f)(2)(B)(i).<sup>88</sup>

The facts of *Erie County* are as follows. In 1972, the County implemented a retiree medical benefits program for all of its retired employees.<sup>89</sup> Under the program, the County created "three main coverage groups:" 1) active employees, 2) Medicare-eligible retirees, and 3) non-Medicare-eligible retirees.<sup>90</sup> "Each group had separate but similar traditional indemnity health coverage."<sup>91</sup> In 1992, faced with increasing health costs, the County began contemplating cost-cutting measures, and opted to limit the eligibility for retiree medical health coverage.<sup>92</sup>

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83. 29 U.S.C. § 623(a)(1)(1998).

84. *Erie County*, 220 F.3d at 208.

85. *Id.* at 211. (quoting *Erie County*, 91 F. Supp. 2d at 867).

86. *Id.* at 213 (concluding that "the County has treated appellants differently than other retirees with respect to their 'compensation, terms, conditions, or privileges of employment, because of . . . age[,] [and therefore, the retiree class] established a claim of age discrimination under 29 U.S.C. § 623(a)(1)," unless the County could satisfy any of the ADEA's safe harbors).

87. *Id.* at 210-12. "In sum, we conclude that members of the plaintiff class are 'individuals' who have been treated differently by their 'employer' with respect to [their] compensation, terms, conditions, or privileges of employment." *Id.* at 210.

88. *Id.* at 216. (citing 29 U.S.C. § 623(f)(2)(B)(i)).

89. *Id.* at 196.

90. *Id.*

91. *Id.*

92. *Id.* The County first decided to amend its retiree medical plan to limit eligibility for retiree medical benefits only to employees hired before January 24, 1992. *Id.* The County further limited benefits by limiting eligibility for benefits to, *inter alia*, employees who retired by fifty-five years of age with

In 1997, the County's health care provider, Highmark Blue Cross/Blue Shield ("Highmark"), raised its annual health insurance premiums by an average of forty-eight percent.<sup>93</sup> In response, the County restructured its retiree medical benefits program.<sup>94</sup> The restructured program no longer provided the traditional indemnity plan to all retirees, but instead, provided HMO group health coverage to Medicare-eligible retirees.<sup>95</sup> Additionally, the newly structured retiree medical program still provided the traditional indemnity plan to non-Medicare-eligible retirees, but also allowed them the choice to remain in the indemnity plan or enroll in a PSO health plan.<sup>96</sup> The HMO group health plan, called SecurityBlue,<sup>97</sup> required a referral from a primary care physician for all treatment.<sup>98</sup> The PSO health plan, which combined the features of an HMO and a traditional indemnity plan—called SelectBlue<sup>99</sup>—differed from SecurityBlue in that it did not require any referrals from a primary care physician for treatment.<sup>100</sup>

The Medicare-eligible retiree class contended that the SecurityBlue plan provided inferior health coverage by comparing the level and type of benefits available to the Medicare-eligible retirees and the non-Medicare-eligible retirees, i.e. the argument was based on the fact that as an HMO, SecurityBlue was less flexible and restricted its members' medical options as compared to SelectBlue and the traditional indemnity coverage previously available to them, and thus, provided inferior benefits.<sup>101</sup> Therefore, plaintiffs contended that SecurityBlue violated the ADEA by treating the Medicare-eligible retirees worse than those retirees under age sixty-five.<sup>102</sup>

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twenty years of service. *Id.* at 196-97.

93. *Id.* at 197.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Erie County*, 91 F. Supp. 2d at 863.

98. *Erie County*, 220 F.3d at 197.

99. *Erie County*, 91 F. Supp. 2d at 863.

100. *Erie County*, 220 F.3d at 197. The County required that all Medicare-eligible retirees enroll in the SecurityBlue plan or forfeit benefits. *Id.*

101. *Id.* at 197-98. (finding that the court must address the applicability of the ADEA when an employer offers its Medicare-eligible retirees health insurance coverage allegedly inferior to the coverage offered to retired employees not eligible for Medicare).

102. *Id.* The retirees contended that "the County violated the ADEA by treating . . . the plaintiff class less favorably on account of their age, as compared to (1) active employees and (2) retirees under age sixty-five[.]" but later limited their complaint to the comparison between the plaintiff's class and retirees under age sixty-five. *Id.* at 198. The court noted that even though individuals can qualify for Medicare based on factors other than age,

The County, however, raised an affirmative defense, contending that it satisfied the equal benefit or equal cost safe harbor<sup>103</sup> as codified in the ADEA by the OWBPA.<sup>104</sup> The plaintiffs, on the other hand, asserted that because the County provided inferior benefits, i.e. unequal benefits, and because the expense for providing health coverage to the retiree class was less than the expense incurred for coverage for younger retirees, the County could not rely on the equal benefit or equal cost safe harbor.<sup>105</sup> Accordingly, the court found that because the benefits offered to those who were eligible for Medicare based on age were less generous than the benefits offered to non-Medicare-eligible retirees, the retiree medical program violated the ADEA.<sup>106</sup>

## II. "RETIRES" ARE NOT "INDIVIDUALS" FOR THE PURPOSES OF THE ADEA

Contrary to the Third Circuit Court of Appeals, the district court<sup>107</sup> initially held that the ADEA did not apply to retirees. The district court relied on the OWBPA legislative history which consistently provided that the ADEA does not apply to retirees, nonetheless, Medicare-eligible retirees.<sup>108</sup> The district court

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e.g. disability, in this case, all of the eligible individuals so qualified "solely" on the basis of their age. *Id.* at 211. Thus, "the gravamen of [the] lawsuit [was] that the County violated the ADEA by discriminatorily placing . . . the plaintiff class into SecurityBlue[,] which provided inferior benefits, "on the basis of their having attained age sixty-five." *Id.* at 198; *see also Erie County*, 91 F. Supp. 2d at 865-66 (noting that Medicare eligibility is not solely based upon age; rather, disabled individuals are eligible for Medicare benefits as well, however, in this case the individuals eligible for Medicare were eligible on account of age, and not due to any disability).

103. 29 C.F.R. § 1625.10(a)(1) (2001).

[B]enefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.

*Id.*

104. *Erie County*, 220 F.3d at 199. "The County [also] argued that it based its decision to place Medicare-eligible retirees in SecurityBlue not on age but on three age-neutral factors: (1) active versus inactive employment status, (2) cost, and (3) availability of plans." *Id.* (citing *Erie County*, 91 F. Supp. 2d at 865).

105. *Id.*

106. *Id.* at 213.

107. *See generally Erie County*, 91 F. Supp. 2d 860.

108. *Id.* at 880. *Cf. Erie County*, 220 F.3d at 208-09. (stating that "[o]bviously, all members of the plaintiff class are 'individuals[,]'" and holding that "the ordinary meaning of the term 'employee benefit' should be understood to encompass health coverage and other benefits which a retired

concluded that based on the presence of the term “older worker” in the equal benefit or equal cost safe harbor,<sup>109</sup> Congress intended the equal benefit or equal cost standard to apply only to benefits for active (or current) employees.<sup>110</sup> The Third Circuit, however, disagreed.<sup>111</sup>

The Third Circuit recognized “that there [were] statements in the legislative history of the OWBPA [that] indicate[d] that certain members of Congress viewed the ADEA as inapplicable to retirees except when a retiree’s benefits are ‘discriminatorily structured prior to retirement.’”<sup>112</sup> The court, however, provided that “nothing in the language of the ADEA” leads to the conclusion that such statements were “accurate” and therefore, did not find them to be “persuasive.”<sup>113</sup> Accordingly, the court noted that they were “left with a rather difficult task of statutory interpretation[,]”<sup>114</sup> and concluded that “[w]hile the legislative history may provide assistance in resolving ambiguity, the language of the statute must guide [them] in the first instance.”<sup>115</sup> In reversing the district court’s application of ADEA, the Third Circuit interpreted the term “individual” as provided in section 4(a)(1) of the ADEA<sup>116</sup> to include the term “employees,” that in turn encompassed “retirees.”<sup>117</sup> The Third Circuit justified this conclusion by relying heavily on the Supreme Court’s statutory interpretation of the term “employee” as provided in section 704(a) of Title VII of the Civil Rights Act of 1964.<sup>118</sup>

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person receives from his or her *former* employer” (emphasis added)).

109. See 29 U.S.C. § 623(f)(2)(B)(i) (2000).

110. *Erie County*, 91 F.Supp. 2d at 869-70

111. See *Erie County*, 220 F.3d at 210 (concluding that the term “individual” as provided in section 4(a)(1) of the ADEA encompassed “retirees”).

112. *Id.*

113. *Id.*

114. *Id.* at 208.

115. *Id.*

116. 29 U.S.C. § 623(a)(1) (2000) (providing that “[i]t shall be unlawful for an employer . . . [to] discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age”).

117. *Erie County*, 220 F.3d at 210 (holding that the decision rendered by the Supreme Court in *Robinson v. Shell Oil and Co.*, 519 U.S. 337, 339 (1997) supported the court’s conclusion that the term “individual” indeed encompassed a “retiree”).

118. See *id.* at 209 (articulating that “*Robinson* addressed the applicability of the anti-retaliation provision in Title VII of the Civil Rights Act of 1964 to actions taken against former employees.”).

A. *Reliance on Robinson Was Erroneous: The Term "Individual" Does Not Cover "Retirees"*

The Third Circuit concluded that "individuals" were "retirees" for the purposes of the ADEA by relying heavily on *Robinson v. Shell Oil Co.*<sup>119</sup> In *Robinson*, the Supreme Court held that the term "employee," as used in section 704(a) of Title VII of the Civil Rights Act of 1964,<sup>120</sup> included "former employees."<sup>121</sup> The Supreme Court articulated that "[a]t first blush, the term 'employee' as provided in section 704(a) would seem to refer to those having an existing employment relationship with an employer in question."<sup>122</sup> The Supreme Court concluded, however, that "[t]his initial impression does not withstand scrutiny"<sup>123</sup> because the term "employed" injected in the definition of "employee" "could just as easily be construed to mean *was employed*."<sup>124</sup> Based on this reasoning, the Court interpreted that section 704(a) of Title VII covered "former employees."<sup>125</sup>

In *Erie County*, the Third Circuit noted that the term "employee" as provided in the ADEA was identical to the definition provided in Title VII, i.e. "an *individual* employed by an employer."<sup>126</sup> Based on this definition, the court concluded that for

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119. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

120. 42 U.S.C. § 2000e-3(a) (2000).

121. *Robinson*, 519 U.S. at 341-43. In *Robinson*, the plaintiff was discharged from his employment. *Id.* at 339. After being discharged, the plaintiff filed a complaint with the EEOC contending that he was discharged on the basis of race. *Id.* After his discharge and pending further action pursuant to his claim, the plaintiff sought new employment whereupon his former employer gave him a negative reference. *Id.* Plaintiff contended that his former employer retaliated against him for having filed the EEOC charge. *Id.* The plaintiff brought suit under Section 704(a) of Title VII of the Civil Rights Act of 1964 that prohibits retaliatory discrimination against any employee or applicant for filing under Title VII. *Id.* The issue was whether "employee" also meant "former employee." *Id.* The Supreme Court concluded that the term employee as used in § 704(a) of Title VII, was ambiguous. *Id.* at 341. The Court relied heavily on the EEOC's argument which provided that "[the] exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims." *Id.* at 346. Thus, the Court stated that "[i]t being more consistent with the broader context of Title VII and the primary purpose of § 704(a), . . . that former employees are included" under the term employee, and therefore, "within § 704(a)'s coverage." *Id.* at 346.

122. *Robinson*, 519 U.S. at 341.

123. *Id.*

124. *Id.* at 341-42 (emphasis added).

125. *Id.* at 341-46.

126. See *Erie County*, 220 F.3d at 209 (noting that the term employee, as defined in § 701(f) of Title VII for the purposes of § 704(a) of Title VII, was "an

the purposes of the ADEA, an “individual” was considered an “employee” employed by any employer.<sup>127</sup> The term “individual,” however, is not defined anywhere in the ADEA.<sup>128</sup> The court went on to conclude that “*Robinson* indicate[d] that an employer’s adverse actions taken against someone who has ceased actively working for that employer, [i.e., a “former employee”], may constitute discrimination against an ‘employee.’”<sup>129</sup> Thus, the Third Circuit opined that because an “individual” was considered an “employee,” and the term “employee” covered “former employees”<sup>130</sup> (a “retiree” is considered a “former employee”),<sup>131</sup> it followed that “retirees” fell within the definition of “employee” under the ADEA, therefore falling under the broad term “individual.”<sup>132</sup>

*B. The Third Circuit Overlooked the Entire Reasoning in Robinson; Robinson Is Distinguishable*

Although the *Erie County* court relied heavily on *Robinson*, the Third Circuit failed to follow *Robinson*’s entire decision. For example, in *Robinson*, the Supreme Court, unlike the Third Circuit, found that relying on the broad term “individual,” “provide[d] no insight” in defining the term “employee.”<sup>133</sup> For example, at the end of the *Robinson* decision, the Supreme Court concluded that, “the use of the term ‘individual’ in section 704(a), as well as in section 703(a), [of Title VII], provide[d] no meaningful assistance in resolving [the] case,” i.e., interpreting the term “employee.”<sup>134</sup> The Court recognized that the term “individual” was “broader” than the term “employee,” which could “facially” be

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individual employed by an employer’ — the same definition present in the ADEA”)

127. *Id.* at 209. (citing 29 U.S.C. § 630(f) provides that the term employee means “an individual employed by any employer”).

128. *Id.* at 208-09.

129. *Id.* at 209

130. *See Robinson*, 519 U.S. at 343.

131. Nowhere in the Third Circuit’s opinion did the Court define the term “former employee.” However, the term “former” means “coming before in time, of, relating to, or occurring in the past.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 459 (9th ed. 1999). The term “employee” means “one employed by another.” *Id.* at 408. The term “former employee” can be construed to mean one employed by another in the past. The term “retired” is defined as “withdrawn from one’s position or occupation,” and a “retiree” is defined as “a person who has retired form a working or professional career.” *Id.* at 1000. Thus, a “former employee” can be considered a “retiree”—one who has withdrawn from employment, or one that was employed in the past.

132. *See Erie County*, 220 F.3d at 209.

133. *Robinson*, 519 U.S. at 345 (emphasis added).

134. *Id.* (finding that “the use of the term ‘individual’ in § 704(a), as well as in § 703(a)” provided no meaningful assistance in interpreting the meaning of the term employee).

interpreted to “cover former employees.”<sup>135</sup> However, the Court concluded that, “[relying on] [t]he term ‘individual’ . . . [did] not seem designed to capture ‘former employees,’ as distinct from current employees, and its use *provide[d] no insight* into whether the term ‘employees’ is limited only to current employees.”<sup>136</sup>

*Robinson* is distinguishable from the *Erie County* decision in that the *Erie County* court relied on the term “individual,” rather than the term “employee,” to reach the conclusion that “retirees” were “former employees.”<sup>137</sup> For example, in *Robinson*, the Supreme Court focused primarily on the term “employee,” and looked to other sections of Title VII to reach the conclusion that the term “employee” was ambiguous.<sup>138</sup> Furthermore, according to the Supreme Court, the term could be construed to cover “former employees.”<sup>139</sup> In *Erie County*, however, the Third Circuit did not focus primarily on the term “employee,” but rather on the term “individual.”<sup>140</sup> The Third Circuit did not look to other sections of the ADEA to aid the court in its interpretation,<sup>141</sup> but instead reasoned that if an “individual” was an “employee,” and the term “employee” covered a “former employee,” an “individual” must also be considered a “former employee.”<sup>142</sup> However, as articulated in *Robinson*, relying on the term “individual” is not “designed to capture former employees.”<sup>143</sup> Therefore, relying on the term “individual” as opposed to “employee,” “provides no insight”<sup>144</sup> as to whether “retirees,” i.e. “former employees,” are considered “individuals” for the purposes of the ADEA. Thus, although *Robinson* stands for the proposition that “employees” may be considered “former employees,”<sup>145</sup> the court should not rely on *Robinson* for the proposition the term “individual” is designed to capture “former employees,” and in turn, “retirees.” Certainly *Robinson* is distinguishable from the *Erie County* decision, and therefore, not applicable to the *Erie County* facts.

### C. The Third Circuit Failed to Identify the “Temporal Qualifiers”

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135. *Id.*

136. *Id.*

137. *Erie County*, 220 F.3d at 208-09.

138. *Robinson*, 519 U.S. at 341-43.

139. *Id.*

140. *Erie County*, 220 F.3d at 208-09.

141. *See infra* notes 146-63 (discussing that the Third Circuit should have looked to temporal qualifiers as stated in the *Robinson* decision and in other sections the ADEA, thereby aiding the court in its interpretation of section 4(a)(1) of the ADEA and the term individual).

142. *Erie County*, 220 F.3d at 209.

143. *Robinson*, 519 U.S. at 345.

144. *Id.*

145. *Id.* at 341-43.

*in Section 4 of the ADEA*

In *Erie County*, the Third Circuit again overlooked the Supreme Court's entire interpretation in *Robinson*, and instead, focused only on a portion of the Supreme Court's decision in order to reach their result.<sup>146</sup> For example, the *Robinson* Court, holding that the term "employee" covered a "former employee" for the purposes of Title VII, cited *Walters v. Metropolitan Educational Enterprises, Inc.*<sup>147</sup> *Walters* provided a contrary interpretation of the term "employee," as provided in Title VII, to mean "persons with whom an employer has an *existing employment relationship*."<sup>148</sup>

In *Walters*, the Supreme Court interpreted the meaning of the term "employee" as provided in section 701(b) of Title VII of the Civil Rights Act of 1964.<sup>149</sup> The *Walters* Court concluded that the term "employee" was limited to persons with whom an employer has an *existing employment relationship* because section 701(b) included two explicit terms illustrating the intended meaning of the term.<sup>150</sup> These explicit and illustrative terms are known as "temporal qualifiers."<sup>151</sup> "Temporal qualifiers" are defined as terms explicitly provided in the language of the statute that illustrate Congress' intended meaning of specific terms.<sup>152</sup>

The *Robinson* Court, while analyzing *Walters*, noted that section 701(b) included two significant "temporal qualifiers" that aided the *Walters* Court in its interpretation of the term "employee."<sup>153</sup> For example, section 701(b) provided that the Act "applies to any employer who 'has fifteen or more employees for each working day in . . . the current or preceding calendar year'".<sup>154</sup>

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146. See *Erie County*, 220 F.3d at 210 (finding that retirees were protected under the ADEA).

147. 519 U.S. 202 (1997).

148. *Robinson*, 519 U.S. at 342 n. 2 (quoting *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202 (1997) where the Supreme Court "held that the term 'employees' [as provided in § 701(b) of Title VII of the Civil Rights Act of 1964], referred to those persons with whom an employer has an *existing employment relationship*" (emphasis added)).

149. See generally *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202 (1997).

150. *Walters*, 519 U.S. at 208-09.

151. *Robinson*, 519 U.S. at 341-42.

152. See *id.* (articulating that temporal qualifiers such as current employee or former employee would have allowed the Supreme Court to unambiguously determine the meaning of employee as provided in § 704(a) of Title VII and citing other statutes that included temporal qualifiers, e.g. 2 U.S.C. § 1301(4)(1994, Supp I), explicitly defining employee to include former employee and 5 U.S.C. § 1212(a)(1) including "employees, former employees, and applicants").

153. *Id.* at 342 n.2.

154. *Walters*, 519 U.S. at 204 (emphasis added).



The *Robinson* Court found this “time-frame in which the employment relationship must exist”<sup>155</sup> to be “temporal qualifiers,” that meant that an “employee” must be a person that *was still working* with the employer.<sup>156</sup> Unlike *Walters*, the *Robinson* Court found that the section 704(a) had *no* “temporal qualifiers,” and therefore found nothing to aid the Court in its interpretation of the term “employee.”<sup>157</sup> Therefore, the *Robinson* Court found the term “employee” to be ambiguous, thus enabling the Court to construe that the term “employee” covered “former employees.”

Similar to the *Robinson* Court’s finding that the term “employee” was ambiguous, the Third Circuit, found the term “individual” ambiguous.<sup>158</sup> However, *Erie County* is distinguishable from *Robinson* and analogous to *Walters* in that section 4 of the ADEA includes a “temporal qualifier” illustrating Congress’ intended meaning of the term “individual” as provided in section 4(a)(1).

To illustrate, section 4(f)(2)(B)(i) provides that “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*.”<sup>159</sup> Pursuant to the Supreme Court, “we do not . . . construe statutory phrases in isolation; we read statutes as a whole.”<sup>160</sup> Therefore, where section 4(a)(1) provides that it is unlawful for an “employer” to “discriminate against *any individual* . . . because of such *individual’s* age”,<sup>161</sup> we must look to section 4(f)(2)(B)(i) which modifies the term “individual” to only cover “*older workers*.” Thus, consistent with *Walters*, the “temporal qualifier” of “*older worker*”

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155. *Robinson*, 519 U.S. at 342 n.2.

156. *Id.* at 342.

157. *Id.* at 341 (stating that “there [was] no temporal qualifier in the statute [that] would make plain that § 704(a) protect[ed] only persons still employed at the time of the retaliation”).

158. *See Erie County*, 220 F.3d at 208 (looking first to the language of the statute itself).

159. 29 U.S.C. § 623(f)(2)(B)(i) (2000) (emphasis added); *see also* 29 C.F.R. § 1625.10(a)(1) (2001).

160. *United States v. Morton*, 467 U.S. 822, 828 (1984). Pursuant to the Supreme Court, construing § 4(a)(1) in isolation would only be half of the analysis. The Supreme Court has provided that courts must read the entire statute in order to adequately interpret its various sections. *Id.* When interpreting whether the ADEA applies to retirees as individuals, as provided in § 4(a)(1), the interpreting court must examine § 4 of the ADEA in its entirety to determine the ADEA’s true applicability. Thus, reading § 4 of the ADEA in its entirety requires a court to interpret § 4(f)(2)(B)(i), along with § 4(a)(2), (a)(3), and (c)(2) that unambiguously refer to active (or current) employees.

161. 29 U.S.C. § 623(a)(1) (2000) (emphasis added).

as provided in section 4(f)(2)(B)(i)<sup>162</sup> helps define the term “individual” to cover “workers” and not “former employees.” Hence, because “older worker” temporally qualifies the term “individual,” the term “individual” does not, and should not, include “retirees.”<sup>163</sup>

### III. THE ADEA DOES NOT APPLY TO RETIREES

The author asserts that the district court was correct in holding that the ADEA does not apply to retirees because the OWBPA amended the ADEA to only apply to “*older workers*,” and not to “*retirees*.”<sup>164</sup> Furthermore, although the district court

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162. Section 4(a)(2), (a)(3) and (c)(2) can also be construed to include temporal qualifiers. For example: 1) § 4(a)(2), 29 U.S.C. § 623(a)(2), provides that, “[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any individual of *employment* opportunities or otherwise adversely affect his status as an *employee*, because of such individual’s age;” (emphasis added) 2) § 4(a)(3), 29 U.S.C. § 623(a)(3), provides that “[i]t shall be unlawful for an employer . . . to reduce the wage rate of any *employee* in order to comply with this Chapter;” (emphasis added) and 3) § 4(c)(2), 29 U.S.C. § 623(c)(2), provides that, “[i]t shall be unlawful for a labor organization . . . [to] fail or refuse to refer for employment any individual . . . which would deprive or tend to deprive any individual of *employment* opportunities, or would . . . adversely affect his *status as an employee* . . . because of such individual’s age.” (emphasis added) 29 U.S.C. § 623 (a)(2), (a)(3), (c)(2)(2000). Reading these sections in connection with § 4(a)(1) indicates that term individual, which, according to the Third Circuit covers the term employee cannot, and should not, be construed to cover former employees, nonetheless retirees. 29 U.S.C. § 623(a)(1)(2000).

163. The Supreme Court in *Robinson* also stated that when interpreting the meaning of a term in Title VII, such term does not always have “the same meaning in all sections” of the Title. *Robinson*, 519 U.S. at 343-44. Rather, “each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute.” *Id.* This concept is illustrated through *Robinson* and *Walters* where the Supreme Court found two different meanings for the same term: employee. See generally, *Robinson*, 519 U.S. 337; *Walters*, 519 U.S. 202. Thus, since the term employee in § 704(a) may have a different meaning than the term employee in other sections of Title VII, the Third Circuit has no justification for explicitly adopting the *Robinson* Court’s holding that the term employee covers former employee under the ADEA. Furthermore, if we were to follow *Robinson*, stating that each section must be analyzed to determine the context of the term, we can look to section 4(a)(2), 4(a)(3) and 4(c)(2) of the ADEA which unambiguously refer to “current employees”—not “former employees”—and most importantly not to retirees. 29 U.S.C. § 623 (a)(1), (a)(2), (a)(3), (c)(2)(2000). Thus, arguably the term employee cannot, and should not, be interpreted to cover former employees, rather employee refers to current employees.

164. See *Erie County*, 91 F. Supp. 2d at 878 n.20. (concluding that because “Congress deliberately limited § 4(f)(2)(B)(i)” by injecting the term older worker, this illustrated Congress’ “primary intent” for the ADEA to apply to active employees only).

stipulated that the retiree class was placed in SecurityBlue because of age,<sup>165</sup> the court held that the ADEA “clearly was not intended to apply to retirees like the plaintiff class.”<sup>166</sup> Thus, as supported by the foregoing discussion, the district court’s initial holding and rationale, and Congress’ clear and unambiguous intent as articulated in OWBPA’s legislative history, leads to the conclusion that ADEA does not apply to “retirees.”

*A. The District Court Determined That the ADEA Does Not Apply to Retirees*

In determining that the ADEA “clearly” did not apply to retirees, the district court examined the statutory language of the ADEA, as amended by the OWBPA.<sup>167</sup> The court opined that it must interpret the ADEA “in a manner which best effectuates Congressional intent and the legislative purpose underlying [the statutes] adoption.”<sup>168</sup> Upon statutory construction, the district court found that the ADEA was unclear as to whether sections 4(a)(1) and 4(f)(B)(2)(i) applied to “retirees” or “older workers.”<sup>169</sup> The ambiguity stemmed from section 4(a)(1) of the Act, which generally prohibited employers from discriminating against “any

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165. *Id.* 865-68. The district court and the Third Circuit concluded that the plaintiff class was treated differently because of age. *Id.* Specifically, the district court concluded that “it [was] undisputed that the triggering feature for SecurityBlue coverage was . . . eligibility for Medicare Part B Medical Insurance. . . .” *Id.* at 865. Thus, the district court held that eligibility for Medicare is an age-based factor and therefore the plaintiffs’ class made a “prime facie” showing of age discrimination. *Id.* at 867-68. The district court noted that “Medicare eligibility and residency within the SecurityBlue service area are both necessary—i.e., ‘but for’—conditions for receiving coverage under the SecurityBlue plan.” *Id.* at 867. “Plaintiffs’ age was a determinative factor in their placement in the SecurityBlue Plan because, if not for their age, they would not be placed in that plan.” *Id.* The Third Circuit, agreeing with the district court, concluded that Medicare eligibility was a direct “proxy for age,” and found that there was a “but-for causal relationship between Medicare eligibility . . . and placement in SecurityBlue.” *Erie County*, 220 F.3d at 212 n.12.

166. *Erie County*, 91 F. Supp. 2d at 880.

167. *See id.* at 872-75 (stating that through examination of the OWBPA’s extensive legislative history, Congress did not intend to extend ADEA protections to retirees, rather, changes in the statutory language of the substitute version, which was passed by an overwhelming majority of Congress, indicated that section 4(f)(2)(B)(i) was to be construed narrowly and limited to active (or current) workers).

168. *Id.* at 869 (citing *In re Jaritz Indus., Ltd.*, 151 F.3d 93, 105 (3rd Cir. 1998) (Mansmann, J., concurring)).

169. *Id.* at 869-70 (providing that the terms “individual,” “older worker,” and “younger worker” were not defined in the statute, and therefore, it was unclear as to whether the retiree class was extended protections under the statute).

individual,”<sup>170</sup> while under section 4(f)(2)(B)(i), however, a limited exception “to ‘older workers’ and ‘younger workers’, terms that, although undefined in the ADEA, suggest[ed] a more narrow and precise scope of protection.”<sup>171</sup> The district court concluded that because Congress did not inject the term “employee” into section 4(f)(2)(B)(i), which according to *Robinson* covered former employees, and, because Congress did not include the broader term “individual,” that it was unclear as to whether the ADEA’s protections reached the retiree class.<sup>172</sup> This ambiguity forced the district court to examine the legislative history of the OWBPA to determine the Congressional intent and the legislative purpose underlying these sections.<sup>173</sup>

The district court found that the legislative history of the OWBPA indicated that Members of Congress viewed the ADEA as permitting employers to offer inferior health benefits to Medicare-eligible retirees.<sup>174</sup> Furthermore, the district court relied on the distinction between “individual” and “older worker” to conclude that “based on the presence” of the term older worker in section 4(f)(2)(B)(i) and statements that “the ADEA was not intended to apply” to Medicare-eligible retirees, Congress intended the equal benefit or equal cost standard to apply only with respect to benefits for *active* (or current) *employees*.<sup>175</sup> Therefore, the district court found that the County should prevail regardless of whether it could satisfy the equal benefit or equal cost standard because the ADEA was restricted to protecting “*current employees*.”<sup>176</sup>

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170. *Id.* at 869.

171. *Id.*

172. *Id.* at 869-70.

173. *Id.* at 869.

174. *See id.* at 874 (articulating that both the Senate and House Floor Managers “were apparently of the view that employers would not run afoul of the ADEA by providing disparate health benefits as between their Medicare-eligible and non-Medicare-eligible retirees”).

175. *Id.* at 878 n. 20.

176. *See Erie County*, 220 F.3d at 200 (finding that the district court held that “the County was entitled to judgment regardless of whether [an employer’s] health insurance scheme satisfied the equal benefit or equal cost standard” because the district court determined that Congress intended the equal benefit or equal cost standard to apply to active employees only). The Third Circuit subsequently criticized the district court’s decision by asserting that “the district court simply recognized an additional safe harbor for an employer [that] treats its Medicare-eligible retirees less favorably with respect to health benefits than other retirees. . . .” *Id.* This new safe harbor would not “require the employer to satisfy the equal benefit or equal cost standard.” *Id.* The Third Circuit stated that it saw nothing in the language of the ADEA that would afford employers the ability to treat Medicare-eligible retirees less favorably. *Id.* at 210. Thus, the Third Circuit explicitly discarded the legislative history of the OWBPA, agreed that the ADEA was ambiguous as to its protection of retirees, and determined that the court’s “statutory

*B. The Statutory Language of the Pryor-Hatch-Metzenbaum-Heinz Substitute*

Commentators contend that statements made by the Bill Managers regarding legislation are considered by the courts to be the most significant statements expressing Congressional intent.<sup>177</sup> Furthermore, commentators and the Supreme Court provide that such statements are considered to be probative evidence underlying the purpose of a statute.<sup>178</sup> Commentators argue that statements of Bill Sponsors, similar to statements of the Bill Managers, should provide probative evidence of the intent underlying a statute.<sup>179</sup> For example, Professor Ross and Judge Mikva assert that two categories of statements made by Members of Congress that are most reliable are: "1) statements [made] by the sponsors of the legislation or the particular provision at issue . . . and 2) colloquies between the 'major players' concerning a legislative provision when it appears that the majority of members are prepared to follow any consensus reached by these individuals."<sup>180</sup> The author asserts that statements made by the OWBPA Bill Sponsors and Bill Managers, along with colloquies that were subsequently followed by an overwhelming majority of Congress, i.e. 94 Members in the Senate and 406 in the House of Representatives, clearly indicated Congress' intent: that the ADEA does not apply to retirees.<sup>181</sup>

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construction must guide the court in the first instance." *Id.* at 208 (citing *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 444 (3rd Cir. 1996)).

177. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 36-37 (Aspen Law & Business 1997); WILLIAM N. ERSKINE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 303 (2000); *United Steel Workers of Am., AFL-CIO v. Weber*, 443 U.S. 193, 239 (1979) (Rehnquist, J., dissenting).

178. See Justice Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (concluding that to better understand the "context and purpose of a statute," courts rely heavily on the legislative history); see also *Steadman v. SEC*, 450 U.S. 91, 100 (1981).

179. See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 576 (1992); see also ERSKINE, JR. ET AL, *supra* note 177, at 303; *Weber*, 443 U.S. at 239; *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring) (stating that committee reports and floor statements should not be given weight in deciding statutory interpretation because they are "increasingly unreliable evidence of what voting Members of Congress actually had in mind.").

180. MIKVA & LANE, *supra* note 177 at 37 (citing Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 576).

181. *Cf. Blanchard*, 489 U.S. at 97-100 (1989) (Scalia, J., concurring). It is apparent, however, that a majority of Congress, i.e., 94 Senators and 406

Senator Hatch, one of the OWBPA Bill Sponsors and Bill Managers in the Senate, was the first to articulate that:

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 is a positive practice which helps provide important protections for retirees. This compromise ensures that the bill will not interfere with these important benefits that are vital to retirees of all ages.<sup>182</sup>

Senators Bentsen and Pryor's colloquy, both Bill Sponsors and Bill Managers, further illustrated that the ADEA does not apply to retirees by providing:

Mr. BENTSEN: Is it the understanding of the Senator that the Age Discrimination in Employment Act does not apply to retirees?

Mr. PRYOR: The distinguished Senator is correct. The ADEA applies only to employees and those individuals seeking employment. However, it does apply to an individual whose retirement benefits are discriminatorily structured prior to retirement.<sup>183</sup>

Members of the House of Representatives also weighed in on expressing the applicability of the ADEA, as amended by the OWBPA.<sup>184</sup> For example, Representative Clay, a Bill Sponsor and Bill Manager in the House reiterated this intent by providing that, "*nothing in the bill would apply the provisions of the ADEA to retirees.*"<sup>185</sup>

Finally, the legislative history articulated the will of the majority of Congress<sup>186</sup> in the "Statement of the Managers" (as provided by both the Senate and the House of Representatives in the Congressional Record as "S. 1511 Final Substitute: Statement of the Managers"):

Many employer-sponsored retiree medical plans provide medical

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Representatives, agreed with Senators Bensten and Pryor and overwhelmingly supported Congressional intent. Thus, Justice Scalia's statements that floor debate only indicates the intent of a small majority of Congress has no merit.

182. 136 CONG. REC. S13,594, S13,600 (daily ed. Sept. 24, 1990) (statement of Sen. Hatch) (referencing the compromise to change section 4(f)(2)(B)(i) to include the term "worker" instead of the term "individual").

183. 136 CONG. REC. S13,594, S13,609 (daily ed. Sept. 24, 1990) (statements of Sens. Bentsen and Pryor).

184. See 136 CONG. REC. H8614, H8618 (daily ed. Oct. 2, 1990) (statement of Rep. Clay) (expressing the desired impact of the OWBPA to exclude retirees from protection).

185. *Id.*

186. See *infra* note 198. The OWBPA passed Congress with overwhelming bipartisan support, thus indicating that a majority of Congress agreed with the statements articulated by the Bill Sponsors and Bill Managers.

coverage for retirees only until the retiree becomes eligible for Medicare . . . . In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retiree's Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute.<sup>187</sup>

The author asserts that statements made by the OWBPA Bill Managers and Bill Sponsors provide sufficient justification that the ADEA does not apply to retirees.<sup>188</sup> Moreover, the statutory language of a substitute version of the OWBPA and examining the reasons for those changes, provides *substantial* justification for the conclusion that Members of Congress did not intend for the ADEA to apply to retirees.<sup>189</sup>

At the onset of the OWBPA floor debates, several Members of Congress had concerns as to whether the OWBPA would negatively impact retiree medical benefits.<sup>190</sup> For example, Senator Grassley (R-IA) stated that although he supported the underlying goal of the OWBPA, he did not want the bill to wreak "havoc in the benefits area."<sup>191</sup> The Senator inquired whether companies that provide health benefits to retirees, but cease benefits upon Medicare-eligibility, would have any protections under the bill.<sup>192</sup> Such concerns, however, were subsequently remedied through a compromise version of the OWBPA,<sup>193</sup> introduced by Senators Hatch (R-UT) and Metzenbaum (D-OH), dubbed the Pryor-Hatch-Metzenbaum-Heinz Substitute ("The Substitute").<sup>194</sup>

The Substitute was significant (and remedied Senator Grassley's concerns) because it replaced the term "individual" in the original version of the OWBPA's section 4(f)(2)(B)(i) of the

187. 136 CONG. REC. S13,594, S13,597 (daily ed. Sept. 24, 1990) (statement of the managers).

188. See *supra* notes 178-87, and accompanying text; see also *infra* notes 210-13, and accompanying text.

189. Cf. *Erie County*, 220 F.3d at 208 (providing that the ADEA was ambiguous as to whether the term "individual" encompassed "retirees," and articulating that in order to resolve the "ambiguity, the language of the statute must guide us in the first instance").

190. 136 CONG. REC. S13,296, S13,297-98 (daily ed. Sept. 18, 1990) (statement of Sen. Grassley).

191. *Id.*

192. *Id.* "If the bill is enacted would such a company be in violation of the law? Is that the sponsors intention? If not, what provision in the bill protects employers in such circumstances?" *Id.*

193. 136 CONG. REC. S13,594, S13,607 (daily ed. Sept. 24, 1990) (statement of Sen. Grassley).

194. 136 CONG. REC. S13,594, S13,594, s13,597(daily ed. Sept. 24, 1990) (statement of Sen. Metzenbaum).

ADEA with the term “worker.”<sup>195</sup> Such a change in The Substitute indicated that Congress intended section 4(f)(2)(B)(i) of the ADEA to have a limited scope. The district court came to the same conclusion.<sup>196</sup> For example, the district court agreed that Senator Grassley’s concerns were “subsequently addressed”<sup>197</sup> when a majority of Congress<sup>198</sup> decided to use the term “worker” in section 4(f)(2)(B)(i) of the ADEA rather than the term “individual.”<sup>199</sup> The district court concluded that the decision to change the “more generic” term “individual” to a much “more specific” term “worker,” indicated Congress’ intent for section 4(f)(2)(B)(i) to be narrow in scope.<sup>200</sup>

The Third Circuit expressly disagreed that construing the term “worker” was exceedingly limited in its meaning than the broader term “individual,” stating that “it was unclear<sup>201</sup> as to why Congress made this change or what significance the change was intended to have.”<sup>202</sup> The Third Circuit reasoned only that “Congress wished to have congruity between the language of

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195. See 136 CONG. REC. S13,594, S13,599 (daily ed. Sept. 24, 1990) (summary of the Pryor-Hatch-Metzenbaum-Heinz Substitute) (changing “the word ‘individual’ in section 4(f)(2)(B) back to ‘worker’”).

196. See *Erie County*, 91 F. Supp. 2d at 869-70, 878 n.20 (finding Congress’ deliberate decision to use the term “worker” in § 4(f)(2)(B)(i) of the ADEA, rather than the term “individual” indicated that Congress intended the section’s limited scope).

197. *Id.* at 873 (providing that Senator Grassley’s concerns were apparently “addressed during the course of proceedings held on September 24, 1990” when the Senate voted to pass the Substitute, “which represented a compromise version as agreed to by the various managers,” i.e. Senators Metzenbaum, Pryor, Hatch, and Heinz, and that the final intent of the Substitute, provided in the “Statement of the Managers,” illustrated that “[Congress] sought to clarify and eliminate [any] existing controversy concerning the reduction of retiree medical benefits at Medicare-eligible age”).

198. The final Roll Call vote of the OWBPA was ninety-four yeas to one nay in the Senate, and 406 yeas to seventeen nays in the House of Representatives. Pub. L. No. 101-433, Bill Summary & Status for the 101st Congress, available at <http://thomas.loc.gov> (last visited August 20, 2002). Such a lopsided bipartisan vote count illustrates that the Substitute of the OWBPA was overwhelmingly accepted by Members of Congress. *Id.*

199. *Erie County*, 91 F. Supp. 2d at 873 (citing 136 CONG. REC. S25,355 (daily ed. Nov. 2, 1990) (summary of the Pryor-Hatch-Metzenbaum-Heinz Substitute)).

200. *Id.* at 869-70 (finding that “[section] 4(f)(2)(B)(i) refers to ‘older workers’ and ‘younger workers,’ terms that, although undefined in the ADEA, suggest a more narrow and precise scope of protection”).

201. The statements made by the OWBPA Bill Sponsors and Bill Managers illustrated Congress’ clear and unambiguous intent: changing the term “individual” to “worker” indicated that the ADEA was not intended to apply to retirees. See *supra* notes 178-87, and accompanying text; see also *infra* notes 210-13, and accompanying text.

202. *Erie County*, 220 F.3d at 215.



section 4(f)(2)(B)(i) and the language of the equal benefit or equal cost regulation,<sup>203</sup> as provided under 29 C.F.R. § 1625.10.<sup>204</sup> Although the Third Circuit acknowledged that the term “older worker” in section 4(f)(2)(B)(i) of the ADEA “complicated” its conclusion that the ADEA applied to retirees,<sup>205</sup> the court nonetheless opined that Congress “did not adopt the word ‘worker’ with the specific intention of excluding retirees.”<sup>206</sup>

How did the court reach such a conclusion? The reasoning that the court offered was that “it makes good sense” to find that Congress intended for the ADEA to apply to retirees, and that “the rule strikes a fair middle ground between the interests of the employer and the interests of older retirees . . .,”<sup>207</sup> adding that “the rule avoids overburdening employers to such an extent that they will be tempted to throw up their hands and eliminate benefits for all retirees.”<sup>208</sup> However, in the words of the Third Circuit such reasoning is “a rather thin reed upon which to base a conclusion.”<sup>209</sup>

Thus, it seems evident that the final intent of Congress was not only to permit employers to reduce benefits for Medicare-eligible retirees, but most importantly, to reinforce the concept that the ADEA protections do not extend to retirees.<sup>210</sup> Additionally, such legislative history provides strong justification that the practice of reducing retiree medical benefits once an individual reaches Medicare-eligibility is not a violation of the law.<sup>211</sup> The intent of Congress is clear: the ADEA does not apply to

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203. *Id.*

204. 29 C.F.R. § 1625.10(a)(1)(2001).

205. *Erie County*, 220 F.3d at 215 (providing that “[w]e acknowledge that our analysis is complicated by the presence of the term ‘older worker’ in section 623(f)(2)(B)(i)”).

206. *Id.*

207. *Id.* at 216.

208. *Id.*

209. *Id.* at 215.

210. Such statements prompted the district court to once again conclude that not only was this narrow intent illustrated through the decision among a majority of Congress to include the term “worker” instead of “individual,” but the clear and unambiguous directives from individual Members calls for a narrow construction of the ADEA with regards to its application to retirees. *Erie County*, 91 F. Supp. 2d at 869-70. Therefore, pursuant to the OWBPA floor debates, such legislative history provides strong justification for the conclusion that the ADEA does not apply to retirees. Thus, through examining how Congress changed the language of section 4(f)(2)(B)(i) we, like the district court, can conclude that the term “worker” was intended only to apply to active (or current) “employees.”

211. *See supra* note 198 (showing clear support, through overwhelming bipartisan votes, for the concept of reducing retiree health benefits upon achieving Medicare eligible status).

retirees.<sup>212</sup>

*C. The Third Circuit's Reliance on the EEOC Was Incorrect*

In addition to the court's reliance on *Robinson*,<sup>213</sup> the Third Circuit relied heavily on the EEOC's interpretation of the OWBPA's legislative history and the EEOC's interpretation of the ADEA, rather than Congress' interpretation and Congressional intent underlying the statute.<sup>214</sup> For example, the court followed the EEOC which explicitly provided:

It is inconceivable that Congress would in the same breath expressly prohibit discrimination in employee benefits, yet allow employers to discriminatorily deny or limit post-employment benefits to former employees at or after their retirement, although they had earned those employee benefits through years of service with the employer.<sup>215</sup>

The court agreed with the EEOC's broad statement.<sup>216</sup> However, Congress intended something entirely different than what the EEOC interpreted, and as discussed, there was substantial legislative history indicating the opposite intent.<sup>217</sup>

It is well established that a federal agency's central function is to interpret its enabling legislation.<sup>218</sup> Frequently, "[a]gencies, like the courts, are required to defer to the plain meaning rule, and failure of any agency to do so is reversible by a court."<sup>219</sup> In situations of an ambiguous statute, the Supreme Court has held that "federal courts must defer to interpretation given to the statute by that agency to which Congress has delegated the power to apply the statute."<sup>220</sup> Where *Congressional intent is clear*, however, the Supreme Court has stated that the court and the federal agency *must defer to Congress' intent* rather than the federal agency.<sup>221</sup>

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212. Thus, as provided, the clear statements advanced by the Bill Managers and Bill Sponsors should not have been discarded by the Third Circuit.

213. See *supra* notes 119-32, and accompanying text (discussing the rational behind the Court's decision regarding Title VII in *Robinson*).

214. See *Erie County*, 220 F.3d at 210 (finding the EEOC's argument to be "persuasive").

215. *Id.*; EEOC Amicus Brief, *supra* note 63, at 16-17.

216. *Id.* (holding that "members of the plaintiff class are 'individuals' who have been treated differently by their 'employer' with respect to [their] compensation, terms, conditions, or privileges of employment").

217. See *supra* notes 177-87 & 210-12, and accompanying text (revealing the underlying Congressional intent behind the OWBPA).

218. *MIKVA & LANE*, *supra* note 177, at 46.

219. *Id.*

220. *Id.*

221. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-

For example, in *Chevron U.S.A. Inc. v. Natural Resource Defense Council*,<sup>222</sup> the Supreme Court concluded that the Clean Air Act Amendments of 1977<sup>223</sup> ("Amendments") were ambiguous as to the meaning of the term "stationary source."<sup>224</sup> The Court subsequently relied on the Environmental Protection Agency's ("EPA") definition of the term, in lieu of Congress, stating that the legislative history of the Amendments did not *squarely address* the meaning of the term, nor did Congress act "*with this narrow issue in mind.*"<sup>225</sup> The Supreme Court articulated, however that "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, *that is the end of the matter*, and that intention is the law which must be given effect."<sup>226</sup> The Court stated that "on issues of statutory construction, courts *must* reject administrative constructions which are contrary to clear Congressional intent."<sup>227</sup>

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43 (1984) (applying a two-step test when reviewing an ambiguous statute and an agency's construction of that statute, and concluding that "when Congress has directly spoken to the precise question at issue . . . that is the end of the matter.") (emphasis added).

222. In *Chevron*, the Supreme Court observed that the relevant amended part of the Clean Air Act did "not explicitly define what Congress envisioned as a 'stationary source,' to which the permit program, provided in section 172(b)(6) of the Clean Air Act, should apply." *Id.* Thus, the Court concluded that the statute was ambiguous as to the meaning of the term. *Id.* The Court ultimately relied on the EPA's definition of term because the Court did not find the legislative history "illuminating." *Id.* at 861-62. Furthermore, the court found the remarks in the legislative history *Chevron* relied upon "were obviously *not made with this narrow issue in mind* and they cannot be said to demonstrate a Congressional desire. . . ." *Id.* at 862.

223. 42 U.S.C. § 7502 (2000).

224. See *Chevron*, 467 U.S. at 841-42 (examining 42 U.S.C. § 7502(b)(6) (1994)).

225. *Id.* at 858 (emphasis added). "Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents 'were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire. . . ." *Id.* at 862 (citing *Jewel Ridge Coal Corp. v. Mineworkers*, 325 U.S. 161, 168-69 (1945)).

226. *Id.* at 843 n.9.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, 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.

*Id.* at 842-43.

227. *Id.* at 843 n.9 (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117-118 (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social*

Like *Chevron*, the Third Circuit found that the ADEA, as amended by OWBPA, was ambiguous.<sup>228</sup> However, unlike *Chevron*,<sup>229</sup> through analyzing the OWBPA's legislative history,<sup>230</sup> one can find that Congress "squarely addressed" whether the ADEA applied to retirees, thus resolving any ambiguity.<sup>231</sup> For example, in the OWBPA's legislative history, the statements made by the Bill Managers and Bill Sponsors<sup>232</sup> indicated that Congress indeed "had the narrow issue" that the ADEA does not apply to retirees "in mind."<sup>233</sup> Thus, following *Chevron*, such statements demonstrated a Congressional desire that the ADEA should not apply to retirees. Therefore, such a clear intent trumped the EEOC's interpretation, thereby indicating that the court should have deferred to Congress rather than the EEOC.

Thus, reliance on the EEOC was inconsistent with the clear intent of Congress, and therefore, incorrect. The Third Circuit explained that legislative history was not persuasive and that further statutory construction was required. Yet, at the same time, followed the EEOC's inconsistent interpretation of the intent of Congress. As stated, reliance on a federal agency's interpretation of a statute, in lieu of clear guidance from Congress, goes against established precedent.<sup>234</sup> Thus, it follows that the Third Circuit erroneously discarded the statements made in the legislative history of OWBPA, and furthermore, incorrectly relied on the EEOC because Congress clearly expressed that the ADEA does not apply to retirees.

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Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896)).

228. See *Erie County*, 220 F.3d at 208-09 (finding that the ADEA was ambiguous).

229. See *Chevron*, 467 U.S. at 862. (finding "that the legislative history as a whole was silent on the precise issue" the Court faced, i.e. the meaning of the term "stationary source").

230. See *supra* notes 177-87 & 210-12, and accompanying text.

231. See, e.g., *supra* note 198.

232. See *supra* notes 177-87 & 210-12, and accompanying text.

233. 136 CONG. REC. S13,594, S13,609 (daily ed. Sept. 24, 1990) (statements of Sens. Bentsen and Pryor).

Mr. BENTSEN. Is it the understanding of the Senator that the Age Discrimination in Employment Act does not apply to retirees?

Mr. PRYOR: The distinguished Senator is correct. The ADEA applies only to employees and those individuals seeking employment. However, it does apply to an individual whose retirement benefits are discriminatorily structured *prior to retirement*.

*Id.* (emphasis added).

234. See *supra* notes 218-227 and accompanying text.

#### IV. EQUAL BENEFIT OR EQUAL COST SAFE HARBOR

It is well established that the cost of providing health benefits increases with age.<sup>235</sup> Thus, the DOL (EEOC) created a separate equal benefit or equal cost safe harbor provision.<sup>236</sup> The equal benefit or equal cost safe harbor was intended to provide flexibility for employers in the provision of health benefits.<sup>237</sup> Under the equal benefit or equal cost safe harbor, an employer could satisfy either 1) an equal benefit test of the safe harbor, or 2) a separate equal cost prong of the safe harbor.<sup>238</sup> The following discussion examines the principles associated with the equal benefit or equal cost safe harbor, explores the district court's and the Third Circuit's application of these principles, and argues that the *Erie County* decision as a whole will result in the elimination of retiree medical programs.

##### *A. The DOL and EEOC Explain the Equal Benefit or Equal Cost Safe Harbor*

On May 25, 1979, two months prior to the EEOC taking jurisdiction over ADEA, the DOL published a comprehensive Interpretative Bulletin explaining the requirements of Section 4(f)(2).<sup>239</sup> The underlying intent of the Interpretative Bulletin was

235. EEOC MANUAL, *supra* note 27 at ¶ 7213 5810

A principal objective of the ADEA was to encourage the hiring and retention of older workers. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers and that those greater costs would create a disincentive to hire older workers. It crafted the equal cost defense to eliminate the disincentive.

*Id.*; see also 136 CONG. REC. H8614, H8617-18 (daily ed. Oct. 2, 1990) (explanation of S. 1511) (explaining that in order to cope with increased health insurance costs, employers must be afforded "flexibility" in order to encourage the provision of benefits).

236. See 135 CONG. REC. S9948, S9949 (daily ed. Aug. 3, 1989) (statement of Sen. Pryor) (providing that Congress intended to create a safe harbor that would encourage employers to provide health benefits to its employees, and furthermore, encourage employers to hire older workers).

237. Congress recognized that the effect of requiring employers to provide all workers with the same benefits may "discourag[e] employers from hiring older workers because some types of benefits, [e.g. health insurance,] are more costly to provide for older workers." 136 CONG. REC. H8614, H8617 (daily ed. Oct. 2, 1990) (explanation of S. 1511) (justifying that the equal benefit or equal cost safe harbor strikes a balance of "fairness" for both employers and employees).

238. EEOC MANUAL, *supra* note 27, at ¶¶ 7212 5807, 7213 5810; see also *Erie County*, 220 F.3d at 215-17 (3rd Cir. 2000); 136 CONG. REC. H8614, H8617-18 (daily ed. Oct. 2, 1990) (statement of Rep. Clay); 136 CONG. REC. S13,236, S13,242-43 (daily ed. Sept. 17, 1990) (summary of OWBPA).

239. See Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648 (May 25, 1979) (discussing the requirements of 4(f)(2)); see also

to explain the equal benefit or equal cost principles.<sup>240</sup> The Interpretative Bulletin explicitly “permitted employers to take into account various benefits provided by the federal government in determining their benefit obligations of older employees.”<sup>241</sup> According to the DOL, “an employer was permitted . . . to offset health care benefits provided by Medicare in determining its own responsibilities.”<sup>242</sup> Furthermore, “employers [were permitted to] either ‘carve-out’ those benefits provided [through] Medicare or to take advantage of Medicare availability through the use of a ‘supplemental’ approach.”<sup>243</sup> Under the carve-out approach,<sup>244</sup> an employer was permitted to take Medicare into account (i.e. discount the Medicare-provided health care benefits) in determining its cost of providing health benefits to eligible employees.<sup>245</sup> An employer taking advantage of the supplemental option<sup>246</sup> was permitted to estimate the cost of the Medicare-provided benefits and subsequently obtain supplemental health care coverage to provide additional benefits not provided under Medicare.<sup>247</sup> The DOL provided that under either approach, the

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Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983); Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978); Executive Order 12144, 44 Fed. Reg. 37,193 (June 26, 1979).

240. See Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648, 30,648 (May 25, 1979); see also Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

241. Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

242. *Id.*

243. *Id.*

244. *Erie County*, 91 F. Supp. 2d at 876 n.16.

“Carve-out” health plans refer to plans whereby, for employees ages sixty-five or older, the employer “carves out” from its own health insurance plan, or directly offsets, those benefits actually paid for by Medicare. Under this approach, Medicare assumes primary responsibility for health care expenses and the employer’s regular plan pays only for those expenses it insures against which are not actually paid for by Medicare.

*Id.*

245. Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648, 30653-54 (May 25, 1979); see also Withdrawal of Proposed Rule, 53 Fed. Reg. 27,360 (July 20, 1988)

246. See *Erie County*, 91 F. Supp. 2d at 876 n.17 (stating that “[m]edicare-supplement plans are separate health insurance plans for employees ages sixty-five or older which attempt to anticipate the benefits that will be paid under Medicare and then supplement the employee with benefits which Medicare is not anticipated to pay.”)

247. Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648, 30,654 (May 25, 1979); see also Advance Notice of Proposed Rulemaking, 53 Fed. Reg. 26,789 (July 15, 1988).

combination of Medicare and employer provided health care benefits would be expected to provide benefits comparable to those provided to younger employees at a cost traditionally less than the cost for same amount of benefits provided to younger employees.<sup>248</sup>

Once the EEOC assumed jurisdiction in July 1979, the Commission initially preserved the principles provided by the DOL.<sup>249</sup> The EEOC subsequently launched a complete review of all interpretations issued by the DOL under the ADEA, and redesignated the DOL regulations and Interpretive Bulletin in 1981.<sup>250</sup> The redesignated regulations promulgated by the EEOC revised the Medicare offset approaches, and explicitly permitted the practice of integrating employer-provided benefits with Medicare, provided the "employer-provided and government-provided benefits" given to older workers were not less than the benefits provided to younger workers.<sup>251</sup> The Senate subsequently approved of the practice of taking Medicare into account,<sup>252</sup> and the EEOC continues to permit integration of retiree medical plans with Medicare.<sup>253</sup>

Thus far, this discussion of the equal benefit or equal cost safe harbor has revolved around "older and younger workers." It was not until the Third Circuit handed down the *Erie County* decision,<sup>254</sup> explicitly following the EEOC,<sup>255</sup> that ADEA protections were extended to retirees.<sup>256</sup> Neither Congress,<sup>257</sup> the DOL,<sup>258</sup> nor

248. Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648, 30,653-54.

249. See generally Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 9, 1978); Executive Order 12144, 44 Fed. Reg. 37,193 (June 26, 1979); Request for Comments, 57 Fed. Reg. 10,626 (March 27, 1992); Withdrawal of Proposed Rule, 53 Fed. Reg. 27,360, 27,360 (July 20, 1988); Advance Notice of Proposed Rulemaking, 53 Fed. Reg. 26,789, 26790 (July 15, 1988).

250. Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724 (Sept. 29, 1981); 29 C.F.R. § 1625.10 (2001).

251. 29 C.F.R. § 1625.10(e)(2001).

252. *Id.*

253. EEOC MANUAL, *supra* note 27 at ¶ 7214 5816 (Rescinded).

254. See *Erie County*, 220 F.3d at 216.

255. See EEOC Amicus Brief, *supra* note 63, at 17 (construing that the term "individual" in section 4(a)(1) of the ADEA encompassed "retirees," and therefore concluding that ADEA protections must be provided to retirees as well as active employees).

256. See *Erie County*, 220 F.3d at 210 (finding the EEOC argument, as provided in its (the EEOC's) amicus brief, "to be persuasive").

257. See *supra* notes 177-88 & 190-216, and accompanying text.

258. 29 C.F.R. § 860.120 (1969) (redesignated at 29 C.F.R. § 1625.10 (2001)); see generally Interpretative Bulletin on Employee Benefit Plans, 44 Fed. Reg. 30,648 (May 25, 1979); Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

the EEOC (prior to the *Erie County* decision)<sup>259</sup> intended such an unprecedented application. Since the Supreme Court recently denied writ of certiorari,<sup>260</sup> the *Erie County* decision is controlling, at least in the Third Circuit.<sup>261</sup> Thus, all references to older and younger retirees are synonymous with older and younger workers.

### *B. The Equal Benefit Test and Its Application to Retirees*

The Equal Benefit test is just that. It holds that “benefits are ‘equal’ only [when] they are the same for older and younger workers in all respects.”<sup>262</sup> Currently, the EEOC and controlling regulations, however, permit employers to reduce benefits, but such reduced benefits, taken together with Medicare benefits, must equal benefits provided to younger retirees.<sup>263</sup> Even after the EEOC’s temporary rescission of its policy regarding retiree medical programs announced on August 17, 2001,<sup>264</sup> the

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259. 29 C.F.R. § 1625.10 (2001); Substantive Regulations on Health Insurance Benefits for Employees Age 65 to 69, 48 Fed. Reg. 26,434 (June 7, 1983).

260. See *Erie County Retirees Assoc. v. County of Erie, Penn.*, 532 U.S. at 914.

261. The *Erie County* decision is controlling in Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands. WATSON WYATT INSIDER, *EEOC to Rethink ADEA’s Application to Retirees*, Sept 2001, available at <http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=8821&Component=The+Insider#top> (last visited July 18, 2002). Although the EEOC has temporarily abandoned the *Erie County* decision as their national policy, “the agency’s shift in position will neither affect court cases [in other Circuits] nor negate the effects of [the] *Erie County* [decision].” *Id.*

262. EEOC MANUAL, *supra* note 27 at ¶ 7212 5807.

EXAMPLE - Employer M maintains a health plan for its retirees. That plan covers 360 days per year of inpatient care in a hospital for retirees who are under 65 years of age. Assume that Medicare covers 180 days per year of inpatient care for individuals who are 65 or above. Based on this, Employer M’s policy provides only 180 days of hospital coverage per year for retirees who are 65 and over. Employer M has not violated the ADEA, because all retirees get coverage for 360 days of hospital care.

*Id.* at ¶ 7214 5816.

263. *Id.*; see also 29 C.F.R. § 1625.10(a)(1)(2001).

264. See EEOC Press Release, *supra* note 35 (explaining that the August 17, 2001 EEOC Directive Transmittal rescinded Section IV (B) of the Compliance Manual Chapter on Employee Benefits, October 3, 2000, regarding the ADEA and health insurance, and also deleted a related Example regarding retiree health benefits found in Section II (B) of the same Compliance Manual Chapter). Although the EEOC has rescinded its policy regarding the ADEA and retiree medical programs, examining the EEOC’s official policy after its adoption of the *Erie County* decision in October 2000 is not only important for our understanding, but important because the EEOC has not entirely abandoned *Erie County’s* principles. Rather, the EEOC is merely reviewing its policy. Thus, the EEOC may once again adopt the *Erie County* decision after further review. If other circuits adhere to the *Erie*



regulations and the EEOC Compliance Manual maintain that employers may take both employer-provided and Medicare-provided benefits into account when structuring its health benefits for older retirees.<sup>265</sup>

### 1. *What Constitutes a Lesser Benefit?*

The EEOC provided that if older retirees do not receive an equal benefit, that is, if an employer provides a type or value of health benefits to younger retirees that cannot be matched under Medicare, then the employer would be found to have violated the ADEA.<sup>266</sup>

**EXAMPLE** – Employer M . . . covers . . . 360 days per year of inpatient hospital care[,] . . . except Employer M reduces its hospital coverage for retirees who receive Medicare benefits to 100 days [(assume that Medicare covers 180 days of hospital coverage)]. Because Medicare recipients will be covered for a total of only 280 days of inpatient care (180 days from Medicare and 100 days from the employer), they have not received an equal benefit [(because all other employees will be covered for 360 days)].<sup>267</sup>

The regulations also provide that a lesser benefit results if an older retiree “bear[s] a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger [retiree].”<sup>268</sup> Additionally, the DOL has stated, at least informally, that a shift from an indemnity plan to a network plan, i.e., an HMO health plan, is a reduction in benefits, thus producing a lesser benefit.<sup>269</sup>

### 2. *The District Court Applied the Equal Benefit Test on Remand*

Pursuant to the laws governing Medicare, employers may provide lesser benefits to Medicare-eligible retirees.<sup>270</sup> There are several situations where “employers that provide health benefits to retirees reduce or eliminate those benefits when the retirees reach Medicare-eligibility.”<sup>271</sup> According to the Third Circuit,

*County* holding, it may be more likely that the EEOC will readopt the policy.

265. 29 C.F.R. § 1625.10(e) (2001).

266. See EEOC MANUAL, *supra* note 27 at ¶ 7414 5816 (rescinded).

267. *Id.*

268. 29 C.F.R. § 1625.10(d)(4)(ii) (2001).

269. Telephone Interview with Michael F. Tomasek, partner, Schiff Hardin & Waite, Chicago, IL (Oct. 30, 2001); see also *Higher Premiums, More Restrictive Coverage for Older Versus Younger Retirees Violates ADEA*, THOMPSON PUBLISHING GROUP, June 2001, available at <http://www.thompson.com>

270. 42 U.S.C. 1395y(b)(1)(A)(2000).

271. See EEOC MANUAL, *supra* note 27 at ¶ 7214 5816; see also *Karlen v. City Colleges of Chicago*, No. 84C2925, 1986 U.S. Dist. LEXIS 16576 \*1-3 (N.D. Ill. Dec. 12, 1986) (discussing sliding scale for sick leave that is unused

however, “Medicare status is a direct proxy for age,”<sup>272</sup> and therefore, any reduction or elimination of benefits due to Medicare status is a violation of the ADEA, unless the employer can justify its actions under the equal benefit or equal cost safe harbor.<sup>273</sup> In its instructions to the district court on remand, the Third Circuit stated that the equal benefit test of the safe harbor should first be applied, and in accordance with 29 C.F.R. § 1625.10(e), the district court should equally consider both the Medicare-provided and County-provided benefits that the Medicare-eligible retirees received.<sup>274</sup>

The district court, following the Third Circuit’s instructions on remand,<sup>275</sup> applied the equal benefit prong by analyzing the benefits provided under SecurityBlue versus benefits provided under the traditional indemnity plan and the SelectBlue plan.<sup>276</sup> The court determined that SecurityBlue provided inferior benefits based upon three different observations.<sup>277</sup>

First, the court found that under the traditional indemnity plan, the retiree class paid their own Medicare Part B premiums, at \$50 per month,<sup>278</sup> whereas the younger retirees’ monthly contribution was only \$12 per month.<sup>279</sup> Looking strictly at what the retirees contributed, the district court held that the retiree class was “made to bear a greater proportion of the total cost of their health insurance premiums than younger retirees,” thus

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by the retiree); 136 CONG. REC. S13,594, S13,607-08 (daily ed. Sept. 24, 1990) (statement of Sen. Grassley); Mark A. Vogel and Alberto L. Calafell, *Issues & Overview: Most Retiree Health Plans Suspect Under EEOC Interpretation of ADEA*, THE METROPOLITAN CORPORATE COUNSEL, July 2001, available at <http://www.weil.com/wgm/cbyline.nsf/7bdf23df983a38848525678a007d059c/401852fc042a330c85256a8400476549?OpenDocument> (last visited Aug. 2, 2002).

272. *Erie County*, 220 F.3d at 211

273. *Id.* at 211-13.

274. *Id.* at 216.

275. *Erie County Retirees Assoc. v. County of Erie, Penn.*, 140 F. Supp. 2d 466, 467 (W.D.Pa. 2001).

276. *See generally Erie County*, 140 F. Supp. 2d at 472-77.

277. *Id.*; *Cf. Gutchen v. Board of Governors*, 148 F. Supp. 2d 151, 161 (D.R.I. 2001) (holding that the University, although providing lesser benefits to individuals over age sixty-five than those under age sixty-five, complied with the equal benefit or equal cost safe harbor of the ADEA because the University reduced benefits to the extent necessary to equalize the cost of providing benefits to older retirees and younger retirees).

278. As of January 1, 2001, “Medicare Part B premiums . . . , as of January 1, 2001, were \$50 per month.” *Erie County*, 140 F. Supp. 2d at 472.

279. *Id.* at 472 (examining the retiree class’ “argument that SecurityBlue [was] a lesser benefit than the traditional indemnity plan because [SecurityBlue] require[d] the [retiree class] to continue paying their Medicare Part B premiums . . . while [the indemnity plan only] required enrollees to make a contribution of only \$12 per month.”).

constituting a violation of 29 C.F.R. § 1625.10(d)(4)(ii)(2001).<sup>280</sup> Likewise, the court found that under the SelectBlue plan, the retiree class paid the \$50 premiums, whereas the younger retirees paid \$0 premium costs, thus creating a violation of the regulations.<sup>281</sup>

Second, the court held that “SecurityBlue [was] a lesser benefit than SelectBlue”<sup>282</sup> because SecurityBlue restricted the retiree class exclusively to a service provider network under the HMO coverage, while SelectBlue gave younger retirees a choice between the HMO coverage or traditional indemnity coverage.<sup>283</sup>

Third, the district court held that SecurityBlue provided a lesser benefit than SelectBlue<sup>284</sup> because the retiree class had to pay a \$10 co-payment for prescription drugs and were limited to a formulary, while younger retirees had only a \$2 prescription-drug co-payment limitation to specified drugs in both plans.<sup>285</sup> The court held that restricting drug coverage based on a formulary was not, in and of itself, discriminatory.<sup>286</sup> But forcing older retirees to bear a greater proportion of the total cost for drug coverage,<sup>287</sup>

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280. *Id.* 472-74.

281. *Id.* at 476. (finding that “[r]equiring older employees to contribute a portion of voluntary benefit plan premiums while requiring no such contribution from younger employees [was] expressly prohibited” under 29 C.F.R. § 1625.10(d)(4)(ii)(B)(2001)).

282. The district court did not hold that SecurityBlue was a lesser benefit than the traditional indemnity plan when it compared the provision of actual benefits under each plan. *Id.* at 474. Instead, the court found that the retiree class’ “preference for the traditional indemnity plan’s mechanism of insuring medical services [i.e., benefits,] [was] a subjective preference” because “benefit[s] of either plan is largely in the eye of the beholder.” *Id.* The court articulated that “[w]hile [the retiree class] may prefer the traditional indemnity plan for its greater choice of service providers, other retirees are likely to prefer SecurityBlue for its low co-payments or other unique attributes such as coverage for eye examinations and dental visits.” *Id.*

283. *Erie County*, 140 F. Supp. 2d at 476.

284. Similar to the district court’s conclusion that SecurityBlue was a lesser benefit than the traditional indemnity plan when it compared the provision of actual benefits under each plan, the court held “that SecurityBlue’s formulary did not render it a lesser benefit than the traditional indemnity plan.” *Id.* at 477. Specifically, the Third Circuit concluded that similar to its (the court) findings that “the traditional indemnity plan’s mechanism of insuring medical services,” i.e., benefits, was “subjective,” the court held that “[t]he greater choice afforded by the traditional indemnity plan” through its prescription drug benefit “does not,” in and of itself, “objectively render the plan a greater benefit than SecurityBlue because the value of this aspect in this context [was] . . . subjective.” *Id.* at 474-75.

285. *Id.* at 477.

286. *Id.*

287. *See id.* (concluding that 29 C.F.R. § 1625.10(d)(4)(ii)(B) was violated because an employer cannot require retirees to pay a greater proportion of the total cost for the prescription drug coverage violated).

along with restricting the formulary, resulted in inferior benefits for older retirees.<sup>288</sup>

### C. The Equal Cost Test and Its Application to Retirees

According to the EEOC, “an employer that spends the same amount of money, or incurs the same cost, on behalf of older [retirees] as on behalf of younger [retirees] may . . . provide certain fringe benefits to older [retirees] in smaller amounts or for shorter time periods than it provides to younger [retirees].”<sup>289</sup> In order to satisfy the equal cost defense, an employer must show that:<sup>290</sup>

- 1) benefits become more expensive with increasing age<sup>291</sup> . . . ;
- 2) the benefit is part of a bona fide employee benefit plan<sup>292</sup> . . . ;
- 3) the plan requires lower benefits<sup>293</sup> . . . ;
- 4) 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<sup>294</sup> . . . ;
- 5) The benefit levels for older workers are reduced only to the extent necessary to achieve approximate equivalency in cost for older and younger workers.<sup>295</sup>

In other words, employers providing lesser benefits to older retirees may avoid ADEA liability by showing that it spends the same amount for benefits for older and younger retirees, and furthermore, that such reductions in benefits for older retirees are limited to an amount which equals the costs incurred by younger retirees.<sup>296</sup>

As stated, the Third Circuit directed the lower court to apply the equal benefit or equal cost test to see whether the County satisfied its requirements.<sup>297</sup> The court subsequently stated that if

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288. *Id.* at 476-77 (finding that “the ability . . . to obtain coverage for a greater number of prescription drugs at a lower cost under SelectBlue renders the plan a greater benefit than SecurityBlue”).

289. EEOC MANUAL, *supra* note 27 at ¶ 7213 5810.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* “EXAMPLE - Employer S shows that it pays \$4,000 per year for each of its employees to purchase a package that includes life and health insurance benefits. Employer S must show how the \$4,000 is allocated between these benefits.” *Id.*

295. *Id.*

296. *Id.*; see also 29 C.F.R. § 1625.10(d)(1) (2001); GROOM LAW GROUP, *supra* note 25 at 3.

297. *Erie County*, 220 F.3d at 216.

the County failed the equal benefit test, the district court should then apply the equal cost test.<sup>298</sup> Unlike the court's direction regarding the application of the equal benefit test, the Third Circuit limited the equal cost test by providing that the district court should only consider the County's cost for providing benefits, *not* the cost of Medicare.<sup>299</sup>

The Third Circuit based its conclusion on a statement provided by Senator Bensten where he articulated that "[t]he [equal benefit or equal cost] rule does not require that an older worker receive the exact same level of a benefit that a younger worker receives, as long as the employer incurs the same cost in purchasing the benefit for the older worker as for the younger worker."<sup>300</sup> Upon the Third Circuit's findings and subsequent directions, "the County conceded that it [could not] meet the equal cost prong as it was defined by the Third Circuit."<sup>301</sup> The County noted that it spent less on the Medicare-eligible retirees because government-provided benefits made up the cost of the remainder of the benefits available to the retiree class.<sup>302</sup>

The Third Circuit acknowledged that ignoring Medicare costs would make it difficult for employers to satisfy the equal cost test.<sup>303</sup> In reality, it is virtually impossible to comply with Erie County's equal cost test.<sup>304</sup> For example, in 2000, the average reported cost for individual coverage under a traditional indemnity plan, as well as an HMO was approximately \$2,340 for an active employee, \$3,072 for a non-Medicare-eligible retiree, and \$1,656 for a Medicare-eligible retiree (excluding the cost of Medicare).<sup>305</sup> A more recent study provides that the cost of a non-Medicare-eligible

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298. *See id.* (providing that in the event the County could not satisfy the equal benefit prong of the equal benefit or equal cost safe harbor, the County could avoid liability if the district court found that the County satisfied the equal cost prong of the test).

299. *Id.*

300. *Id.* (quoting 136 CONG. REC. S13,594, S13,609 (daily ed. Sept. 24, 1990) (statement of Sen. Bentsen)).

301. *Erie County*, 140 F. Supp. 2d at 477.

302. *Id.*

303. *See Erie County*, 220 F.3d at 216 n.15. (recognizing that the Court's conclusion may eliminate the ability of an employer to satisfy the equal cost safe harbor where retiree medical benefit programs are structured in such a way that Medicare-eligible retirees are placed in a health plan which piggy-backs off of Medicare and non-Medicare-eligible retirees placed in a plan which resembles, for example, a health plan offered to active employees).

304. *See Vogel & Calafell, supra* note 273.

305. *See TOWERS PERRIN MONITOR, Employers Encounter Surging Health Care Costs*, Issue 220, Jan. 2000, at 1-2, available at [http://www.towers.com/towers\\_publications/publications/Monitor/mon0001.htm](http://www.towers.com/towers_publications/publications/Monitor/mon0001.htm) (last visited Aug. 20, 2002) [hereinafter TOWERS PERRIN].

retiree was \$5,537, compared to \$2,319 for a Medicare-eligible.<sup>306</sup> That is a considerable disparity in cost between the non-Medicare-eligible retiree and the Medicare-eligible retiree. This considerable difference in cost, coupled with the Third Circuit's ruling that the cost of Medicare cannot be taken into account, indicates that an employer would never be able to satisfy the equal cost test.<sup>307</sup>

Experts contend that in response to such an onerous test, an employer will likely choose either to terminate the retiree medical program for all retirees, or to limit benefits available to non-Medicare-eligible retirees by reducing their costs to equal the cost of the Medicare-eligible retirees.<sup>308</sup> For example, instead of providing health benefits totaling \$5,537 for a non-Medicare-eligible retiree, an employer may opt to reduce those benefits to total \$2,319 in order to meet the equal cost test under the ADEA. Such a reduction in benefits for non-Medicare-eligible retirees will negatively impact this class of retirees.<sup>309</sup> Instead of providing lesser benefits to older retirees due to increased cost because of age, employers may provide lesser benefits to non-Medicare-eligible retirees, and still be able to comply with the equal cost

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306. *William M. Mercer, Inc., Testimony Before the Subcomm. on Employer-Employee Relations Committee on Education and the Workforce, House of Representatives, 107th Cong., 4* (Nov. 1, 2001) (statement of Mr. Chip Kerby, consulting attorney and principal, Washington Resource Group of William M. Mercer, Incorporated) [hereinafter Mercer Testimony] (citing William M. Mercer, *Mercer/Foster Higgins National Survey of Employer-Sponsored Health Plans*, 2001) available at <http://edworkforce.house.gov/hearings/107th/eeer/retiree110101/kerby.pdf> (last visited Aug. 23, 2002).

307. See Vogel and Calafell, *supra* note 273.

308. See, e.g., WIMBERLY LAWSON AND SEALE, PLLC, *Lower Benefits For Older Retirees May Violate Age Discrimination Law*, available at [http://www.wls-law.com/newsletters/oct2000/lowerbenefits\\_older.htm](http://www.wls-law.com/newsletters/oct2000/lowerbenefits_older.htm) (last visited Aug. 20, 2002); see also James P. McElligott & Marc E. Purinton, *Retiree Health Plans Need Review After Erie County Age Discrimination Decision*, MCGUIREWOODS, LLC, June 2001, available at <http://www.mwbb.com/news-resources/publications/taxation/article614.asp> (last visited August 20, 2002) (stating that "[i]t will be difficult for most retiree health care plans to meet the 'equal benefit' standard . . ."); EEOC, *Information About the Age Discrimination in Employment Act*, WISCONSIN ASSOCIATION OF SCHOOL BOARDS, available at <http://www.wasb.org/legislative/adea.html> (last visited Aug. 20, 2002); GROOM LAW GROUP, *supra* note 25; QUARLES & BRADY, LLP, *supra* note 30.

309. See generally United States General Accounting Office, *Report to the Chairman, Committee on Health, Education, Labor, and Pensions, U.S. Senate, Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable to Further Erosion*, Pub. No. GAO-01-374, 19-24 (May 2001) [hereinafter GAO Report] available at <http://frwebgate.access.gpo.gov/cgi-bin/useftg.cgi?IPaddress=162.140.64.21&filename=d01374.pdf&directory=/diskb/wais/data/gao> (last visited August 25, 2002).

test.<sup>310</sup>

*D. Retiree Medical Programs Are Declining: Erie County Will Contribute to the Erosion of Retiree Medical Benefits*

The employer-provided health benefits system is voluntary,<sup>311</sup> and therefore, an employer can lawfully terminate health benefits or refrain from providing health benefits at all.<sup>312</sup> The Supreme Court has recognized that “[n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.”<sup>313</sup> Furthermore, the mandatory vesting rules set forth in ERISA do not apply to welfare benefits.<sup>314</sup> Therefore, employers are free to eliminate or cut back benefits offered under their health plans.<sup>315</sup> Thus, “the concern that intrusive regulation” of employer-provided benefits could contribute to the decline in the provision of benefits “is a realistic one,” especially if employers are subject to increased liability.<sup>316</sup>

Providing retiree medical benefits to a retiree is also voluntary.<sup>317</sup> ERISA permits employers to eliminate or modify its

310. *GAO Testimony II*, supra note 11, at 3-6; see also *GAO Report*, supra note 309, at 8-10.

311. *GAO Report*, supra note 309, at 17, Appendix II; see also *GAO Testimony I*, supra note 2, at 2.

312. *Center v. First Int’l Life Ins. Co.*, Civil Action No. 94-11596-PBS, 1997 U.S. Dist. LEXIS 3480 (Dist. Ct. Mass. 1997); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); see also *Sprague v. GMC*, 133 F.3d 388 (6th Cir. 1997) (holding that “welfare plans are specifically exempted from vesting requirements to which pension plans are subject (see 29 U.S.C. § 1051(1)) . . . [t]herefore, employers ‘are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.’”).

313. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

314. ERISA § 201; 29 U.S.C. § 1051(1) (2000).

315. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 3.25 (2nd ed. 1999). “In passing ERISA, Congress determined that requiring employers to vested employee welfare benefits ‘would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.’” *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 859 (4th Cir. 1994); see also H. REP. NO. 93-807 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4726 and H. REP. NO. 93-383 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4935. “Congress accordingly rejected vesting requirements for welfare benefit plans.” *Gable*, 35 F. 3d. at 859.

316. Brief of Amici Curiae the American Association of Health Plans, Inc., American Benefits Council, Blue Cross Blue Shield Association, Chamber of Commerce of the United States of America, and Health Insurance Association of America in Support of Petitioner at 4, *County of Erie, Penn. v. Erie County Retirees Assoc.*, 121 S. Ct. 1247 (2001) (No. 00-906) available at [www.americanbenefitscouncil.org/documents/eric\\_county\\_amicus\\_brief.pdf](http://www.americanbenefitscouncil.org/documents/eric_county_amicus_brief.pdf) (last visited August 25, 2002); see also EEOC Amicus Brief, supra note 64, at 30.

317. *GAO Testimony I*, supra note 14, at 2; see also EEOC, supra note 308

retiree medical programs so long as such benefits were not promised in the employer's plan documents.<sup>318</sup> For example, employers can eliminate retiree medical benefits if the employer retained the right to change or eliminate the plans, or have promised retirees that benefits would not be permanent.<sup>319</sup> To date, employers have been traditionally terminating or modifying these benefits in response to increased health care costs.<sup>320</sup>

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(stating that “[a]n employer is not required to offer health benefits to its retirees.”).

318. EBRI REPORT, *supra* note 33, at 7; *see also* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (holding that Curtiss-Wright's reservation of the right to amend the plan enabled Curtiss-Wright to terminate its retiree medical program); *In re Unisys Corp. Retiree Medical Benefit “ERISA” Litig.*, 58 F.3d 896, 904-05 (3rd Cir. 1995) (holding that retiree and disability benefits provided by Unisys Corp. were not vested because Unisys. “reserved the right” to modify or eliminate those benefits whenever they wanted); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994) (stating that the Plan “specifically reserved the company's right to modify the plan”); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) (noting that the majority of Circuits “agree that ‘ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued’”); *Sprague v. GMC*, 133 F.3d 388, 393 (6th Cir. 1997) (stating “the plan document, including the summary plan descriptions, effectively reserved a right on GM's part to amend or terminate the plan,” thus, modification to their retiree medical program was permissible); *Frahm v. Equitable Life Assur. Soc’y of the United States*, 137 F.3d 955, 957 (7th Cir. 1998) (finding that when the plan documents reserve the right to change the terms of the plan, any modification is permissible under the law); *Marx v. Loral Corp.*, 87 F.3d 1049, 1052 (9th Cir. 1996) (noting that “because the Plan expressly reserved the defendant's right” to modify the Plan's terms, Loral did not violate the law when it decreased the retiree class' health benefits); *Alday v. Container Corp. of America*, 906 F.2d 660, 665-66 (11th Cir. 1990) (holding that the modifications made to the retiree medical program were permissible under the law and that any oral or other communications were trumped by the reservation of the right to modify or terminate clause provided in the plan document).

319. *Supra* note 318; *see also* United States Department of Labor, Pension and Welfare Benefits Administration, *Can the Retiree Health Benefits Provided By Your Employer Be Cut?* (Mar. 1998), available at <http://www.dol.gov/pwba/pubs/brief1.htm> (last visited Aug. 22, 2002). “Typical language giving the employer the right [to modify or terminate benefits] might read: *The company reserves the right to modify, revoke, suspend, terminate, or change the program, in whole or in part, at any time.*” *Id.* (emphasis in original).

320. *The Henry J. Kaiser Family Foundation, The Future of Retiree Health Benefits: Challenges and Options, Testimony Before the Subcomm. on Employer-Employee Relations Committee on Education and the Workforce, House of Representatives*, 107th Cong., 5 (Nov. 1, 2001) (statement of Patricia Neuman, Sc.D., Vice President and Director, Medicare Policy Project) [hereinafter *Kaiser Testimony*] available at <http://www.kff.org> (last visited Aug. 23, 2002); *see also* GAO *Testimony II*, *supra* note 11 at 1-3; *Mercer Testimony*, *supra* note 306, at 1-5.



Several surveys conducted prior to January 2000 illustrate the rapid increase in the cost of providing retiree medical benefits.<sup>321</sup> For example, “[t]he combined cost of coverage for [non-Medicare-eligible retirees] in all plan types jumped by 10%, the same amount reported by employers for active employees.”<sup>322</sup> Additionally, the cost of coverage for Medicare-eligible retirees dramatically increased, on average, by 24%.<sup>323</sup> Such rising health costs can place a huge burden on employers.<sup>324</sup> Due to escalating costs, many employers have articulated that they do not want to terminate the benefits they provide to their employees and/or retirees, but sometimes have no choice in the matter.<sup>325</sup>

Employer-provided retiree medical benefits have been steadily declining over the past ten years.<sup>326</sup> For example, a “survey of large employers (most with 1,000 or more employees) also showed that the percentage [of employers] offering retiree health benefits” to Medicare-eligible retirees and non-Medicare-eligible retirees has declined by 18% and 15% respectively.<sup>327</sup> Another study reveals that coverage has decreased among large employers for non-Medicare-eligible retirees from 88% in 1991 to 76% in 1999, and from 80% in 1991 to 66% in 1999 for Medicare-eligible retirees.<sup>328</sup> Between 1999 and 2001, employers providing retiree medical benefits to Medicare-eligible retirees declined by 10%.<sup>329</sup>

Moreover, employers opting to continue to provide retiree medical benefits have sought to modify their benefits structure.<sup>330</sup> Instead of terminating benefits, employers are using different

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321. See generally TOWERS PERRIN, *supra* note 305.

322. *Id.*

323. *Id.*; see also Mercer Testimony, *supra* note 306, at 3.

324. GAO Report, *supra* note 309, at 12.

325. See TOWERS PERRIN, *supra* note 305 (stating that employers must consider the financial situation and objectives of the company when making decisions about health care); see also Mercer Testimony, *supra* note 306, at 9; Kaiser Testimony, *supra* note 320, at 5-6.

326. GAO Testimony I, *supra* note 14, at 5-6; see also EBRI REPORT, *supra* note 33, at 9 (stating that “employers are dropping retirees health benefits.”) (emphasis in original).

327. EBRI REPORT, *supra* note 33, at 9 (citing Frank McArdle et al., *Retiree Health Coverage: Recent Trends and Employer Perspectives and Future Benefits*, THE HENRY J. KAISER FAMILY FOUNDATION, Oct. 1999 and Steve Coppock & Andrew Zebrak, *Finding the Right Fit: Medicare, Prescription Drugs and Current Coverage Options*, Testimony before the U.S. Senate, Comm. on Finance, Apr. 24, 2001); see also Kaiser Testimony, *supra* note 320, at 5 (showing a decline in percentage as well).

328. Kaiser Testimony, *supra* note 320, at 5.

329. *Id.*

330. See TOWERS PERRIN, *supra* note 305 (explaining that employers have created new approaches to health care management); see also GAO Report, *supra* note 309, at 8-12.

approaches to controlling the costs of providing benefits, thus maintaining the provision of benefits while dealing with the increased health costs.<sup>331</sup> Oftentimes, employers are adopting cost-sharing programs.<sup>332</sup> Many employers are also restricting eligibility for retiree medical coverage, e.g. “employers with an age requirement of 55” with ten years of service.<sup>333</sup> Some other approaches include adopting a defined contribution plan health benefit plan,<sup>334</sup> consolidating health plans, changing network delivery models (similar to *Erie County*) and/or changing or developing their employee/retiree contribution strategy.<sup>335</sup> Several of these new approaches, however, could place the employer in a position where liability is inevitable.<sup>336</sup>

The *Erie County* decision is the main source of this potential liability facing employers who are attempting to cope with rising health costs.<sup>337</sup> Such liability could be the proverbial “straw that broke the camel’s back,” because many employers who are taking such cost control approaches have been discouraged from making any modifications for fear that such modifications and/or reductions may lead to increased liability.<sup>338</sup> Additionally, because

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331. See *GAO Report*, *supra* note 309, at 9-10; see also EBRI REPORT, *supra* note 33, at 17-19.

332. TOWERS PERRIN, *supra* note 305; see also *GAO Report*, *supra* note 309, at 9-10 (explaining that such employers are asking retirees to pay for a larger share of the coverage costs).

333. EBRI REPORT, *supra* note 33, at 10; see also *GAO Report*, *supra* note 309, at 9-10.

334. See *GAO Report*, *supra* note 309, at 10-11. A defined contribution (DC) type health plan structure has been gaining momentum within the benefits community. EBRI REPORT, *supra* note 33, at 17-18. A DC health plan is essentially identical to a 401(k) plan (except that funds are used to purchase, among other things, health insurance). *Id.* at 17. Under a DC health plan, individual accounts are created on behalf of each employee. *Id.* The accounts are funded via employee elective deferrals, employer nonelective contributions, or a combination of elective deferrals and nonelective contributions. *Id.* Contributions to the accounts are then available to the employee to cover, for example, the cost of health insurance premiums, co-payments, or other health related expenses. *Id.* at 17-18. Each individual draws down their account as medical expenses are incurred. *Id.* Any amounts left over, may be rolled over and used to pay for expenses in subsequent years. *Id.*

335. See *GAO Report*, *supra* note 309, at 9-12; see also *Mercer Testimony*, *supra* note 306, at 3-4; *GAO Testimony II*, *supra* note 11, at 4-5; *Kaiser Testimony*, *supra* note 320, at 6-8; EBRI REPORT, *supra* note 33, at 17-19.

336. See EBRI REPORT, *supra* note 33, at 12 (explaining the Third Circuit Court ruling that a claim is established under the ADEA unless one of two “safe harbor” provisions is applicable); see also *GAO Report*, *supra* note 309, at 16-17; *Mercer Testimony*, *supra* note 306, at 8-9.

337. See *Mercer Testimony*, *supra* note 306, at 8-9.

338. EBRI REPORT, *supra* note 33, at 14 (explaining that “the Erie County decision increases the uncertainty about [employer’s] future liability. . .”).

many employers sponsor a retiree medical program similar to *Erie County's* program, many fear that a new wave of class action lawsuits may be filed pursuant to *Erie County*.<sup>339</sup>

As stated, in order to comply with the equal benefit or equal cost safe harbor, employers will either have to increase the costs they incur for older retirees, or cut back on benefits already provided to non-Medicare-eligible retirees. With health care costs increasing and some employers already terminating retiree health benefits or restricting eligibility, it is unlikely that employers will increase the level of health benefits for Medicare-eligible retirees.<sup>340</sup> Thus, the only option employers may have, as a result of *Erie County*, is to simply eliminate retiree health benefits for all retirees.<sup>341</sup> Eliminating retiree medical programs, however, would not be in the best interests of the public.<sup>342</sup> Contributing to the elimination of benefits strikes at the heart of the intent of Congress to provide health benefits,<sup>343</sup> and would leave retirees unprotected when their need for health care is probably the greatest.<sup>344</sup>

## V. PROPOSAL

The combined effect of rising health costs and potential liability as a result of the *Erie County* decision will contribute to the decline of retiree medical benefits.<sup>345</sup> As stated, such benefits

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339. See Thomas S. Gigot, *District Court Holds on Remand that Erie County's Retiree Health Program Flunks ADEA's "Equal Cost or Equal Benefit" Test By Requiring Medicare-Eligible Retirees to Accept Coverage through a Medicare HMO While Providing Coverage to Pre-Medicare Retirees through a Point-of-Service Plan*, GROOM LAW GROUP, July 1, 2001, available at [http://www.groom.com/articles\\_display.asp?display=61](http://www.groom.com/articles_display.asp?display=61).

340. GAO Report, *supra* note 309, at 17; see also *Mercer Testimony*, *supra* note 306, at 8-9;

341. Trish Nicholson, *Long Goodbye to Benefits?*, AARP BULLETIN, July/August 2001, available at <http://www.aarp.org/bulletin/julyaug01/goodbye.html> (last visited Aug. 2, 2002).

342. QUARLES & BRADY, LLP, *supra* note 30. County of Erie, Penn., Petitioner v. Erie County Retirees Assoc., et. al., Respondents, No. 00-906, Oct. Term 2000, Brief for Petitioner at 26-29; see also Brief of Amici Curiae the Am. Assoc. of Health Plans, Inc., American Benefits Council, Blue Cross Blue Shield Association, Chamber of Commerce of the United States of America, and Health Insurance Association of America in Support of Petitioner at 4-7, County of Erie, Penn. v. Erie County Retirees Assoc., 121 S. Ct. 1247 (2001) (No. 00-906)(discussing regulation of Employee Benefits programs).

343. See *supra* note 1, at 13,600(statement of Sen. Hatch); see also QUARLES & BRADY, LLP, *supra* note 30.

344. GAO Report, *supra* note 309, at 25; see also *GAO Testimony II*, *supra* note 11, at 6.

345. See, e.g. *Erie County*, 91 F. Supp. 2d at 878 (stating "[b]ecause the cost of such benefits can represent a prohibitively large expense, there is a very real danger that employers would attempt to comply with the equal

are arguably one of the most valued benefits an employee can receive from his or her employer.<sup>346</sup> The *Erie County* decision may result in an effect that negatively impacts employees and retirees alike because such valued benefits may be too difficult to provide, and therefore, such benefits could be eliminated altogether.<sup>347</sup> Thus, the author proposes that the *Erie County* decision should be viewed as an anomalous decision and it should be disregarded by the courts. Additionally, the Third Circuit's application of the equal benefit or equal cost safe harbor to retiree medical programs should be viewed as an erroneous application as well.

Congress should expressly amend ADEA to codify 29 C.F.R. § 1625.10(e), which permits employers to take Medicare into account when determining if the equal benefit test has been satisfied.<sup>348</sup> Currently, an employer can provide equal benefits to both younger and older retirees under a Medicare carve-out approach, which is permissible under 29 C.F.R. § 1625.10(e).<sup>349</sup> Under a Medicare carve-out plan, the employer can structure a retiree medical program to provide benefits to younger retirees that mirrors Medicare benefits, and provide any additional benefits, both in type and in value, to younger and older retirees.<sup>350</sup> Under this approach, the employer can take advantage of 29 C.F.R. § 1625.10(e) and satisfy the equal benefit prong. By taking the employer-provided and Medicare-provided benefits into account,

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cost/equal benefit rule by simply eliminating (or severely reducing) health benefits for all retirees.”); see also *Kaiser Testimony*, *supra* note 320, at 8; EBRI REPORT, *supra* note 33, at 14; Gigot, *supra* note 339.

346. Telephone Interview with Mary Lou Dixon, *supra* note 12.

347. See generally *supra* notes 312-44, and accompanying text.

348. 29 C.F.R. § 1625.10(e)(2001). Allowing employers to take Medicare provided benefits into account allows the employer to incur lesser costs for older retirees because the employer is not spending money on the benefits provided under Medicare to those older retirees. Instead, the employer is simply spending money on any additional benefits provided to older retirees, e.g. a prescription drug benefit. Thus, the employer will incur the cost of any additional benefits provided to younger and older retirees alike, but would only incur the cost of benefits provided to younger retirees which would be similar to benefits provided under Medicare. The equal benefit prong of the safe harbor is relatively easy to satisfy, in that, an employer need only provide the same benefits to older retirees as provided to younger retirees. Referencing the *Erie County* case as an illustration, if the County would have provided the older retirees with the choice of participating in the POS health plan, or the choice to remain in the traditional indemnity health plan, the County would have satisfied the equal benefit test. But the reason the County structured their retiree medical program to provide such a choice only to younger retirees was due to rising health costs.

349. 29 C.F.R. § 1625.10(e)(2001).

350. If an employer structures their retiree medical benefit plan in such a manner, the employer would satisfy the equal benefit or equal cost safe harbor as described in 29 C.F.R. § 1625.10(e).

the employer is providing equal benefits to both younger and older retirees.

For situations where the employer pays for the older retirees premiums, possible Congressional language could read as follows:

[When a participant in an ERISA-covered plan becomes eligible for Medicare,] [t]he Employer shall reimburse the full cost of Part B coverage (including the costs for eligible dependents) on a monthly basis. In addition, the Employer shall provide the retired [participant] and eligible dependents with sufficient supplemental coverage to ensure that the Employer-provided and Government-provided benefits together supply the retired employee with benefits that are equal to the benefits received prior to attaining Medicare coverage. The term "equal to the benefits" shall be interpreted in a manner consistent with 29 CFR 1625.10(e).<sup>351</sup>

In situations where retirees are required to contribute towards the cost of health benefits, the following language may be used:

[When a retired participant becomes eligible for Medicare], the retired [participant] shall purchase Medicare Part B coverage. At that time, the Employer shall provide the retired [participant] and eligible dependents with sufficient supplemental coverage to ensure that the combination of Employer-provided and Government-provided benefits supply the retired [participant] with benefits that are equal to the benefits the retired employee received prior to attaining Medicare coverage. The term "equal to the benefits" shall be interpreted in a manner consistent with 29 CFR 1625.10(e). In accordance with 29 C.F.R. section 1625.10(d)(4)(ii)(C), retired [participants] covered by Medicare shall pay no more than the greater of:

1. The dollar amount paid by pre-Medicare eligible retirees; or
2. The same proportion of the total premium paid by pre-Medicare eligible retirees, for the coverage described in this paragraph.<sup>352</sup>

Furthermore, recognizing that health insurance increases with age, the Third Circuit's equal cost test should be ignored.<sup>353</sup> As stated, it is virtually impossible to comply with the Third

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351. The preceding language was quoted from Steve Kreisberg, *Age Discrimination & Retiree Health Benefits*, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, 2001 No. 1, available at [http://www.afscme.org/wrkplace/cbr101\\_4.htm](http://www.afscme.org/wrkplace/cbr101_4.htm) (last visited Aug. 22, 2002).

352. *See id.*

353. *See* EEOC MANUAL, *supra* note 27, at ¶ 7214 5817 (explaining that "[t]he cost of disability benefits increased with age, and the benefit is part of a bona fide employee benefit plan that explicitly sets forth the benefit schedule.").

Circuit's interpretation of the test.<sup>354</sup> Due to rising health costs, it is unlikely that employers will gross up benefits for older retirees in order to comply with the equal cost test.<sup>355</sup> Instead, employers may opt to reduce the cost of benefits for younger retirees in an attempt to comply with this onerous test.<sup>356</sup> Thus, when faced with an issue similar to that raised in *Erie County*, the courts should establish a precedent that when applying the equal cost test, courts should take into account *both* the cost incurred by the employer and the cost of Medicare.

In addition, Congress should mandate that when applying the equal cost test, the cost incurred by the employer should be coupled with the cost of Medicare. Regulations could be promulgated pursuant to this mandate to explicitly provide that *both* the cost incurred by the employer and the cost of Medicare must be taken into account under the equal cost test, similar to 29 C.F.R. section 1625.10(e).

The *Erie County* decision has created tension between two federal statutes that must be reconciled.<sup>357</sup> In order to reconcile the tension between ERISA and the ADEA, Congress should enact legislation, providing that any modification or termination upon Medicare-eligibility *is permissible* under the law. Similar legislation is now pending in the 107th Congress.<sup>358</sup> On July 18, 2001, Rep. Petri (R-WI) introduced H.R. 2558, a bill that would effectively repeal the *Erie County* decision.<sup>359</sup> H.R. 2558 amends the ADEA to provide that “[i]t shall not be a violation of “ ADEA’s general prohibition on age-based compensation differences “solely because an ERISA-covered plan alters, reduces or eliminates a retired participant’s benefits when the participant becomes eligible

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354. See *supra* notes 303-10, and accompanying text.

355. *Id.*

356. *Id.*

357. As stated, there is established case law providing that under ERISA an employer is permitted to modify or terminate retiree medical benefits at any time or for any reason so long as the employer has reserved the right to do so. *Supra* note 318. Under the ADEA, however, if an employer modifies or terminates benefits upon Medicare-eligibility, the employer can be found to have engaged in a violation as provided under the *Erie County* decision, i.e. any modification or termination of benefits based on Medicare-eligibility would be deemed an age-based distinction, and thus a violation of section 4(a)(1) of the ADEA. See *Erie County*, 220 F.3d at 213 (stating “[i]n sum, we conclude that the County has treated [the retiree class] differently than [younger] retirees with respect to their ‘compensation, terms, conditions, or privileges of employment, because of . . . age.’ Accordingly, [the retiree class] [has] established a claim of age discrimination under 29 U.S.C. § 623(a)(1), unless any of the ADEA’s ‘safe harbors’ is applicable.”).

358. Teacher Voluntary Early Retirement Incentive Act of 2001, H.R. 2558, 107th Cong. § 3(b) (2001).

359. Gigot, *supra* note 339.

for Medicare.”<sup>360</sup> Such a legislative remedy is appropriate, and should be enacted by a majority of Congress.

Furthermore, the courts should not determine it a violation of the ADEA when employers modify or terminate benefits upon Medicare-eligibility. The courts should not only recognize that modifying or terminating benefits upon Medicare-eligibility is a relatively common practice among employers,<sup>361</sup> but more importantly, recognize that if employers are not permitted to modify or terminate benefits upon Medicare-eligibility, employers are more likely to terminate their retiree medical benefits to all retirees. Finally, the author proposes that regulations should be promulgated under 29 C.F.R. §1625.10 to allow employers to modify or terminate benefits upon Medicare-eligibility.

### CONCLUSION

The Third Circuit’s decision in *Erie County* is not good law. The *Erie County* decision, and the Third Circuit’s interpretation of the ADEA as amended by the OWBPA, renders illegal all retiree medical benefit plans that reduce or terminate retiree medical benefits based on Medicare eligibility. If adopted by other courts, the *Erie County* decision will negatively impact the voluntary employer-provided benefits system. As a result, employers may choose to eliminate retiree medical programs entirely, rather than risk violating a federal discrimination law. Because there is no requirement for employers to provide retiree medical benefits, significant increases in the cost of benefits and administration has already caused employers to reconsider the scope and availability of their retiree medical programs.<sup>362</sup> An employer with a retiree medical program that stops at Medicare eligibility would be forced to consider either reducing benefits for younger retirees, or eliminating its retiree medical program completely, a result contrary to public interest and Congressional intent.<sup>363</sup>

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360. *Supra* note 358.

361. *See GAO Testimony II, supra* note 11, at 4-5; *see also* GROOM LAW GROUP, *supra* note 25, at 3.

362. *See supra* notes 321-36 and accompanying text (discussing the decline in employer-sponsored benefit programs).

363. On March 20, 2002, the parties to *Erie County* settled the class action lawsuit. *See generally Erie County*, 192 F. Supp. 2d 369. Specifically, the settlement requires the County to reduce benefits provided to non-Medicare-eligible retirees by eliminating the PSO plan offered to younger retirees and limiting the younger retirees to an HMO option, thereby matching the benefits provided to Medicare-eligible retirees. Furthermore, non-Medicare-eligible retirees will now be required to pay an HMO premium that equals Medicare Part B premiums paid by older retirees, i.e. \$50 per month. *Erie County*, 140 F. Supp. 2d at 472. “Medicare Part B premiums, as of January 1, 2001, were \$50 per month.” *Id.* The settlement represents the reality of the negative

Until the Supreme Court overturns *Erie County*, the Third Circuit's decision still provides a retiree class an avenue to claim ADEA violations. Pursuant to *Erie County*, the retiree class may prevail. Such a ruling, however, will sadly result in retirees winning the battle but ultimately losing the war.

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effects of the *Erie County* decision, and reinforces the position advocated by the author that the *Erie County* decision will either result in lesser benefits for non-Medicare-eligible retirees or the elimination of retiree medical benefits altogether.



